

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
Opinion No. 95-13
December 4, 1995

The Ethics Committee has been requested to issue its opinion on whether an attorney has an obligation to inform the Court of certain facts adverse to the attorney's client, learned by the attorney after a hearing on a contested matter, but prior to the time the Court issued its Memorandum decision.

FACTS

The lawyer requesting the opinion represents the Defendant. Plaintiff filed a Motion to Modify a Divorce Judgment regarding Child Support, seeking an increase. The previous motion seeking review of the amount of child support occurred approximately two years prior to the present motion. Defendant answered, providing financial information. The committee assumes that the financial information consists of a financial statement and affidavit similar to that shown in Appendix A, North Dakota Rules of Court, and possibly an income tax return, and W-2 forms. The Court heard the matter, based on the pleadings and financial information provided. No oral argument was requested, nor had.

At the time of filing the response and on the day of the hearing, the information provided by Defendant was accurate. However, the Defendant, who had been unhappy in his employment for some time, was promised new employment which he accepted. He began working at his new job seven days after the hearing, and received his first pay check approximately two weeks later. The wage base for the new job does not differ from the old job to any degree, but the new job has the potential for overtime. What are the ethical obligations of the Defendant's attorney?

DISCUSSION

To understand the context in which this fact situation arises, a brief discussion of the procedure with respect to child support modifications is necessary.

When a motion to amend child support is made, after hearing, and findings of fact, "the Court shall order the amendment of the child support order to conform the amount of child support to that required by the child support guidelines". If more than one year has elapsed since the previous child support order, a material change of circumstances is not required, unless the presumption that the correct amount of child support would result from the application of the child support guidelines is rebutted. Section 14-09-08.4(3), N.D.Cent.Code.

The child support guidelines are those established by the North Dakota Department of Human Services pursuant to Section 14-09-09.7, N.D.Cent.Code. The child support guidelines are found in Chapter 75-02-04.1, North Dakota Administrative Code. The amount of child support payable by an obligor is determined by the application of a schedule in that chapter to the obligor's monthly net income and the number of children for whom support is being sought. Section 75-02-04.1-10, N.D.Admin.Code. Net income is gross monthly income less various deductions. Gross income means income from any source; gross income includes overtime wages.

Generally, the child support guidelines are based on current net income. Past income tax returns are often used as evidence of income. "Calculations made under this chapter are ordinarily based upon recent past circumstances because past circumstances are typically a reliable indicator of future circumstances, particularly circumstances concerning income. If circumstances that materially affect the child support obligation are very likely to change in the near future, consideration may be given to the likely future circumstances." Section 75-02-04.1-02(8), N.D.Admin.Code. (emphasis added)

Based on all the foregoing facts and circumstances, it is the opinion of the Committee that the Defendant's attorney has no affirmative duty under the North Dakota Rules of Professional Conduct to notify the Court or opposing counsel of the Defendant's new job, and possible increase in income after the hearing date, even though the Court's memorandum decision has not yet been issued.

A lawyer shall not offer evidence that the lawyer knows to be false. Rule 3.3(a)(2). 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. Rule 3.3(c). 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. Rule 3.3(d). See also Rule 1.16 N.D.R.P.C. for further guidance on when a lawyer shall seek to withdraw from the representation of a client.

In summary then, certain affirmative duties are required of a lawyer under Rule 3.3, or Rule 1.16, but only if the evidence was false, and then only if the false evidence was material. Based on the facts presented here, and assuming there was no

testimony or evidence offered by the defendant, or defendant's attorney pertinent to possible future income, it is the opinion of the Committee that the evidence offered was not false. Further, this information about the new job was not material, in the routine application of the child support guidelines. Once the Plaintiff learns of the new job, she always has the option of initiating another child support review.

