

STATE BAR ASSOCIATION OF NORTH DAKOTA  
ETHICS COMMITTEE

Opinion No. 97-12  
November 11, 1997

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The Ethics Committee has received a request for an opinion with respect to the lawyer's duties to release psychological records to a client when the psychologist requests the lawyer not to release the records to the client.

FACTS

In the course of representation, the lawyer's client executed a release requesting the client's psychologist to forward copies of the client's psychological records to the lawyer. The lawyer provided copies of the records to the client. Subsequently, the psychologist learned from the patient that the records had been released by the lawyer to the client/patient and requested that in the future, the lawyer consider withholding such records from the client/patient as "it is not always helpful or beneficial to patients to have information from psychological or neuropsychological evaluations since this generally contains sensitive material, such as . . . , which are potentially detrimental to the patient". The psychologist continued, "there are often other things contained in reports, which while they may even be important for you as an attorney to know, may be harmful or distressing for the patient to be directly reading about themselves", and later "may have a direct bearing on the well-being of any individual". The lawyer requests guidance with respect to his prospective conduct when faced with like situations.

QUESTION

The question posed by the lawyer to the Committee is as follows:

Is a lawyer either permitted or required to disclose to a client the contents of the client's psychological records, which the lawyer has received from the client's health care provider pursuant to the client's authorization for release of those records to the lawyer, when the health care provider has requested that the contents of the records not be disclosed to the client?

DISCUSSION

Competent, diligent, and informed representation are at the core of an attorney's duty to zealously and faithfully pursue a client's interests. Disciplinary Bd. v. Britton, 484 N.W.2d 110, 111, (N.D. 1992).

Rule 1.4, Communication, North Dakota Rules of Professional Conduct states:

- a. A lawyer shall make reasonable efforts to keep a client reasonably informed about the status of a matter. A lawyer shall promptly comply with a client's reasonable requests for information.
- b. A lawyer shall explain matters related to the representation to the extent reasonably necessary to permit the client to make informed decisions.

This basic rule is explained in the Official Comment which states in part:

"The client should have sufficient information to participate intelligently in decisions concerning the representation to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party, and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party . . . . Adequacy of communication depends in part on the kind of advice or assistance involved . . . . The guiding principle is that the lawyer should fulfill reasonable client expectations for information."

The linchpin to the question posed to the Committee is the final paragraph of the Official Comment to Rule 1.4, which reads in part:

"When a lawyer reasonably believes the disclosure of certain information to a client would have a high probability of resulting in substantial harm to a client or others, the lawyer may withhold or delay the transmission of the information, but only to the extent reasonably necessary to avoid the harm. For example, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client." (Emphasis added.)

Interestingly, North Dakota's version of the comment differs from the comment to the Model Rules of Professional Conduct promulgated by the American Bar Association. The corresponding sentence of the ABA version reads, "In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication." Annotated Model Rules of Professional Conduct. Third Ed. 1996.

A well-known commentator on legal ethics writes,

"The comment to Rule 1.4 lists a few common-sense 'exceptions' to the rules on communication. These are not so much exceptions as examples of how the word 'reasonably', which appears in both subsections of the rule, should be interpreted. What is required to keep a client 'reasonably informed' will differ from client to client . . . . The final paragraph of the Comment contains one idea which may be misunderstood, and perhaps would have been better left unsaid: the Comment permits a delay in communicating information if the client might 'react imprudently' to an immediate communication. The example given (of a psychiatric diagnosis) is extreme, and the Comment must be understood to be limited to such situations."

Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering 84, (1991 supplement).

The Committee has been unable to determine exactly why the North Dakota version of the comment to Rule 1.4 was modified from that of the Model Rules version, and the Committee has not discovered any ethics opinions, either from the American Bar Association or from any other state, that have interpreted this exception to the general rule.

Although the Committee believes that communication with a client is of utmost importance, it is the Committee's opinion that it is not always necessary for the lawyer simply to recopy medical or psychological records verbatim and forward them to a client. This is particularly so when a client has not asked for a verbatim copy of the records. It would be a rare situation that a client (or the lawyer, for that matter) fully understands the significance of everything in every medical or psychological record, and in some cases, communication between lawyer and client may even be inhibited by the presence of the verbatim records.

