

RECEIVED MAY 24 1995

May 22, 1995

95-04

Mr. Michael J. Maus
Attorney at Law
P.O. Box 370
Dickinson, ND 58602-0370

Re: Interpretation of North Dakota
Rules of Professional Responsibility

Dear Mr. Maus:

I am an attorney licensed in North Dakota. I am also admitted to practice in several other states. I recently represented a North Dakota attorney in a hearing before the board of law examiners of one of those other states. The board rejected my client's application for admission for reasons that included the following :

1. Submitting numerous false, misleading and incomplete answers to questions on the application for admission.
2. Giving false testimony to the board: "The Board finds that Petitioner was not honest in [Petitioner's] dealings with the Board, nor in [Petitioner's] testimony before the Board."
3. Failure to disclose a disciplinary complaint.
4. Coercing a client into accepting a settlement.
5. Improperly charging client trust funds.

The memorandum decision of the board noted my client's "record manifests a significant deficiency in honesty; for that reason, [Petitioner's] application is denied."

Would you please advise me whether the North Dakota rules require me to report the substance of the findings and determination of the other state's board of law examiners. I realize North Dakota's rules require me to report to the North Dakota Disciplinary Board any facts or circumstances which create a significant doubt about a fellow attorney's honesty or character with respect to the attorney's ability to practice law. The determination of the other state's board raises such a doubt.

On the other hand, a report of this nature would not serve my client's best interest because of the potential for leading to disciplinary action. Consequently, if I made such a report I would not be acting in the client's best interest which the rules

also require. Furthermore, I question whether such a disclosure would amount to a breach of the duty of confidentiality, a question which probably depends, in large part, on the confidentiality of hearings and proceedings of the other state's board. I intend to inquire further into that matter.

Would you please consider this dilemma and advise me how to proceed. Thank you for your consideration and any advice you may render.

Sincerely,



STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

OPINION 95 - 04
June 30, 1995

The Ethics Committee has received a request from [REDACTED]
[REDACTED] of [REDACTED] on the following question:

A lawyer who is licensed in North Dakota as well as in several other states represented another lawyer before the board of law examiners in another state. That board of law examiners denied the lawyer-client's application for admission. Reasons for denial included false, misleading, and incomplete information on the application for admission; false testimony to the board; failure to disclose a disciplinary complaint; coercing a client into accepting a settlement; and improperly charging client trust funds. The board's decision noted that the lawyer-client's record manifested a "significant deficiency in honesty." The lawyer-client is admitted to practice in North Dakota.

The inquiring lawyer asks whether the Rules of Professional Conduct require that the inquiring lawyer report the facts surrounding the matter to the disciplinary authority in North Dakota.

DISCUSSION

N.D.R. Prof. Conduct 8.3 requires that a lawyer having knowledge that another lawyer has committed a violation of the rules report that violation, if the violation raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. The conduct of the lawyer-client raises a substantial question as to the lawyer-client's honesty and trustworthiness.

There are certain exceptions to Rule 8.3's reporting requirement. One of those exceptions, Rule 8.3(c), exempts reporting if doing so would involve disclosure of information protected by Rule 1.6. Rule 1.6, the basic rule of lawyer/client

confidentiality, prohibits a lawyer from revealing, or using to the disadvantage of a client, any information relating to the representation of the client, unless disclosure is otherwise required or permitted under Rule 1.6.

This Committee has previously interpreted Rule 8.3:

An exception to a requirement for immediate reporting could be based on Rule 8.3(c), which provides, "This Rule does not require disclosure of information protected by Rule 1.6." Rule 1.6 protects "information relating to the representation of the client," and provides that a lawyer shall not reveal that information or use it to the disadvantage of a client except when required or permitted by Rule 1.6. One commentator has noted:

The reporting obligation of MR 8.3(a) is narrower than the Code's DR 1-103(A) in one material way. The confidentiality rule extends to all "information relating to representation of a client," the only relevant exception being that for "disclosures impliedly authorized to carry out the representation." Thus, reporting is foreclosed if it would entail revelation of any client information, whether or not revelation would prejudice the client's interests. Reporting under Rule 8.3(a), therefore, is required only when (1) to do so would affirmatively advance a client's interests; or (2) reporting would not involve revelation of any information relating to the representation of a client.

C. Wolfgram, Modern Legal Ethics 685 (1986); State Bar of Wisconsin Op. E-89-12.

State Bar Association of North Dakota Ethics Committee Op. 90-42.
See also Paul Richard, Lawyers As The Police Of Their Own Profession: Rule 8.3 And The Duty To Report, 67 N.D.L. Rev. 373 (1991).

The committee is of the opinion that Rule 1.6 does not require disclosure in the situation presented. The comments to Rule 8.3 make it clear that Rule 8.3 was not intended to require reporting in the situation presented:

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

Rule 1.6 overrides Rule 8.3's reporting requirement in these circumstances.

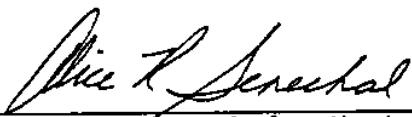
CONCLUSION

In the Committee's opinion, the inquiring lawyer is not required to report the conduct of the lawyer-client under the facts presented by the inquiring lawyer.

This opinion is provided pursuant to Rule 1.2(B), North Dakota Rules for Lawyer 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 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 Alice R. Senechal and was unanimously approved by the Committee on June 30, 1995.



Alice R. Senechal, Chair