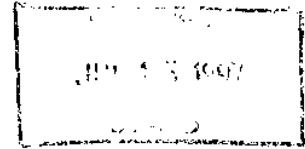


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STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
Opinion No. 97-05

June 30, 1997



The Committee has received a request for an opinion regarding the application of Rule 5.6(b) of the North Dakota Rules of Professional Conduct to a proposed confidentiality agreement and release being negotiated as part of a settlement agreement.

FACTS

The attorneys who requested this opinion represent opposing parties in a lawsuit concerning disability insurance coverage. As part of the settlement of that lawsuit, "Attorney A," counsel for the insurance company involved in the dispute ("Insurance Company" or "Company"), has proposed to "Attorney B," counsel for the individual involved in the dispute (the "Insured"), settlement documents that include the following "Confidentiality Agreement" (to be signed by Attorney B):

As a consideration of the settlement by [the Insurance Company] of a lawsuit between [the Company] and [the Insured], the undersigned, [Attorney B], individually and on behalf of the law firm of [Attorney B] (collectively "[B]"), subject to the conditions subsequent hereinafter set forth, hereby agrees to keep all information obtained by [B], as attorney for [the Insured], obtained on account of or through the claims of [the Insured] against [the Company], or obtained on account of or through the lawsuit instituted by [the Insured] against [the Company] (the "Litigation"), strictly confidential. This information includes, but is not limited to, any matters obtained through discovery in the Litigation, as well as the fact of, or conditions of, settlement between [the Company] and [the Insured]. [B] will not disclose any such matters to any third party. [B] will also not disclose to any third party the fact that the Litigation was brought, and will not discuss any matters, of any kind, related to the Litigation, with any third parties. [B] further agrees: (1) to return to [the Company] all copies of documents produced by [the Company] in connection therewith and as part of the discovery proceedings in the Litigation, (2) to return to [the Company] any documents or letters sent from [the Company] to [the Insured] before commencement of the Litigation to the extent he has possession or control of the same, and (3) to deliver to [the Company] the original and all copies of any deposition transcripts obtained by [B] or [the Insured] in connection with the Litigation.

In addition, Attorney A has proposed including the following language in a "Release" to be signed by the Insured:

[The Insured] agrees to, and by this settlement does, request his attorney, [B] and [B's] law firm . . . , to keep all information relating to the representation of [the Insured] confidential. He hereby requests his attorney to return to [the Company] any information obtained by [the Insured] or his attorney as a part of the Litigation, including without limitation any and all copies of documents previously produced by [the Company] in discovery proceedings regarding the Litigation, as well as all copies and originals of any deposition transcripts or depositions taken as a part of the Litigation. [The Insured] agrees to, and shall, return to [the Company] any documents, letters, or other materials received by [the Insured] from [the Company], including any such letters received prior to commencement of the Litigation; provided, however, that this requirement shall not be construed as requiring [the Insured] to return to [the Company] his, or his attorney's, copy of this Release. In addition, [the Insured] may retain those materials required by [the Insured] for tax purposes or accounting services or purposes. Any materials retained by [the Insured] for tax purposes or accounting services or purposes shall be used strictly by him for those purposes only.

[The Insured], by this agreement, specifically agrees he will not hereafter consent to the use of any information obtained by his attorney as a result of, or through the Litigation, in any manner.

As a further condition of this release, [the Insured's] attorney shall execute a Confidentiality Agreement by which his attorney agrees to keep confidential all information relating to this settlement or the Litigation to the full extent allowed by the Rules of Professional Conduct.

DISCUSSION

The Ethics Committee Procedures provide that the Committee "will not act as a fact finder. If the outcome of a question presented is dependent on deciding among conflicting facts, the committee will, to the extent possible, issue an opinion which addresses the alternative findings of fact."

In this instance, there apparently is a dispute between the two requesting attorneys as to the interpretation to be given at least some portions of the agreements quoted above. It would be inappropriate for the Committee to resolve this dispute about the proper construction of agreements. Therefore, this opinion will not provide an interpretation of the quoted language. The opinion will, however, discuss the application of Rule 5.6(b) to the differing constructions proposed by the requesting attorneys.

The opinion will consider the application of Rule 5.6(b) to the three main issues raised by the attorneys' requests, specifically, the propriety under Rule 5.6(b) of:

- (1) A provision making the settlement agreement terms confidential;
- (2) A provision requiring the return of discovery and other documents to the Company; and
- (3) A provision making confidential other "information" Attorney B obtained "on account of or through" the Insured's claims or lawsuit against the Company.

