

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
Opinion No. 95-14
December 4, 1995**

The Committee received a request for an opinion concerning the disclosure of confidential information.

Facts

The requesting attorney (Attorney A) represents a plaintiff in a personal injury action. Co-plaintiffs, represented by another attorney (Attorney B), settled with the defendant.

Attorney B allowed Attorney A to review Attorney B's litigation file concerning the case. During the review, Attorney A discovered releases, which contained a confidentiality clause, signed by the co-plaintiffs. Attorney A copied the releases and wants to use them in the personal injury action.

Discussion

The disclosure and subsequent use of confidential information has been the recent subject of ABA opinions, state ethics committee opinions, judicial decisions, and *ABA Journal* articles.

ABA Formal Opinion 94-382 (July 5, 1994) recently addressed the disclosure of confidential attorney-client information. The opinion explained the factual context of the request:

The Committee has been asked to consider the obligations of a lawyer under the Model Rules of Professional Conduct (1983, as amended) when the lawyer is offered or sent, by a person not authorized to offer them, materials of an adverse party that the lawyer knows to be, or that appear on their face to be, subject to the attorney-client privilege of an adverse party or otherwise confidential within the meaning of Model Rule 1.6. The question posed addresses situation in which the lawyer *has not solicited* the production of such material and its production was not authorized by the owner of the materials. It includes situations in which the lawyer is offered such material and has an opportunity to decline them, as well as situations in which, without notice, the materials are simply sent to, and received by, the lawyer. The question embraces both situations in which the lawyer has knowledge of the privileged and/or confidential nature of the materials before receiving them and situations in which the lawyer does not recognize the confidential nature of the materials until receipt. [Footnotes omitted.]

The opinion reviewed a number of prior judicial, ABA, and state opinions including ABA Formal Opinion 92-368 (a lawyer received materials that appeared on their face to be subject to

the attorney-client privilege or otherwise confidential and it was clear that the materials were not intended to be sent to the receiving lawyer); *In re Shell Oil Refinery*, 143 F.R.D. 105 (E.D. La. 1992) *amended and reconsidered on other grounds* 1992 WL 275426 (E.D. La. Sept. 29, 1992) and 144 F.R.D. 73 (E.D. La. Nov. 3, 1992) (an employee of a party provided an adverse party with confidential documents belonging to the employer); Maryland Bar Association Opinion 89-53 (1989) ("A lawyer who receives from an unidentified source copies of documents belonging to an opposing party has no obligation to reveal the matter to the court or the opposing party."); Virginia Bar Association Opinion 1076 (1988) ("The...lawyer may retain, read, and make use of material from his opponent's file that was sent to him by an unknown third party."); and Michigan Bar Association Opinion CI-970 (1983) ("An attorney who comes into possession of a document of the opposing party during litigation may use the document at trial provided it is admissible evidence and neither the attorney nor his client in any way procured the removal of the document from the possession of the opposing party.").

The authors of the ABA Opinion concluded that the receiving attorney should not use the documents:

Although the Model Rules do not offer explicit guidance on the present issue, we are persuaded by relevant public policy considerations and case law that a lawyer who, without solicitation, receives materials which are obviously privileged and/or confidential has a professional obligation to notify the adverse party's lawyer that he or she possesses such materials and either follow the instructions of the adversary's lawyer with respect to the materials, or refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from the court.

A December 1995 article in the *ABA Journal* titled "Law Firms Take Document Blooper Battles to Court" explains how courts are handling recent inadvertent disclosures of confidential information.

The court decisions, ABA decisions, state bar association decisions, and journal articles mentioned above address the inadvertent disclosure of confidential attorney-client information). Accordingly, those decisions and articles can be distinguished from the facts submitted to this ethics committee.

Attorney B did not disclose confidential attorney-client information. Instead, Attorney B inadvertently disclosed the details of a settlement agreement between adverse parties. Rule 1.6, North Dakota Rules of Professional Conduct, does not address such a situation.

Conclusion

Accordingly, it is not a violation of the North Dakota Rules of Professional Conduct to attempt to use the documents in the pending personal injury action.

This opinion is provided pursuant to Rule 1.2(B), N.D.R. Lawyer 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 Murray G. Sagsveen and was approved by a majority of the Committee on December 4, 1995.



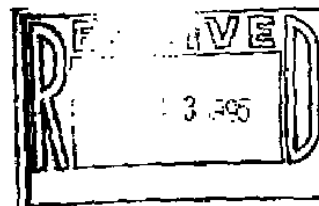
Alice R. Senechal, Chair

95-14



October 20, 1995

Ms. Alice R. Senechal, Esq.
Ethics Committee Chair
State Bar Association of North Dakota
P.O. Box 5576
Grand Forks, ND 58206-5576



Dear Alice:

I am writing you asking for an ethics opinion.

I represent a client in a personal injury action involving two other plaintiffs not represented by myself. The other two plaintiffs were represented by another attorney and have settled their action against the defendant. In settling their claims, the other two plaintiffs signed releases which contained confidentiality clauses -- releases of which I was not aware until I discovered them later while looking through the other attorney's files.

In representing my client I asked permission of the attorney for the other two plaintiffs to look through that attorney's files regarding the personal injury action involving my client and his two clients. Upon agreement of the other attorney, and without any limitations being placed on me by the attorney, I went to his office to look through his files. Although the attorney was not present when I looked through his files, other members of his office were present. Upon finding the release forms signed by the other two plaintiffs, I asked a member of the office if I could make copies of the documents I had found. Without limiting the copies I was able to make, I was then given permission to make copies and did so.

My question for the Ethics Committee is whether or not it is an ethical violation for me to include these release forms in an appendix that I am preparing on behalf of my client.

Thank you for your attention to this matter.

Very truly yours,

[Redacted signature block]