Rule 1.4, N.D.R. Prof. Cond. comes into play only when the client specifically requests the records, or when the lawyer determines that a discussion of the records with the client is reasonably necessary to comply with the spirit of Rule 1.4, or to adequately represent the client.

In the instant case, and in other similar cases, assuming the records were requested by the client, or a discussion of them with the client is necessary to representation, despite the psychologist's request, the lawyer must disclose (and probably should explain to the psychologist why disclosure was required). The only exception is that rare occasion when the lawyer "reasonably believes the disclosure would have a high probability of resulting in substantial harm to the client or others".

In those cases, the Committee recommends that the lawyer urge the client to discuss the records in question directly with the

psychologist, or together with the lawyer, psychologist, and client/patient. Also, depending on the circumstances, it may be possible to have the necessary communication without verbatim copying of the records, and the furnishing of them to the client.

Finally, the Committee wishes to indicate that it is not unmindful of the much broader latitude given to psychologists and physicians to withhold records from the patient. For example, Section 50-02-10-01, North Dakota Administrative Code, provides that psychiatric records may be transferred or released to the patient or patient's representative upon request, "whenever the treating physician believes that such action is not contrary to the patient's best interests".

This Committee expresses no opinion with respect to the legal or ethical duties of any health care professional concerning the release of patient's records.

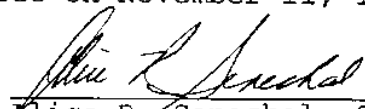
#### CONCLUSION

A lawyer has an ethical obligation to release medical or psychological records to a client when communication concerning the records is necessary to proper representation of the client, or when the client requests the records from the lawyer. The only exception is when the lawyer reasonably believes the disclosure of certain information to the client would have a high probability of resulting in substantial harm to the client or others. The lawyer may withhold or delay the transmission of the information only to the extent reasonably necessary to avoid the harm.

This opinion is provided pursuant to Rule 1.2(b), North Dakota Rules for 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 David L. Petersen and was unanimously approved by the Ethics Committee on November 11, 1997.

  
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Alice R. Senechal, Chair

97-12

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October 8, 1997

Alice R. Senechal, Esq.  
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North Dakota  
Ethics Committee Chairperson  
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RE: Ethics Committee Opinion

Dear Ms. Senechal:

This letter serves to request the assistance of the Ethics Committee in providing an ethical opinion. Specifically, I am inquiring as to the propriety and/or responsibility of an attorney to provide his or her client with medical records which are received pertaining to treatment of the client. I am enclosing a letter dated 9/24/97 which I received from [REDACTED], PhD, of the [REDACTED] advising that a neuropsychological report should not have been provided to the client. I am of the opinion that it is the responsibility of an attorney to provide a client with copies of such medical records. Certainly where medical records are requested by the client, an attorney would have an affirmative duty to provide such records to the client even though the medical facility may not desire that such records be disclosed. I would appreciate the Ethics Committee's commenting on this subject.

Thank you for your consideration in this matter.

[REDACTED]  
Very truly yours,  
[REDACTED]

[REDACTED]  
Enclosure

COPY

September 24, 1997

Dear [REDACTED]

I recently was informed by a patient that you had given her a copy of a neuropsychological evaluation I had performed. While I understand that this was probably done in the spirit of communication between attorney and client, I would like to ask that you reconsider doing this in the future. It is not always helpful or beneficial to patients to have information from psychological or neuropsychological evaluations, since this generally contains sensitive material such as IQ scores, which are potentially detrimental to the patient. It is not always a good thing for a person to know their own IQ scores, since there is a margin of error to these scores and people tend to become focused on a number, either in a positive or a negative fashion. I also think that there are often other things contained in reports, which while they may even be important for you as an attorney to know, may be harmful or distressing for the patient to be directly reading about themselves. I certainly respect the fact that you have probably not had to consider these issues in the past but I believe that you should be aware of them as they do have a direct bearing on the well-being of any individual. Certainly, if it was beneficial for patients to have copies of their psychological notes and records, we would be handing them out ourselves here at the clinic, but we tend to protect this information for the above reasons.

Thank you for your consideration of this matter.

Sincerely,  
[REDACTED]