(1) Rule 5.6(b)

North Dakota Rule of Professional Conduct 5.6 provides:

A lawyer shall not participate in offering or making:

...

(b) An agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

The Comment to Rule 5.6 states that "[p]aragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client."

(2) The Rationale Behind and Test Used in Applying Rule 5.6(b)

Colorado Formal Ethics Opinion 92 (June 19, 1993) contains a good discussion of the general principles governing the application of Rule 5.6(b). According to that opinion,

The rationale for this rule is that restrictions of this kind placed on a settling claimant's lawyer would be contrary to the meaning and spirit of former Canon 2, which urged lawyers to make legal counsel available. *Annotated Code of Professional Responsibility* 115 (1979). Similarly, as the Chair of American Bar Association Committee on Ethics and Professional Responsibility explained to the ABA House of Delegates in 1970:

[A] covenant of that type would, in effect, restrict . . . a lawyer's ability to engage in the practice of law by agreeing in advance before he had considered any of the merits, that he would not represent certain types of clients. Secondly, we [the Committee] felt that a covenant of that type would inevitably involve a conflict of interests.

....

Rule 5.6(b) and its predecessor, DR 2-108(B), generally have been understood to hold unethical any settlement provision that requires a lawyer to decline future representation against a party defending the claim that is being settled. Case law and ethics opinions are virtually unanimous on this point.

Practice restrictions of the kind prohibited in Rule 5.6(b) are clearly overbroad and antithetical to a lawyer's ability to practice. Where the lawyer is representing contemporaneously settling and non-settling claimants, such restrictions could create an irreconcilable conflict of interest. Such a contractual restriction also creates a conflict of interest between the lawyer and future clients ... and has been deemed to be in contravention of public policy.

Other types of restrictions less onerous than a complete prohibition against subsequent representation of clients against a settling party defending a claim may similarly violate Rule 5.6(b). Ethics committees in other jurisdictions have recognized the impropriety of practice restrictions that fall short of an outright bar to future or ongoing representation.

The rationale for the prohibition against such lesser restrictions is that they too are "restriction[s] on the lawyer's right to practice" precluded by Rule 5.6(b). . . . Prohibited restrictions may include barring a lawyer representing a settling claimant from subpoenaing certain records or fact witnesses in future actions against the defending party, preventing the settling claimant's lawyer from using a certain expert witness in future cases, and imposing forum or venue limitations in future cases brought on behalf of non-settling claimants.

In the opinion of this Committee, the test of the propriety of a settlement provision under Rule 5.6(b) is whether it would restrain a lawyer's exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitation. Material restrictions obtained with an eye towards thwarting a non-settling claimant from obtaining counsel of choice fail this test. Although public policy favors fair settlements, the public policy favoring full access to legal assistance should prevail.

Id. (footnote omitted)(citations omitted).

(3) Application of the Rule to the Settlement Provisions Proposed in this Case

(a) The Agreement to Keep the Settlement Terms Confidential

Both Attorney A and Attorney B apparently agree the proposed settlement language restricts Attorney B from disclosing the amount and terms of the settlement. That restriction is not prohibited by Rule 5.6(b) where those details are not a matter of public record.

As a New Mexico ethics opinion concluded,

[a] settlement condition providing for nondisclosure of the amount and terms of a settlement is not only proper, but should be recognized where the details are not a matter of public record. The amount and terms of a settlement are the secrets of the client which may not be disclosed by the attorney. If a client agrees to such a settlement condition, the attorney must not disclose the amount or terms of the settlement.

State Bar of New Mexico Advisory Opinions Committee Advisory Opinion 1985-5 (Oct. 23, 1985) (citations omitted).

Similarly, a North Carolina State Bar ethics opinion found:

A lawyer may not be a party to a settlement agreement wherein he agrees to refrain from representing other potential plaintiffs in the future. . . . Nevertheless, participation in a settlement agreement conditioned upon maintaining the confidentiality of the terms of the settlement is not unethical. The amount and terms of any settlement which is not a matter of public record are the secrets of a client which may not be disclosed by a lawyer without the client's consent. If a client desires to enter into a settlement agreement requiring confidentiality, the lawyer must comply with the client's request that the information regarding the settlement be confidential.

North Carolina State Bar Ethics Opinion RPC 179 (July 21, 1994). See also Colorado Formal Ethics Opinion 92 (June 19, 1993) ("A lawyer may enter into a settlement agreement conditioned upon nondisclosure of the amount and terms of the settlement, provided this information is not already a matter of public record.").

These conclusions in the cited opinions appear sound and are adopted by the Committee.

