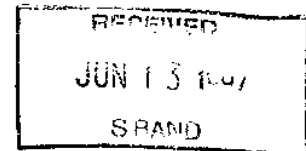


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**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE**

OPINION NO. 97-03



FACTS

The Ethics Committee received a request for an opinion regarding the following:

A lawyer in this state represented a client who was committed for a mental health evaluation on an emergency basis pursuant to N.D.C.C. Chapter 25-03.1 et seq. The petition was reviewed and approved by an assistant states attorney. The client was held at a psychiatric hospital for five days. He was then released and the petition dismissed as he was found not to be a person "requiring treatment" under the statute.

The evening before the client was taken into custody based on the involuntary petition, he was arrested and charged with gross sexual imposition. Following an initial appearance, he posted a personal recognizance bond and was released to be transported to the psychiatric hospital pursuant to the mental health petition. When the commitment petition was dismissed, he remained free on bond on the criminal charge. While out on bond, the client traveled to South Dakota in violation of the conditions of his bond where he was subsequently charged with having committed rape. As a result of his violation of the conditions of his bond, bail was revoked and he was incarcerated in North Dakota. He was also charged with tampering with a witness in North Dakota as a result of a telephone call which he allegedly made to the mother of the South Dakota victim.

After his arraignment, the North Dakota lawyer filed an ex parte application for a psychological evaluation at state expense. The court granted the request for psychological evaluation and sealed that portion of the file. Based upon the evaluation, it was determined that the defense of lack of criminal responsibility would not be raised. In connection with the application for the evaluation, a copy of the order granting continuance and the order granting the evaluation were served upon the states attorney.

The North Dakota charge of gross sexual imposition was reduced to a misdemeanor offense of corruption of a minor pursuant to plea agreement. The client plead guilty to corruption of a minor and was sentenced to time served. The North Dakota charge of tampering with a witness remained and the client was released upon a personal recognizance bond and on the condition that he waive extradition to South Dakota to respond to the rape charge. The client waived extradition and

requested that bond be set by the South Dakota court. The court set the bond at \$5,000 cash which was posted by the client's parents. He was released pending his initial appearance before the South Dakota court. The North Dakota lawyer obtained information that the mother of the victim in the South Dakota proceedings made frequent contacts with the South Dakota prosecutor complaining about the client being released on a \$5,000 cash bond. The states attorney in the North Dakota proceedings apparently communicated with the prosecutor in South Dakota in an attempt to get the bond increased. When the client appeared in South Dakota for his initial appearance, he was arrested on a warrant relating to the same charge which had been issued pursuant to an indictment by a grand jury and carried a much larger bond than the one already posted. A hearing was held regarding the issue of the bond during which the South Dakota prosecutor raised the issue of the client's danger to society based, in part, upon his alleged defective mental health.

The bond hearing was continued. The lawyer for the client in South Dakota then contacted the North Dakota lawyer and requested copies of all psychological evaluation reports. The North Dakota lawyer had previously received authorization to release all pertinent information to the South Dakota lawyer and that information was FAXed to the South Dakota lawyer. When the bail hearing continued, the South Dakota lawyer presented copies of the psychological reports to the court in camera. Thereafter, during the course of a discussion in chambers, the South Dakota prosecutor revealed that he had in his possession a copy of the mental health petition and evaluation. The South Dakota prosecutor acknowledged that these documents had been obtained from the states attorney in North Dakota. The client was subsequently released upon the same \$5,000 cash bond.

In a subsequent discussion among the North Dakota lawyer, the judge, and the states attorney in the North Dakota proceedings, the states attorney advised that it was possible that the psychological evaluation had been released from his office but, if that did occur, it was done unintentionally. He agreed to withdraw as the prosecutor in the North Dakota tampering case. It was later determined that a secretary in the states attorney's office likely sent a copy of the petition and psychological evaluation to the prosecutor in South Dakota based on an instruction that she copy the entire criminal file and mail it to the prosecutor in South Dakota. A copy of the mental health petition and evaluation had apparently been placed in the criminal file by mistake. It was copied and sent to the prosecutor in South Dakota. No information has been gained to suggest that the states attorney in North Dakota intentionally released the petition and psychological evaluation.

