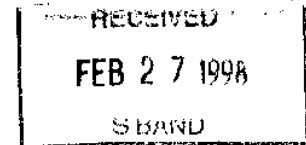


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STATE BAR ASSOCIATION OF NORTH DAKOTA ETHICS COMMITTEE
Opinion No. 98-02
February 23, 1998

The Ethics Committee has been asked to render its opinion regarding possibly unethical conduct by an out-of-state attorney.

FACTS



As outlined in the letter by the North Dakota attorney who requested the Committee's opinion, the facts are as follows: A California attorney represented a claimant in an arbitration held in North Dakota. The defendant, a North Dakota corporation, was represented by the North Dakota attorney who requested this opinion. In the arbitration, the claimant received "a small award." Later, the California attorney contacted the North Dakota attorney. The California attorney advised the North Dakota attorney that he had been contacted by two other parties who may have claims against the North Dakota corporation. The California attorney then stated that "he had a 'deal'" for the North Dakota corporation. As the California attorney described the deal, he would agree not to represent any additional claimants against the North Dakota corporation if the corporation would pay him \$60,000.00 and retain him as a "consultant." The North Dakota attorney requested confirmation of this offer via fax letter to the California attorney, but the California attorney has not contacted the North Dakota attorney in response. The North Dakota corporation is aware of the California attorney's conduct and of the North Dakota attorney's request for this opinion.

The North Dakota attorney has requested the Committee's opinion regarding the following two questions:

1. Whether the Rules [of Professional Conduct] govern the conduct of an Attorney

licensed in the State of California who threatens to represent additional claimants against a North Dakota-based corporation unless the corporation pays the California Attorney a sum of money and retains the attorney as a "consultant."

2. Whether the corporation's Attorney, who is licensed in the State of North Dakota, has a duty to report the aforementioned conduct of the California Attorney.

DISCUSSION

The Committee will discuss the questions in the order presented by the attorney requesting this opinion.

Applicability of North Dakota Rules to Out-of-State Attorneys

The first issue is whether the North Dakota Rules of Professional Conduct apply to an out-of-state attorney who represents (and potentially represents) clients in North Dakota proceedings. Under the jurisdictional provisions of the Rules, the answer is "yes."

Rule 8.5(b) of the North Dakota Rules of Professional Conduct states, "Persons not licensed to practice law in this jurisdiction, but eligible to practice elsewhere who actually engage in this jurisdiction in the practice of law, are subject to the disciplinary authority of this jurisdiction." The Comment to Rule 8.5 provides, "When this jurisdiction exercises its authority over persons eligible to practice elsewhere but not here, although there is no license or certificate of admission against which to act the disciplinary authority may enter findings of violation of these rules and enter, as relief, prohibitions from applying for admission here, pro hac vice or otherwise, for a period, and report the action to the jurisdiction in which the person is eligible." Because the California attorney appeared in the North Dakota proceeding and assuming that he was suggesting appearances in further North Dakota proceedings, he is subject to discipline in North Dakota.

To the extent that the California attorney is subject to North Dakota discipline for his actions within the jurisdiction of the North Dakota disciplinary authorities, his conduct is subject to the North Dakota Rules of Professional Conduct. As the "Scope" section of the Rules of Professional Responsibility notes, the Rules are designed to "provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies."

Even though the attorney is licensed in California and not in North Dakota, the Committee believes his conduct is governed by the North Dakota Rules of Professional Conduct, at least to the extent that he is subject to discipline in North Dakota. On August 11, 1993, the American Bar Association House of Delegates amended Rule 8.5 of the ABA Model Rules of Professional Conduct. Following this amendment, Model Rule 8.5 now states:

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction where the lawyer is admitted for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for the purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and

(2) for any other conduct,

(i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and

(ii) if the lawyer is licensed to practice in this and

another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Although neither California nor North Dakota has adopted Model Rule 8.5(b), court decisions and other authorities suggest that, to the extent that the California lawyer has subjected himself to North Dakota discipline by practicing in North Dakota, he will be subject to the North Dakota Rules of Professional Conduct. *See Elder v. Metropolitan Freight Carriers, Inc.*, 543 F.2d 513, 518 (3d Cir. 1976) ("Mr. [REDACTED] had been admitted *pro hac vice* and, accordingly, was subject to the local rules during the course of his practice before the district court."); *In re: Fletcher*, 655 N.E.2d 58, 60 (Ind. 1995) ("A *pro hac vice* admission, being a trial court's accommodation of an out-of-state lawyer pursuant to authority granted by this Court, bears with it the obligation to subject oneself to the full panoply of Indiana court rules, including those involving professional conduct and discipline."); Missouri Informal Opinion 960099 ("[I]f an attorney is involved in a case which will be entirely litigated within another state and the attorney is authorized to appear in the case in that state, through licensure or visiting attorney admission, the attorney will not be found to violate Missouri's version of Rule 4.2 if the attorney complies with the other state's version and interpretations of that rule for purposes of that case.").

In addition, the Rules of Professional Conduct of the State Bar of California support the conclusion that the California attorney is subject to the North Dakota Rules, to the extent that he is subject to North Dakota discipline. California Rule 1-100(D)(1), regarding the geographic scope of the California Rules, states:

As to members: These rules shall govern the activities of members in and outside this state, except as members lawfully practicing outside this state may be specifically required by a jurisdiction in which they are practicing to follow rules of professional conduct different from these rules.