(b) The Agreement to Return Discovery and Other Documents to the Company

The Confidentiality Agreement in question seeks to require Attorney B to turn over to the Insurance Company certain documents, specifically, documents the Company produced in discovery, correspondence from the Company to the Insured before the litigation began, and deposition transcripts. The Release the Insured is asked to sign includes similar requirements (with certain tax- or accounting-related exceptions) and also includes a requirement that the Insured request Attorney B "return to [the Company] any information obtained by [the Insured] or his attorney as part of the Litigation." It is unclear what "information" is intended to be included in this requirement.

The Colorado and New Mexico ethics opinions quoted above address the issue of turning over documents to opposing counsel. The Colorado opinion concluded: "[A] settlement requirement that a lawyer return documents obtained in discovery as a condition of settlement is not unethical in proper circumstances." Colorado Formal Ethics Opinion 92 (June 19, 1993).

The New Mexico opinion contains a more detailed discussion of a similar document issue. State Bar of New Mexico Advisory Opinions Committee Advisory Opinion 1985-5 (Oct. 23, 1985). In that instance the committee was considering an agreement requiring the settling attorney to "give her entire file to defense counsel to be sealed." Id.¹

The New Mexico committee concluded that, with the exception of attorney work product,

[t]he decision whether to agree to this condition rests with the client because the file is the property of the client. . . . The attorney should fully explain the condition to her client, its threat to the attorney-client privilege, and all other ramifications of having the file sealed in the manner requested by defense counsel. It is the client's decision whether to accept this condition of the settlement.

Id. (citations omitted).

¹ This Committee does not necessarily adopt the concept that it would be appropriate under Rule 5.6(b) for an attorney to turn over his/her entire file to defense counsel to be sealed since that issue is not before us. The requirement that the entire file be turned over raises issues concerning, among other things, the ability of the attorney to defend against disciplinary claims and/or malpractice claims which could arise out of the representation. The ability of an attorney to defend against disciplinary proceedings and malpractice actions is important to the practice of law. Even though the Committee finds no violation of Rule 5.6 in an agreement for Attorney B to return to Company documents produced in discovery, deposition transcripts, and correspondence from the Company to the Insured which do not involve work product, it should be made clear that the Committee is not condoning the destruction of such documents by the receiving party in a manner intended to thwart or interfere with existing or future claims.

The committee noted, however, that attorney work product materials raise a separate but related question. Id. On that issue the committee wrote:

Releasing work product papers as a condition for settlement may be distinguishable from the protection afforded to an attorney and client during discovery. . . . It is the Committee's position that if the attorney is required to disclose her entire work product, it may inhibit her representation of subsequent clients. If this were to occur, defense counsel would accomplish indirectly what they cannot accomplish by directly precluding the attorney from representing other plaintiffs with similar claims. . . .

The attorney's work product papers may reveal her client's position which could affect her representation of future clients whose weaknesses and settlement positions are similar to those of the settling client. Also, the attorney may not be able to recreate her work product if it is sealed by defense counsel. Therefore, with regard to work product, the attorney must first determine whether the condition will restrict her right to practice law. If it will, the attorney cannot agree to the condition. If it will not, the attorney may agree to the condition. . . .

Id.

Applying these principles, to the extent the Confidentiality Agreement and Release in question here are construed to require Attorney B to provide to the Company documents the Company produced in discovery, deposition transcripts, and correspondence from the Company to the Insured, Rule 5.6(b) does not prohibit the agreements if the documents in question do not constitute attorney work product.

However, to the extent the provisions are interpreted to require Attorney B to turn over documents protected by the attorney work product doctrine, the provisions may be prohibited by Rule 5.6(b). That is, Attorney B may not agree to turn over any work product materials as part of the settlement if that action will restrict his representation of other clients. Whether providing the opposing side access to or losing his or her own access to work product materials would restrict the attorney's representation of other clients is a factual question the attorney must decide based on the document(s) involved and the facts and circumstances of the case.

(c) The Agreement to Maintain the Confidentiality of Other "Information" Attorney B Obtained "on Account of or Through" the Insured's Claims or Lawsuit against the Company

The proposed Confidentiality Agreement provides Attorney B may "not disclose to any third party the fact that the Litigation was brought" or "discuss any matters, of any kind, related to

the Litigation, with any third parties.” Further, the proposed Release states the Insured requests Attorney B “to keep all information relating to the representation of [the Insured] confidential.” It is unclear what “matters” or “information” are intended to be included in the prohibition against disclosure contained in these documents.