N.D.C.C. § 25-03.1-43 requires that records obtained in the course of an evaluation under Chapter 25-03.1 shall be kept confidential and not be considered public records. These confidential records may only be disclosed in circumstances unrelated to the facts of this case. N.D.C.C. § 25-03.1-43 does not contain a penalty provision. N.D.C.C. § 12.1-13-01 may provide an applicable penalty. That statute reads as follows:

Disclosure of confidential information provided to government. A person is guilty of a class C felony if, in knowing violation of a statutory duty imposed on him as a public servant, he discloses any confidential information which he has acquired as a public servant. 'Confidential information' means information made available to the government under a government assurance of confidence as provided by statute.

ISSUE

The question presented is whether the North Dakota lawyer is required to initiate proceedings under the North Dakota Rules of Disciplinary Procedure with respect to the potential violation of the North Dakota Rules of Professional Conduct by the states attorney in the North Dakota proceedings.

DISCUSSION

Rule 8.3(a) of the North Dakota of Professional Conduct governs this issue. This subpart reads as follows:

(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.

When a lawyer knows of a violation of the Rules of Professional Conduct, it is important to the continued self-regulation of the profession that a disciplinary investigation be initiated. Comment to Rule 8.3, N.D.R. Prof. Conduct. The duty of a lawyer to assist in policing the profession has been summarized as follows:

Lawyers also must assist in the policing of lawyer misconduct. The vigilance of the bar in preventing and, where required, reporting misconduct can be a formidable deterrent to such misconduct, and a key to maintaining public confidence in the integrity of the profession as a whole in the face of the egregious misconduct of a few.

Weber v. Cueto, 568 N.E.2d 513, 518 (Ill. 1991).

A lawyer is not required to report every violation of the rules. Richard, Lawyers as the Police of Their Own Profession: Rule 8.3 and The Duty to Report 67 N.D.L. Rev. 371, 374 (1991). Rather, the rule limits the reporting requirement "to those offenses that a self-regulating profession must vigorously endeavor to prevent." Comment to Rule 8.3, N.D.R. Prof. Conduct. The lawyer who is considering the duty to report must, therefore, exercise a measure of judgment. The determination of whether the violation raises a "substantial question" is dependent upon "the seriousness of the possible offense and the quantum of evidence of which the lawyer is aware." Id. "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." SBAND Ethics Committee Opinion No. 93-06. In a previous interpretation of this rule, this committee 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 respects.' ... 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.

SBAND Ethics Committee, Formal Opinion 42 (1990).

Rule 8.3(c) creates an exception to the reporting requirement when such a report would violate the duty of a lawyer not to disclose confidential information under Rule 1.6. A lawyer excused from reporting under those circumstances is encouraged to obtain the consent of his client, however, when reporting the violation "would not substantially prejudice the client's interest." Comment to Rule 8.3, N.D.R. Prof. Conduct.

In the matter presently before the committee, the inquiring lawyer has obtained the consent of the client to report the alleged violation. Thus, the North Dakota lawyer is not excused, under these facts, from reporting the violation if that lawyer has knowledge that the states attorney from North Dakota "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." Rule 8.3, N.D.R. Prof. Conduct.

In the committee's opinion, the inquiring lawyer is not required to report the conduct of the states attorney under the facts presented. The inquiring lawyer believes that there may have been a violation of the records confidentiality statute found at N.D.C.C. § 25-03.1-43 by the disclosure of the psychological evaluation conducted pursuant to N.D.C.C. Chapter 25-03.1. The inquiring lawyer, however, has apparently

not made the determination that the states attorney knowingly disclosed the documents, but rather the documents were disclosed through an instruction by the states attorney to the secretary to copy the file and send it to the prosecutor in South Dakota without realizing that the psychological evaluation had mistakenly been placed in the criminal file. The wrongful disclosure of a confidential psychological evaluation may constitute a Class C felony under N.D.C.C. § 12.1-13-01 if it is a violation knowingly done contrary to a statutory duty. Here, since the inquiring lawyer believes that the psychological evaluation was released in error due to an unintentional placement of the psychological evaluation in the criminal file, it does not appear that the knowledge of the inquiring lawyer raises a "substantial question" as to the states attorney's "honesty, trustworthiness, or fitness as a lawyer in other respects." The committee cannot substitute its judgment in that regard for the judgment of the inquiring lawyer. There is, therefore, no duty of the inquiring lawyer to initiate a proceeding under the North Dakota Rules of Disciplinary Procedure.