There are other rules that may in certain instances give rise to a duty of disclosure or other obligations. Under Rule 3.4, N.D.R.P.C., a lawyer has an obligation of fairness to the opposing party and counsel regardless of whether a duty of disclosure exists under Rule 3.3. Among other things, the lawyer 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 committee assumes that in this case there was no evidence offered as to possible future income. Also, the comments to Rule 4.1 indicate that although a lawyer is required to be truthful when dealing with others on a client's behalf, the lawyer generally has no affirmative duty to inform an opposing party of relevant facts. The comments to Model Rule 3.3 (not fully adopted in North Dakota) state "There are circumstances where failure to make a disclosure is the equivalent of an affirmative representation." The instant case is not such a case.

Mention must also be made of Rule 1.6., N.D.R.P.C., Confidentiality of Information. There may be similar situations, when evidence has been actually offered by a lawyer's client, and is later learned to be false, and when the evidence is material. Lawyers are reminded, "A lawyer shall not reveal, or use to the disadvantage of a client, information relating to representation of the client unless required or permitted to do so by this rule." Rule 1.6. Since the information learned by the attorney could work to the disadvantage of the lawyer's client, revelation or use of the information by the lawyer is not permitted, unless the client consents. The comments to Rule 1.6 state that there are some circumstances that permit and others that require a lawyer to disclose information relating to the representation. There are provisions in other law that may seem to permit or require a lawyer to disclose information relating to a representation. Such provisions may raise the legal issue of which directive takes precedence --- the general rule of non-revelation, or provisions authorizing disclosure. It is the lawyer's obligation to disclose only when the precedence of the law authorizing disclosure is clear.

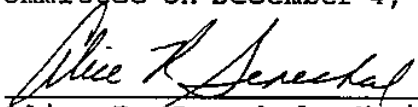
CONCLUSION

The evidence offered by the lawyer in this case was not false when offered. Although the facts may have changed since the evidence was offered, neither Rule 3.3, nor Rule 1.6, nor any other provisions of the North Dakota Rules of Professional Conduct require disclosure, except under the limited circumstances set forth in Rule 1.6, North Dakota Rules of Professional Conduct.

This opinion is provided pursuant to Rule 1.2(B) North Dakota Rules for Lawyers Discipline, which 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 David L. Petersen and was unanimously approved by the Ethics Committee on December 4, 1995.



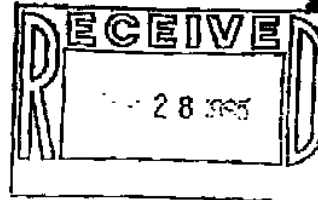
Alice R. Senechal, Chair

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95-13

September 26, 1995

Alice Senechal, Chair
SBAND Ethics Committee
P.O. Box 5576
Grand Forks, ND 58206-5576



Dear Ms. Senechal:

I would like to request an opinion from the Ethics Committee on the following scenario:

The Plaintiff filed a Motion to Modify Judgment Regarding Child Support, seeking an increase, on July 6, 1995. No oral argument was requested. My client, the Defendant, answered providing financial information. The Motion was heard on August 7, 1995. At the time of filing the response and on the day of the hearing, the information provided was accurate. However, my client, who had been unhappy in his employment for some time, was promised new employment which he accepted. He began working at the new job on August 14, 1995 with his first check received in the beginning of September. The Memorandum Decision was issued September 10, 1995. My question is whether I have an obligation to inform the judge that my client has new employment.

On the side of informing, the facts as stated in the Amended Judgment are no longer correct. On the other hand, there is periodic review of child support (the Plaintiff initiated a motion to increase the previous order after two years). Child support is traditionally based upon earning history when one is available rather than potential. The base wage does not differ to any degree, but the new job will have the potential for overtime.

I thought of corresponding with the judge, but I did not want to initiate an ex parte communication with him. Also, I did not want to initiate a review and the additional expense of another hearing if it is not required as it would be detrimental to my client, and I should not be working adversely to his interests. Thus, because I am left with a feeling of unease about the situation, I am requesting an opinion from your committee. Thank you very much.

Yours truly,

[Redacted signature block]