Attorney B states he believes the agreements require him to deny the Insured’s lawsuit against the Company ever existed, even if he could have obtained that information through discovery in another lawsuit. Attorney A claims the agreement would not require Attorney B to deny the lawsuit ever existed, just not to comment on the existence of the lawsuit.

The ethics opinions from other jurisdictions discussed above addressed whether an attorney may agree to keep the “amount and terms” of a settlement confidential, but not specifically whether an attorney may agree to keep the fact of the lawsuit or the settlement itself confidential.

As discussed above, under Rule 5.6(b) the test of the propriety of a restriction is whether the restriction “would restrain a lawyer’s exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitation.” Colorado Formal Ethics Opinion 92 (June 19, 1993).

Applying that test to this issue, Rule 5.6(b) does not prohibit an agreement to keep the existence of a lawsuit and settlement confidential if those facts constitute confidential client information under North Dakota Rule of Professional Conduct Rule 1.6. In many instances the fact that Attorney B’s client sued and received a settlement in a case would constitute such confidential client information and whether that information may be disclosed would be the client’s decision.

Under those circumstances (that is, if the information about the litigation and settlement does constitute confidential client information) Attorney B must respect his client’s confidences and adhere to relevant Rules of Professional Conduct in responding to inquiries about the lawsuit or settlement from other prospective clients. See, e.g., N.D.R. Prof. Conduct 4.1 (“In the course of representing a client a lawyer shall not make a statement to a third person of fact or law that the lawyer knows to be false.”); N.D.R. Prof. Conduct 7.1 (concerning false or misleading communications concerning a lawyer’s services).

However, under Rule 5.6(b) Attorney B may not enter into an agreement restricting his use of any information that would not constitute protected client information under Rule 1.6 if that restraint would restrict his ability to represent other clients. For example, Attorney B could not agree to keep “confidential” information that is a public record or that he could otherwise obtain through channels, such as discovery, and use in subsequent cases, but for the proposed confidentiality agreement. Restricting Attorney B’s use of information that a lawyer other than Attorney B could learn and use in litigation on behalf of a client would restrain Attorney B’s exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitation. Therefore, the proposed agreements would

violate Rule 5.6(b) if they were construed to prohibit Attorney B from disclosing information that is a public record or he could otherwise obtain.

Attorney B further characterizes the Confidentiality Agreement as prohibiting him and his law firm "from using any knowledge, expertise, or information gained in the lawsuit in any future lawsuit." For example, Attorney B states the Confidentiality Agreement would prohibit him and members of his firm from telling prospective clients with possible claims against the Company that they had experience with the Insurance Company and its policies, procedures or personnel. Attorney B also claims the agreement would prohibit his firm from using information about this case in another lawsuit alleging an inappropriate "general business practice," even if he could have obtained that information through discovery in the other lawsuit.

Attorney A disagrees with this construction of the proposed agreement. Attorney A states nothing in the agreement restricts Attorney B's use of any "knowledge or expertise" gained in the Litigation or the use of "information that he has in his mind" in future litigation.

Applying the test of the propriety of a restriction in a settlement agreement set out above, if the Confidentiality Agreement and Release were construed to restrict Attorney B's use of attorney work product -- mental impressions, conclusions, opinions, legal theories or strategies, etc. -- in a manner that would inhibit Attorney B's ability to represent future clients, those agreements would violate Rule 5.6(b). It is difficult to imagine how an attorney could "unlearn" theories or knowledge of law acquired as part of preparation for a case and not use that knowledge in representation of clients in similar cases in the future. If an agreement prohibiting the future use of such knowledge or information were permissible, therefore, defense counsel could use such agreements to "accomplish indirectly what they cannot accomplish by directly precluding the attorney from representing other plaintiffs with similar claims," State Bar of New Mexico Advisory Opinions Committee Advisory Opinion 1985-5 (Oct. 23, 1985). Accordingly, if the agreements at issue here were construed as a broad prohibition on Attorney B's "using any knowledge, expertise, or information gained in the lawsuit in any future lawsuit," the agreements would be prohibited by Rule 5.6(b).

However, if the agreements were construed to prohibit only Attorney B's future use of confidential client information protected by Rule 1.6 acquired in his representation of the Insured, the agreements would not violate Rule 5.6(b). It is permissible for the Insured and Attorney B to enter into an agreement restricting the future use of confidential client information protected under Rule 1.6.

CONCLUSION

In summary, the test of the propriety of a settlement provision under Rule 5.6(b) is whether the restriction would restrain a lawyer's exercise of independent judgment on behalf of other clients

to an extent greater than that of an independent attorney not subject to such a limitation. Under that test, at a client's request, an attorney may agree:

- To keep confidential the amount and terms of the settlement, provided this information is not a matter of public record;
- To keep confidential the fact of the lawsuit and settlement or any other information to the extent that information constitutes confidential client information under Rule 1.6; and
- To return to opposing counsel or party documents that party produced in discovery, deposition transcripts, and correspondence between the opposing party and the Insured if the documents in question do not constitute attorney work product.