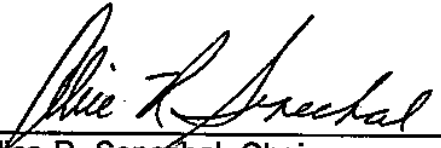
CONCLUSION

In the committee's opinion, the inquiring lawyer is not required to report the conduct of the states attorney under the facts presented.

This opinion is provided pursuant to Rule 1.2(B) of the North Dakota Rules for Lawyer Discipline. This rule states:

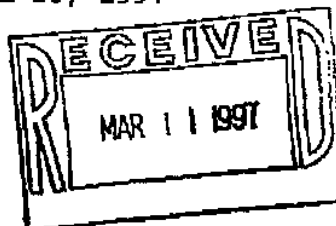
A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This opinion was drafted by David S. Maring and was unanimously approved by the Ethics Committee on April 29, 1997.



Alice R. Senechal, Chair

March 10, 1997



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

Re: Advisory Opinion Request of February 12, 1997

Dear Ms. Senechal:

Thank you for speaking to me a couple of weeks ago. Following our conversation I determined to try to obtain further facts for the purpose of again requesting an advisory opinion. While I am fairly certain of what I must do in this situation, I do feel that I would like to have an advisory opinion supporting or rejecting my position for the reasons that we had discussed.

I also determined that reporting this possible violation of the Rules of Professional Conduct would likely result in a violation of my client's right to keep the matter confidential. Thus, I requested and have obtained a release from my client authorizing me to report this violation if required.

The facts, as I now believe them to be, are as follows:

My client was committed for a mental health evaluation on an emergency basis pursuant to Chapter 25-03.1 N.D.C.C. pursuant to a petition filed by his parents. This petition was reviewed and approved by the Assistant States Attorney. My client was held at a psychological hospital for five days following which he was released and the petition dismissed as he was found not to be committable under the statute.

The evening before he was to be taken into custody on the involuntary petition he was arrested and charged with gross sexual imposition. Following his initial appearance he posted a personal recognizance bond and was released to be transported to the psychological hospital pursuant to the mental health petition. He was subsequently released from the hospital as indicated and remained free on bond on the criminal charges. While out on bond he went to South Dakota in violation of the

conditions of his bond where he was accused and subsequently charged with having committed another rape.

As the result of his violation of the conditions of his bond, bail was revoked and he was incarcerated in jail here in North Dakota. He was also charged with tampering with a witness here in North Dakota as the result of a telephone call which he made to the South Dakota victim's mother.

Following his arraignment I made an *ex parte* application for a psychological evaluation at state expense. That ~~evaluation~~ *application* and the supporting materials were reviewed by the Court, an order was issued granting the evaluation, and that portion of the court's file was sealed. Based upon the evaluation it was determined that no defense of lack of criminal responsibility would be raised and the issue went no further. However, in conjunction with application for the evaluation I also requested a continuance of the criminal court proceedings to allow for that evaluation. A copy of that continuance, and of the order granting the evaluation, was served upon the States Attorney.

My client eventually plead guilty to a misdemeanor offense of corruption of a minor, was sentenced to time served and released. The tampering charge remained pending and then my client was given a personal recognizance bond on the condition that he waive extradition to South Dakota to answer first to the underlying rape charge. My client did waive extradition and then requested bond be set by the South Dakota court. The Court set that bond at \$5,000.00 cash which was immediately posted by my client's parents. He was then released pending his initial appearance before the South Dakota court.

