

COPY

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NO. 96-14

DECEMBER 9, 1996

The Committee has been asked to issue an opinion regarding whether an attorney is required to report, as professional misconduct, the alleged violation by an attorney of the provisions of one of the notary statutes.

FACTS

The attorney requesting the opinion received an Affidavit of Service wherein a second attorney has notarized the signature of that second attorney's spouse who is employed as the second attorney's secretary. Because another attorney apparently reported similar conduct on the part of the attorney requesting the opinion, the requesting attorney feels that, notwithstanding a belief that it is not reportable conduct, an opinion would be appropriate.

DISCUSSION

NDCC § 44-06-13.1, in relevant part, states:

A notary public may not notarize a signature on a document if:

...
3. The signature is that of the notary public or the spouse of the notary public.

A notary public who violates this section is guilty of an infraction and the notary public's commission must be canceled by the secretary of state, who shall give written notice of such cancellation to the notary public.

RULE 8.3, in relevant part, states:

(a) A lawyer having knowledge that another lawyer has committed a violation of these rules that raises a substantial question as to that lawyer's honesty, trustworthiness, or

fitness as a lawyer in other respects shall initiate proceedings under the North Dakota Rules of Disciplinary Procedure.

The determinative questions raised by these facts are whether the alleged violation of the applicable notary statute is (1) "a violation of [the Rules of Professional Conduct] that (2) raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects" under RULE 8.3.

It does not appear that the alleged conduct is addressed specifically by the letter of any provision of the Rules of Professional Conduct or the Comments thereto. If that conduct is "a violation of these rules", it would be by virtue of the general terms of Rule 8.4 wherein it incorporates by reference what is NDCC §27-14-02.

In terms of whether the alleged conduct "is a violation of these rules, RULE 8.4, defining "misconduct", provides some direction. In relevant part, it states:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate these rules, knowingly assist or induce another to do so, or do so through the acts of another;

(d) engage in other conduct that is enumerated in the North Dakota Century Code as a basis for revocation or suspension of a lawyer's certificate of admission.

In turn, NDCC §27-14-02, entitled "Causes for suspension or revocation of certificate of admissions to bar", states, in relevant part, as follows:

The certificate of admission to the bar of this state of an attorney and counselor at law may be revoked or suspended by the supreme court if he has:

1. Committed an offense determined by the supreme court to

have a direct bearing upon a person's ability to serve the public as an attorney and counselor at law, or the supreme court determines, following conviction of an offense, that the person is not sufficiently rehabilitated under section 12.1-33-02.1;

...

7. Committed any other act which tends to bring reproach upon the legal profession. The enumeration of certain grounds for disbarment or suspension of attorneys at law may not be deemed a limitation upon the general powers of the supreme court to suspend or disbar for professional misconduct.

It does not appear that the alleged conduct is "an offense determined by the supreme court to have a direct bearing upon a person's ability to serve the public as an attorney and counselor at law". Therefore, if it were to constitute "misconduct" under Rule 8.4, it would have to be an "act which tends to bring reproach upon the legal profession."

That language is similar to that in the second part of Rule 8.3 insofar as it refers to the "question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects", and the second question to be addressed by the committee.

In previous interpretations of Rule 8.3, this Committee has stated:

Rule 8.3's requirement of a "substantial question" depends on the seriousness of the possible violation rather than on the quantum of evidence of which the lawyer is aware. The "substantial question" must concern a lawyer's "honesty, trustworthiness, or fitness as a lawyer in other respect." A lawyer must exercise independent judgment in determining whether he or she has the requisite knowledge of a violation and whether the violation meets Rule 8.3's "substantial question" and "honesty, trustworthiness, or fitness" standards. See Comment to Rule 8.3. (Opinion No. 93-06)

The COMMENT to Rule 8.4 provides, in part, as follows:

"Many kinds of wrongful conduct reflect adversely on fitness to practice law. Some kinds, however, do not. In the past, the distinction between these two types of wrongful conduct

was made on the basis of "moral turpitude." That test has been abandoned in favor of a more functional analysis. The concept of "moral turpitude" had been construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that had no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics necessary for the responsible practice of the profession..." (emphasis added)

While, in previous interpretations of Rule 8.3, it has been stated that "this Committee cannot substitute its judgment for that of the requesting attorney to determine whether the requesting attorney has the requisite knowledge of a rules violation to initiate reporting under Rule 8.3" (Opinion No. 93-06), it would be difficult to conclude that the alleged violation of the notary statute in question would "raise[] a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects" unless such was demonstrated by the attending circumstances. As stated in a previous interpretation of Rule 8.3:

"Rule 8.3's 'substantial question' requirement depends on the seriousness of the possible violation. 'Substantial is defined as 'a material matter of clear and weighty importance.' Terminology, Model Rules of Prof. Conduct. Rule 8.3 limits the reporting obligation to violations that the profession must vigorously endeavor to prevent. See Comment to Rule 8.3. (Opinion No. 93-06)

The Committee is of the opinion that, unless it was otherwise demonstrated by the attending circumstances, a violation of the notary statute in question does not raise a substantial question as to a lawyer's honesty, trustworthiness, and fitness as a lawyer.

CONCLUSION

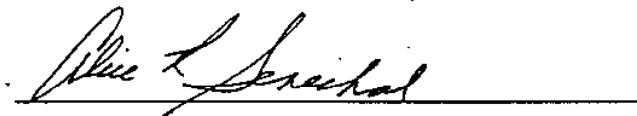
The act by an attorney of notarizing the signature of a spouse, unless otherwise demonstrated by the attending circumstances, does not raise a substantial question as to a

lawyer's honesty, trustworthiness, and fitness as a lawyer; and, therefore, it does not constitute a violation of the North Dakota Rules of Professional Conduct which must be reported.

This opinion is provided pursuant to Rule 1.2(B) of the 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 Dann Greenwood and was approved by a unanimous vote of the Committee on December 9, 1996.

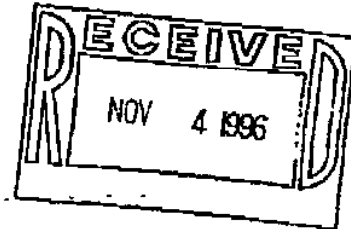
A handwritten signature in cursive script, reading "Alice R. Senechal", is written over a horizontal line.

Alice R. Senechal, Chair

[REDACTED]

November 1, 1996

Ms.. Alice R. Senechal
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RE: REQUEST FOR OPINION

Dear Ms. Senechal:

Pursuant to your last letter, the particulars of my question is as follows.

I have an Affidavit of Service wherein an attorney in [REDACTED] whose wife works for him as a secretary, has notarized his wife's signature. While I do not believe this is a reportable issue, inasmuch as [REDACTED] thinks that it is and sent a copy to the Secretary of State of my alleged notary misfeasance, and I do not wish to violate the rules if the committee believes that this is a mandatory reporting situation. I do not read the rules as such but you are the expert on this so I will defer to your opinion.

Thank you.

Sincerely,

[REDACTED]

[REDACTED]