Under Rule 5.6(b) an attorney may not agree -- even at a client's request:

- To turn over to the opposing party or counsel documents protected by the attorney work product doctrine if that action would restrict the attorney's representation of other clients; or
- To keep confidential information that is not confidential client information under Rule 1.6, for example, information that is a public record or that the attorney could otherwise obtain through channels, such as discovery, and use in subsequent cases, but for the proposed confidentiality agreement.

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 Laurie J. Loveland and was approved by the Committee on June 30, 1997.

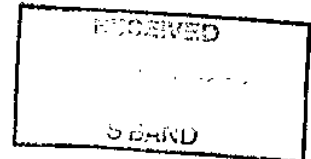


Alice R. Senechal, Chair

Attorneys at Law

March 27, 1997

State Bar Association
of North Dakota
ATTN: Executive Director
P.O. Box 2136
Bismarck, ND 58502



In re: [REDACTED]

Dear Sir/Madam:

The purpose of this letter is to request an opinion by the ethics committee on a dispute which has arisen between the parties to this action. The dispute involves the application of Rule 5.6, ND Rules of Professional Conduct. That rule, with the relevant provisions emphasized, reads as follows:

Rule 5.6 Restrictions On Right To Practice

A lawyer shall not participate in offering or making:

- (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

This dispute arose out of a lawsuit concerning disability insurance coverage. The plaintiff alleged he was entitled to total disability benefits, and the defendant insurance company denied he was totally disabled. The case was hotly litigated for several months, until a mediation was held on March 7, 1997. At that mediation, the parties agreed on a settlement which called for the insurer to pay total disability benefits. The settlement is in the best interests of my client, the insured.

[REDACTED]

The insurer's counsel drafted the settlement documents, and included therein the agreement which is the subject of this dispute. A copy is attached as Exhibit A. Defense counsel has stated that this supposed "confidentiality" agreement is a condition to the settlement in this case. The agreement must be signed by me individually, and on behalf of my law firm, otherwise [REDACTED] claims there is no settlement. The agreement requires that I and anyone associated with me deny that this lawsuit ever existed. It prohibits me and my law firm from using any knowledge, expertise, or information gained in this lawsuit in any future lawsuit. It requires that we return to the insurer all documents exchanged during the case, all deposition transcripts, and any other documents which might be used against the insurer in future cases.

It is our position that this supposed "confidentiality" agreement is in reality a back-door way of preventing or hindering this law firm from representing insureds with claims against this company in the future. We believe this violates Rule 5.6, and have refused to sign the agreement on that basis.

It is our position that Rule 5.6 was intended to prevent precisely the dilemma with which we are presently faced. The monetary settlement offered by the insurer is a good settlement for our client. Obviously we are ethically obligated to do what is in our client's best interests. However, that same settlement will severely restrict our right to take cases against this insurer and other insurers in the future. We feel it is in fact designed to do exactly that. Our own interests are therefore diametrically opposed to those of our client. The insurer in this case has used our dilemma to pressure us to sign the confidentiality agreement. This, we feel, was precisely the situation Rule 5.6 was designed to avoid.

We have not engaged in any significant research on this issue, because our client should not be required to pay for it. We can, however, verify there are no North Dakota cases interpreting Rule 5.6 in this situation. Nevertheless, an example serves to illustrate how the proposed confidentiality agreement will "restrict our right to practice" in similar cases against this company.

Assume an insured has been denied benefits by this same company. The insured seeks out an attorney, and is referred to several. He or she comes to our office, and meets with the undersigned. The insured is looking for someone who has experience with this company, its policies and procedures, and its personnel. The insured asks whether we have ever been involved with this company in the past.

Under the proposed confidentiality agreement, we will be forced to either 1) lie to the prospective client; or 2) cryptically refuse to answer his or her inquiries. The insured will go elsewhere. That is precisely what the insurer in this case

wants, and it is precisely the purpose behind the confidentiality agreement. The insurer in this case does not want to be sued by attorneys with experience with its policies, procedures and personnel. It wants the attorneys who represent its insureds to start from scratch. That way, the burden of bringing litigation against them is increased, attorneys are less willing to take the case, and insureds are less likely to want to bear the costs and therefore less likely to bring suit in the first place. We think this is unfair, and is prohibited by Rule 5.6.