My client's release resulted in the mother of the South Dakota victim to begin to harass the local States Attorney on a daily and more frequent basis about this terrible injustice which had occurred. (I am assuming the injustice which occurred was that my client was actually allowed to be presumed innocent by the court in South Dakota.) Since writing my last letter I have become aware that the local States Attorney began to closely communicate with the prosecutor in South Dakota in an effort to assist him in getting my client's bond increased in South Dakota, thereby forcing my client's incarceration pending trial. Upon my client's appearing for court in South Dakota he found himself being arrested on another warrant for the same charge, this one issued pursuant to indictment by a grand jury and carrying a much larger bond than that which he had already posted. A hearing was held regarding the issue of bond during which the prosecutor raised the issue of my

client's dangerousness to society based in part upon his alleged defective mental health.

Upon discovering this, my client's attorney in South Dakota requested a continuance of the bond hearing to later that afternoon. She then immediately contacted me and requested that I fax all copies of any psychological evaluation reports pertaining to my client. As my client had already authorized me to release all pertinent information to his attorney in South Dakota I then immediately faxed her a copy of all psychological evaluation reports which I had in my possession.

When the bail hearing recommenced, the defense attorney presented copies of those reports (which indicated he was not a danger to society as the result of any mental disease or defect) to the court in camera. Thereafter a lengthy and heated argument took place in chambers during which the prosecutor revealed that he already had in his possession a copy of the mental health petition and the subsequent evaluation. The defense attorney immediately asked where he obtained those and he indicated from the States Attorney in North Dakota. My client was subsequently released upon the same bond which he had already posted. Thereafter, the defense attorney immediately called me and reported that the prosecutor had a copy of one of the evaluation reports, that being the one which was completed as part of the mental health procedures, and also what she was told regarding how he came in possession of that report.

The following day my client and his parents spoke to me and indicated that they were very upset that this information, which they had assumed would be kept confidential, had been released. I checked the mental health statute and determined that there was no authorization for releasing that information. However, the mental health chapter indicated no penalty for anyone releasing that confidential information. Consequently, I advised my client and his parents that, while his rights were violated, his remedy was to sue the responsible party in a civil action. I then advised them to await the outcome of the criminal actions before deciding if they wished to pursue this course of action.

During that weekend I was researching a brief when I stumbled across §12.1-13-01 which makes the disclosure of such confidential information by a public servant a class C felony. I immediately called my client and advised him that it appeared that he was now the victim of a crime and thus he should report it immediately if he wished. We determined that he should think about it and let me know how he wished to

proceed. On Monday I spoke to the judge assigned to the criminal case still pending against my client and sought his advice on how to proceed. This judge was also the judge who presided over the mental health proceeding and so I asked him to check to assure that the information had not been released by either his office or the clerks. I also advised him that, in light of the fact that my client would likely be pressing criminal charges in the matter, that I felt the States Attorney should withdraw from the case. The judge agreed with me and we determined that we would speak with the States Attorney regarding this and his withdrawal upon his return from a trip out of state.

We subsequently verified that the information was not released from either the Judge's office or the Clerk's. Upon the States Attorney's return we confronted him at which time he indicated that it was entirely possible that the information was released from his office. He indicated that if it was released from his office it was not done intentionally. He then agreed to withdraw as the prosecutor of the case.

I subsequently spoke to the States Attorney's secretary who indicated that she is likely the one who sent a copy of the report to the South Dakota prosecutor. According to her, she was instructed to copy the entire file on the criminal charges pending here and mail them to South Dakota. A copy of the mental health petition and evaluation was apparently placed in the file, probably at the time I had filed my request for continuance in order to allow the second psychological evaluation.

Other than the above facts, I have no further information other than that I did double check the facts with my client's South Dakota attorney, who indicated to me that she had double checked with the prosecutor about the source of the mental health documents. According to her, he had confirmed that he received them from the States Attorney in North Dakota.

The manner in which the material was likely disclosed indicates that there may be the lack of sufficient mens rea on the part of the States Attorney to meet the requirement of the criminal statute. Further, the information was apparently not released with a specific purpose, eg. embarrassing my client. Thus, although his actions may constitute "misconduct which tends to bring reproach upon the legal profession", and further may raise "a substantial question" as to the States Attorney's trustworthiness, I do not believe that I can reach that determination with any degree of certainty. Thus, I am requesting that an advisory opinion be

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drafted in response to my first letter taking into account the additional facts set out in this letter.

Thank you for your's and the committee's assistance in this matter.

