

[REDACTED]

[REDACTED]

[REDACTED]

July 17, 1995

[REDACTED]

State Bar Association of North Dakota
Attn: Sandi Tabor, Exec. Director
P.O. Box 2136
Bismarck, ND 58502

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JUL 1995
RECEIVED

Re: Solicitation of Ethics Opinion

Dear Ms. Tabor:

I am requesting an ethics committee opinion with respect to disclosure during discovery in a civil action materials obtained for use in said action that would solely be used in a rebuttal capacity.

Essentially, the facts of the case are as follows:

1. I represent several plaintiffs in a matter pertaining to their former employer.
2. A statement has been obtained and surveillance photos taken of the defendant and another person which may place the defendant in a compromising situation in this case.
3. The plaintiffs do not want to use this information unless there is a denial during the deposition of the defendant with regard to his relationship with this other person.

The question then becomes when the defendant's attorney sends out blanket discovery requests seeking all statements in the possession of the plaintiffs, as well as a request for the production of any surveillance documents, "whether the plaintiffs have to disclose the existence of the same at the discovery stage of the proceedings prior to the taking of the deposition of the defendant." The plaintiffs fear and have a legitimate and rationally based fear that the defendant would lie and attempt to have other witnesses lie in furtherance of an ongoing conspiracy to continue to injure the plaintiffs if this information is provided to defendant prior to his deposition.

Plaintiffs are willing to disclose existence of the statement and their surveillance photographs during the deposition of the defendant if the defendant testifies in a manner inconsistent with the truth.

Our research indicates that there is some confusion in the various states with the need to

disclose rebuttal testimony and rebuttal exhibits in the early stages of discovery or for that matter any time prior to the commencement of the plaintiffs' rebuttal case. Your prompt attention to this problem will be greatly appreciated. I await the receipt of the Ethics Committee's opinion to assist me in my representation of my clients.

Sincerely,

[REDACTED]

[REDACTED]

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NUMBER 95-07
Date: September 26, 1995**

The Ethics Committee has received a request from attorney [REDACTED]

[REDACTED] for an opinion on the following question:

Whether plaintiff's attorney must disclose the existence of statements and surveillance photographs at the discovery stage of the proceedings prior to the taking of the deposition of the defendant where a plaintiff's attorney fears that the defendant might lie about the events if the information is provided to the defendant prior to his deposition.

Rule 3.4 Fairness to opposing party and counsel provides in part as follows:

A lawyer shall not:

(a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value;

...
(d) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

DISCUSSION

The language of Rule 3.4 which addresses this question is relatively clear in its meaning and purpose. As the Comment to the rule indicates, the lawyer's actions in the course of the representation must be consistent with the requirements of honest dealing with the opposing party and counsel. The rule prohibits obstructive tactics in discovery procedures. While withholding statements and photographs which are otherwise discoverable may not constitute a criminal offense of destroying material evidence for the purpose of precluding its availability in a pending proceeding, it does

frustrate the discovery process to allow one of the attorneys participating in the discovery to choose the time when he will disclose certain documents and information rather than to make such disclosures within the timeframe set out by the rules.

In order to determine when and how certain disclosures of information, such as statements and photographs, must be made by an attorney responding to discovery proceedings necessitates reference, application and interpretation of specific rules of civil procedure which deal with discovery.

Rule 26(g) of the North Dakota Rules of Civil Procedure requires a signature, by an attorney representing the party, of every response or objection to requests for discovery. The signature constitutes a certification that the signer has read the request, and, to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is consistent with these rules and warranted by existing law. If a certification is made in violation of the rule, the court, on motion of a party or its own motion, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney's fee.

CONCLUSION

Without attempting to apply or interpret the discovery rules of procedure, it appears that the question presented by this request for opinion to the ethics committee is really a legal question based on the interpretation and application of the rules of civil procedure. If in fact the interpretation and application of the rules of civil procedure, in

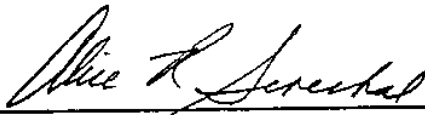
particular the discovery rules, are violated by the attorney signing the response to discovery by certifying the answer which does not include documents that are intended to be included in the discovery request, the attorney would not only face the consequences of Rule 26(g), as referenced herein, but would be in violation of Rule 3.4(a) and (d).

This opinion is provided pursuant to Rule 1.2(b), North Dakota Rules for Lawyer

Discipline. This rule states:

A lawyer who acts in good faith and with 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 Albert A. Wolf and was unanimously approved by the Committee on September 26, 1995.



Alice Senechal, Chair