A whole set of additional problems will arise if we ever do accept a case against this insurer in the future. The Unfair Claims Practices Act allows the jury to consider additional evidence if the improper actions of the company are shown to have been pursued as a "general business practice." The proposed confidentiality agreement would prohibit us from using the existence of this case in any future action, regardless of whether we would have obtained that information independently through the discovery process. We must deny that the insurer's dispute with this client ever existed.

Clearly one of the insurer's concerns is that counsel will "solicit" clients and engender more litigation against it. Improper solicitation of clients without valid claims is already prohibited by the ethical rules, and needless to say, we have no intention of so doing. See Rule 7.1, ND Rules of Professional Conduct. This agreement is not intended to prevent such conduct. It is intended to prevent legitimate claimants from having all of the facts necessary to make their choice of counsel.

We have absolutely no objection to being bound by our client's promise not to reveal the amount of this settlement, and to generally keep the settlement itself confidential. These types of confidentiality provisions are included in releases all the time, and we have no objection to them. Thus, we will not be allowed to say "we obtained a favorable settlement against X Insurance Company" under our proposed agreement. However, we cannot rightly be prevented from saying we have represented parties against this company before.

We also feel the proposed confidentiality agreement raises significant First Amendment issues. This is especially true in light of the fact that the "existence" of this litigation (what the agreement tried to keep secret) is a matter of public record and is available to the public generally. We recognize, however, that such issues may not be within the scope of this committee's review.

Our primary concern, at present, is the significant dilemma the insurer's proposed agreement is placing us in. We do not feel we should be forced to choose between what is in the best interests of our client, and being restricted in our right to effectively take cases against this company in the future. We do not feel other attorneys in North Dakota should be placed in this dilemma

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in the future. This, we feel, is precisely what Rule 5.6 was designed to prevent.

We thank the committee for its consideration of this important issue.

Very truly yours,

A large, irregular black redaction mark covering the signature and any text that might have been present below the closing.

CONFIDENTIALITY AGREEMENT

As a consideration of the settlement by [REDACTED]
[REDACTED] of a lawsuit between [REDACTED] and
[REDACTED] the undersigned, [REDACTED]
individually and on behalf of the law firm of [REDACTED]
[REDACTED] (collectively, [REDACTED]), subject to the
conditions subsequent hereinafter set forth, hereby agrees to
keep all information obtained by [REDACTED] as attorney for [REDACTED],
obtained on account of or through the claims of [REDACTED] against
[REDACTED], or obtained on account of or through the lawsuit instituted
by [REDACTED] against [REDACTED] (the "Litigation"), strictly confidential.
This information includes, but is not limited to, any matters
obtained through discovery in the Litigation, as well as the fact
of, or conditions of, settlement between [REDACTED] and [REDACTED]. [REDACTED]
will not disclose any such matters to any third party. [REDACTED]
will also not disclose to any third party the fact that the
Litigation was brought, and will not discuss any matters, of any
kind, related to the Litigation, with any third parties. [REDACTED]
further agrees: (1) to return to [REDACTED] all copies of documents
produced by [REDACTED] in connection therewith and as part of the
discovery proceedings in the Litigation, (2) to return to [REDACTED] any
documents or letters sent from [REDACTED] to [REDACTED] before commencement
of the Litigation to the extent he has possession or control of
the same, and (3) to deliver to [REDACTED] the original and all copies
of any deposition transcripts obtained by [REDACTED] or [REDACTED] in
connection with the Litigation.



As a condition subsequent to the enforceability and validity of this Confidentiality Agreement, [REDACTED] through their counsel, will request a determination from the North Dakota Ethics Committee as to whether this Confidentiality Agreement violates the provisions of Rule 5.6 of the North Dakota Rules of Professional Conduct. In the event the North Dakota Ethics Committee determines any portion of this agreement violates said Rule 5.6 of the North Dakota Rules of Professional Conduct, that portion of this Confidentiality Agreement shall be null, void and of no effect.

DATED this _____ day of March, 1997.

[REDACTED] Individually
and as a Partner of [REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

April 4, 1997

RECEIVED

APR 09 1997

S BAND

State Bar Association of North Dakota
Attn: Executive Director
P. O. Box 2136
Bismarck, ND 58502-2136

Re: [REDACTED] v. [REDACTED]

Dear Ms. Tabor:

I am sending this to supplement a letter from [REDACTED] to the State Bar Association of North Dakota dated March 27, 1997, in which Mr. [REDACTED] requests an opinion by the Ethics Committee on a confidentiality agreement drafted by me. Attached to Mr. [REDACTED] letter is a copy of a Confidentiality Agreement drafted by me which provided that it would be submitted to the North Dakota Ethics Committee for a ruling as to whether it violated the provisions of 5.6 of the North Dakota Rules of Professional Conduct. Mr. [REDACTED] chose to submit the agreement, and it seems to me it should not matter which party submits the agreement. I also am requesting the opinion by the Ethics Committee as to whether the agreement attached to Mr. [REDACTED] letter of March 27, 1997, violates the provisions of 5.6 of the North Dakota Rules of Professional Conduct.

