

June 22, 1995

CONFIDENTIAL

Ms Alice R. Senechal, Chairperson, SBAND Ethics Comm.
106 North 3rd, Suite M-102
P. O. Box 5576
Grand Forks, N. D. 58206-5576

Re: Rules of Professional Conduct

Dear Ms Senechal:

I presently represent two separate clients, in cases concerning Radial Keratotomy, against the same doctor, clinic and hospital.

Informed Consent is an issue, and because the doctor has stated in his deposition that, "I always give my patients total informed consent about all the procedures that I'm going to undertake with them.", I would like to publish, statewide, the enclosed, and try to learn if that statement is totally true. (underline added)

Rule 3.6 deals with communications that might materially prejudice the trial, but I can't see that that would be the situation in my case. What does your committee think?

Defense counsel are [REDACTED]. I note [REDACTED] is on your committee, so I suspect that he would not participate nor become aware of this request; and [REDACTED].

If you have any questions, please call me.

Very truly yours, [REDACTED]

1 INFORMATION REQUESTED

2 The National Eye Institute, Bethesda, Maryland, has
3 supported a five and ten year study, on the Prospective Evaluation
4 of Radial Keratotomy, called PERK, and continues its interest in
5 the surgical procedure on the cornea, to correct nearsightedness,
6 (Myopia).

7 My interest, is in learning, from the people of North
8 Dakota, how many have had the procedure, where they have had it
9 performed, and their satisfaction or dissatisfaction.

10 PLEASE CALL OR WRITE: [REDACTED]
11 [REDACTED]
12 [REDACTED]
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27 [REDACTED]

[REDACTED]

July 10, 1995

[REDACTED]

CONFIDENTIAL

Ms Alice R. Senechal, Chairperson, SBAND Ethics Commn.

Re: Rules of Professional Conduct

Dear Ms Senechal:

I have received notice from the Bar office that you committee will be meeting in early August, and to have a better understanding of my request, I add the following:

1. Copy of part of page 21, of defendant's deposition of August 15, 1994;
2. I have learned that said defendant performed the Radial Keratotomy in different cities in North Dakota; and,
3. From a deposition of another person, it appears the "always" is not accurate.

Since I am concerned with ethics, the Bar office relates that all committee members receive requests and draft opinions. This raises another question, at least to me, on whether the confidentiality of committee membership outweighs the loyalty relationship of an involved member of the same law firm?

As I view my request, there would be nothing unethical about such a publication; however, I am interested in the Bar's opinion.

[REDACTED]

[REDACTED]

cc/ Sandi Tabor



9 Q. Is this procedure that you advertise and
10 perform an elective procedure on the part of the
11 patient?

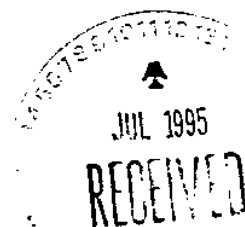
12 A. Yes.

13 Q. As an ophthalmologist and a medical doctor
14 do you understand that it's the surgeon's duty to
15 inform the patient of the known risks, benefits,
16 possible outcome, side effects and alternatives?

17 A. I always give my patients total informed
18 consent about all the procedures that I'm going to
19 undertake with them.

20 Q. And you consider that your duty?

21 A. Absolutely. I always do it.



STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

OPINION NO. 95-05
August 7, 1995

The Ethics Committee received a request for an opinion from Attorney [REDACTED]. [REDACTED] represents two clients in cases concerning radial keratotomy against the same doctor, clinic and hospital. Informed consent is an issue in each case. The doctor has apparently testified in one case, stating: "I always give my patients total informed consent about all the procedures that I'm going to undertake with them."

[REDACTED] is proposing to publish the following on a statewide basis:

INFORMATION REQUESTED

The National Eye Institute, Bethesda, Maryland, has supported a five and ten year study, on the Prospective Evaluation of Radial Keratotomy, called PERK, and continues its interest in the surgical procedure on the cornea, to correct nearsightedness (Myopia).

My interest, is in learning, from the people of North Dakota, how many have had the procedure, where they have had it performed, and their satisfaction or dissatisfaction.

PLEASE CALL OR WRITE: [REDACTED]

[REDACTED] stated purpose in making this publication is to "try to learn if th[e doctor's] statement [that he always gives his patients total informed consent] is totally true."

[REDACTED] as directed the Committee's attention to Rule 3.6 of the Rules of Professional Conduct, which relates to trial publicity and has inquired whether the Committee believes that there is a problem. Rule 3.6 provides:

A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of mass public communication if the lawyer knows or reasonably should know that the statement will create a serious and imminent threat of materially prejudicing an adjudicative proceeding.

Nothing in the facts provided to the Committee or in the proposed publication appears to run contrary to Rule 3.6. Rule 3.6, however, is not the only rule which has application.

Rule 4.1 provides that "[i]n the course of representing a client a lawyer shall not make a statement to a third person of fact or law that the lawyer knows to be false." See also Rule 7.1 (which prohibits a lawyer from making "a false or misleading communication about the lawyer"). The facts as provided to the Committee by [REDACTED] indicate that the proposed publication contains a false statement. According to the letter of inquiry, [REDACTED] interest is in learning whether the doctor's testimony regarding informed consent is true, not in learning about the satisfaction of patients who have had radial keratotomy.

The Committee would also point out that Rule 4.3 appears to have application. It provides:

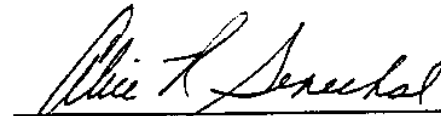
In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

The proposed publication, particularly as a result of its reference to the National Eye Institute and its studies, is likely to cause persons reading the publication to believe [REDACTED] is disinterested or otherwise result in confusion with regard to [REDACTED] role. Accordingly, the proposed publication is also contrary to Rule 4.3. See N.D. Ethics Op. No. 95-1 (noting that a lawyer must take care to avoid any misunderstanding on the part of an unrepresented person when making a contact with such person). Cf. Rule 7.1(a) (indicating that a communication is false or misleading if it "contains material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading").¹

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 Pamela J. Hermes and was unanimously approved by the Ethics Committee on August 7, 1995.



Alice R. Senechal
Chairperson

¹The Committee would also point out that if Mr. Saefke were to publish a statement such as that proposed, in addition to Rule 4.3, Rule 7.1 might have application.