I do not believe that the Ethics Committee needs a long discussion as to the arguments, one way or the other, on this issue. They will obviously exercise their own knowledge and interpretations in reaching a decision. I do, however, feel that I must respond to several of the comments in Mr. [REDACTED] letter of March 27, 1997.

Mr. [REDACTED], in the first paragraph of page two of his letter, states that the agreement requires that he, and anyone associated with him, deny that the lawsuit ever existed. The agreement contains no such language; the agreement would merely require Mr. [REDACTED] to state that he has no comment on any such request. The same paragraph also states the agreement prohibits him and his law firm from using any "knowledge, expertise, or information gained in this

lawsuit in any future lawsuit." There is no such condition, implied or expressed, in the agreement regarding any "knowledge or expertise." With regard to any "information," the information cannot be disclosed by Mr. [REDACTED]; however, there is nothing in the agreement that would restrict Mr. [REDACTED] ability to use the information that he has in his mind in handling future litigation.

There is nothing in the agreement that would preclude Mr. [REDACTED], or his law firm, from instituting future action against my client. In fact, Mr. [REDACTED] has been specifically advised that this is not a condition of the agreement. My client and I believe that this is what Rule 5.6(b) precludes.

There is nothing in the agreement that restricts the ability of Mr. [REDACTED] or his law firm to take cases against either [REDACTED] or other insurers. All that the agreement does is require that the information that he has obtained in the lawsuit that is being settled be kept strictly confidential, and that he not disclose any such information to any third party. While the agreement does preclude Mr. [REDACTED] and his law firm, from using the present lawsuit as part of any solicitation of clients, such a restriction does not violate the provisions of Rule 5.6(b). A lawyer's right to practice is separate from any ability to advertise. In fact, the right to practice law existed long before the ability to advertise. Moreover, clients can insist upon confidentiality at any time. Varying degrees of confidentiality are a part of the practice of law. Insisting on confidentiality does not place a restriction on a lawyer's right to practice.

My concern is that the Ethics Committee reach a decision on whether the proposed confidentiality agreement violates Rule 5.6 based upon the language of the proposed confidentiality agreement, and not upon the characterizations from either Mr. [REDACTED] or me as to the terms of the agreement.

Thank you for your consideration.

Yours very truly,
[REDACTED]

[REDACTED]

Attorneys at Law

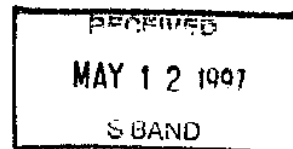
[REDACTED]

May 9, 1997

[REDACTED]

State Bar Association of North Dakota
P.O. Box 2136
Bismarck, ND 58502

Attn: Executive Director



In re: [REDACTED]

Dear Sir/Madam:

Our office has previously written you in regard to a release prepared by [REDACTED]. Since our last correspondence, there have been additional terms inserted into the release by [REDACTED]. Specifically, those changes are contained on pages 4 and 5 of the enclosed revised release.

Could you please have the Ethics Committee review these changes to determine whether this language (on pages 4 and 5) constitutes an attempt to limit the undersigned's ability to practice law, and thus constitutes a violation of the Rules of Professional Conduct.

Thank you for your consideration regarding this matter.

Very truly yours,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

RELEASE OF ALL CLAIMS

KNOW ALL MEN BY THESE PRESENTS that the undersigned, [REDACTED], being of lawful age, for and in consideration of the sum of [REDACTED] ([REDACTED]), payable to [REDACTED] and his attorney, [REDACTED], does, for [REDACTED], his heirs, executors, administrators, successors and assigns, release, acquit and forever discharge [REDACTED], its predecessor in interest [REDACTED], as well as their agents, employees, attorneys, officers, and directors, of and from any and all claims, actions, causes of action, demands, or rights for damages, expenses, interest, claims and compensation whatsoever, which [REDACTED] now has, or which may hereafter accrue on account of, or in any way grow out of, any and all known or unknown, foreseen and unforeseen, injuries, damages, tort, or contract claims resulting to [REDACTED] in any way related to or arising out of: (1) the disability insurance contract from [REDACTED] to [REDACTED] issued June 26, 1974, or (2) any matters related to the lawsuit brought by [REDACTED] against [REDACTED] and venued in the County of [REDACTED], [REDACTED] Judicial District of North Dakota.

IT IS UNDERSTOOD AND AGREED that in exchange for the payment hereinabove set forth, [REDACTED] shall surrender to [REDACTED] the above-referenced disability insurance policy, and that said policy shall be completely terminated and of no further force or effect. This release includes, but is not limited to, claims for benefits of any kind, type or nature that [REDACTED] may claim under

said disability insurance policy as a result of: (1) any and all past known or unknown insurance claims, (2) the heart attack which [REDACTED] experienced on June 18, 1995, or (3) as a result of any claim of total or partial disability from said heart attack, including without limitation any claim, attorney's fees or costs incurred in connection with the above-referenced lawsuit.

IT IS UNDERSTOOD AND AGREED that this settlement is the compromise of a disputed claim, that the payment made is not to be construed as an admission of liability on the part of [REDACTED], and that [REDACTED] continues to deny it has any legal obligation to make payments under the referenced disability insurance policy on account of the above-referenced heart attack beyond those previously approved for the period of June 18, 1995 through August 19, 1995; [REDACTED] intends merely to avoid litigation and buy its peace. Without limitation, it is understood that a dispute exists between [REDACTED] and [REDACTED] as to the interpretation or applicability of language contained in the case of Kooker v. Benefit Associates of Railway Employees, 248 N.W.2d 743 (N.D. 1976), with reference to total and/or partial disability under the above-referenced disability insurance policy, and that a dispute exists as to whether such case would preclude [REDACTED] from denying a claim for total disability.

By entering into this settlement, it is understood that [REDACTED] continues to take the position that the decision in Kooker does not require further payment to [REDACTED] beyond those previously approved for the period of June 18, 1995 through August 19, 1995. Similarly, it is understood that [REDACTED] disagrees with the

position of [REDACTED], and by entering into this settlement is not accepting the interpretation of [REDACTED]

[REDACTED] further declares he is relying wholly upon his judgment, belief and knowledge as to the nature, extent, effect and duration of damages and liability therefore, and this release is made without reliance upon any statement or representation of [REDACTED] or any of its representatives.

[REDACTED] further declares and represents that no promise, inducement or agreement not herein expressed has been made to him, that this release contains the entire agreement between the parties hereto, and that the terms of this release are contractual and not a mere recital.

As additional consideration for the sum paid, [REDACTED] further agrees to keep the terms of this settlement and compromise wholly confidential, and further agrees that, from this date forward, he will not discuss with any person, except his attorney, the terms of this settlement or any matters related to, arising out of, or involving the litigation between [REDACTED] and [REDACTED] (the "Litigation"), unless required by a court of law, statute, or other rule of law to do so. [REDACTED] agrees from this day forward to keep confidential the fact that litigation was commenced against [REDACTED] by himself, as well as the fact that he received any payment in settlement of the Litigation. [REDACTED] agrees from this date forward that he will not publicly discuss the disputes or claims referenced in this settlement or in the Litigation.

[REDACTED] agrees to, and by this settlement does, request his attorney, [REDACTED] and the law firm of [REDACTED], to keep all information relating to the representation of [REDACTED] confidential. He hereby requests his attorney to return to [REDACTED] any information obtained by [REDACTED] or his attorney as a part of the Litigation, including without limitation any and all copies of documents previously produced by [REDACTED] in discovery proceedings regarding the Litigation, as well as all copies and originals of any deposition transcripts of depositions taken as a part of the Litigation. [REDACTED] agrees to, and shall, return to [REDACTED] any documents, letters, or other materials received by [REDACTED] from [REDACTED] including any such letters received prior to commencement of the Litigation; provided, however, that this requirement shall not be construed as requiring [REDACTED] to return to [REDACTED] his, or his attorney's, copy of this Release. In addition, [REDACTED] may retain those materials required by [REDACTED] for tax purposes or accounting services or purposes. Any materials retained by [REDACTED] for tax purposes or accounting services or purposes shall be used strictly by him for those purposes only.

[REDACTED], by this agreement, specifically agrees he will not hereafter consent to the use of any information obtained by his attorney as a result of, or through the Litigation, in any manner.

As a further condition of this release, [REDACTED] attorney shall execute a Confidentiality Agreement by which his attorney agrees to keep confidential all information relating to this

settlement or the Litigation to the full extent allowed by the
Rules of Professional Conduct.

DATED this _____ day of April, 1957.