Thus, to the extent (if any) that the North Dakota Rules provide for obligations in addition to (or different from) those outlined in the California Rules, the California Rules incorporate the North Dakota Rules. To the extent that the California and North Dakota Rules provide for the same obligations, the California attorney is subject to these similar provisions. Therefore, the remainder of this section of the opinion will discuss the North Dakota Rules of Professional Conduct.

The factual outline provided by the requesting attorney suggests that Rule 1.8(b) of the North Dakota Rules may be relevant to the California attorney's conduct. Rule 1.8(b) states, "[A] lawyer shall not use information relating to the representation of a client to the disadvantage of the client for purposes of furthering either the lawyer's or another person's interest unless after consultation, including advice to seek independent counsel, the client consents." The facts outlined by the requesting attorney suggest that the California attorney may be using facts relating to the representation or potential representation of potential clients (i.e., the existence of potential claims against the corporation) to his advantage.

Duty To Report

The second issue is whether the North Dakota attorney is required to report the possible ethical violation. Because the requesting attorney does not specify whether the duty would be to report to California or North Dakota disciplinary authorities, both states will be addressed.

With regard to California, it is the Committee's opinion that there is no duty to report. Rule 8.3 of the North Dakota Rules of Professional Conduct, concerning the duty to report, specifically addresses the duty to "initiate proceedings under the North Dakota Rules of Disciplinary Procedure." Therefore, the Rule 8.3 duty appears to be limited to initiation of North Dakota disciplinary proceedings. In the absence of a specific provision of the North Dakota Rules requiring a duty to report possible misconduct to disciplinary officials in states other than North Dakota, the Committee believes that there is no such duty. See Opinion No. FIO 221 of the Mississippi Bar (November 17, 1994) ("[A]ny ethical obligation to report such misconduct is satisfied by a report to the Mississippi Bar, which in turn will make any appropriate report to the Bar in the state in which the non-Mississippi lawyer is licensed. The Mississippi Bar member has no obligation to report such misconduct directly to the Bar in the state in which the other lawyer is licensed, . . . but may do so."). It is also instructive that the California Rules, unlike the North Dakota Rules, do not contain any provision requiring that state's attorneys to report possible ethical violations. See Rules of Professional Conduct of the State Bar of California; see also San Diego County Bar Association Ethics Opinion 1992-2 ("This Committee concludes that there is no ethical duty imposed by the California Rules of Professional Conduct upon California attorneys to report the misconduct of other attorneys. This is true regardless of the nature or magnitude of such misconduct."); cf. Rhode Island Ethics Advisory Panel Opinion #93-63, Request #402 (September 14, 1993) (because Massachusetts does not have a mandatory reporting rule, a Rhode Island lawyer need not report a potential ethical violation by a Massachusetts lawyer to Massachusetts disciplinary authorities, even though Rhode Island does have a mandatory reporting rule).

In contrast to California, North Dakota does require attorneys to report possible ethical violations in some circumstances. Rule 8.3(a) of the North Dakota Rules of Professional Conduct provides:

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.

As noted above, even though the attorney who may have engaged in unethical conduct is apparently not a member of the North Dakota bar, he is subject to discipline in North Dakota. Therefore, Rule 8.3 may require initiation of disciplinary proceedings.

By its terms, Rule 8.3(a) does not require an attorney to initiate disciplinary proceedings in every instance of misconduct. Instead, the duty to initiate disciplinary proceedings is limited to circumstances that raise substantial questions regarding a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

In past opinions, the Committee has expressed its reluctance to determine whether a fact pattern described by an attorney requesting the Committee's opinion requires an attorney to initiate disciplinary proceedings. In Opinion 93-06, which was quoted in Opinion 96-14, the Committee stated, "[T]his 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." This reluctance stems in part from the nature of the Committee's work, which involves review of fact patterns described by attorneys requesting opinions. Even when these descriptions are detailed, the Committee is not placed in the position of the attorney, who is in the best position to evaluate all of the facts and determine whether there is an obligation to report.

The Committee will not offer a final opinion regarding whether there is an obligation to report under Rule 8.3 in this instance. The Committee does believe that the facts described by the North Dakota attorney strongly suggest that the attorney has an obligation to report under Rule 8.3. For the guidance of the attorney requesting this opinion, the Committee refers this attorney to the opinions cited in the previous paragraphs and to Paul F. Richard, *Lawyers as the Police of Their Own Profession: Rule 8.3 and the Duty To Report*, 67 N.D. L. REV. 373 (1991).

CONCLUSION

The Committee concludes that an out-of-state attorney who participates in arbitration proceedings in North Dakota against a North Dakota corporation and threatens further actions against the North Dakota corporation, presumably in North Dakota, is subject to discipline in North Dakota to the extent of his activities in North Dakota. The Committee further concludes that, to the extent that the out-of-state attorney is subject to discipline in North Dakota, his professional activities must comply with the North Dakota Rules of Professional Conduct.

The Committee further concludes that, although a North Dakota attorney who may have information suggesting ethical violations by a California attorney has no duty to report potential violations to California disciplinary authorities, Rule 8.3 of the North Dakota Rules of Professional Conduct may require the North Dakota attorney to initiate disciplinary proceedings in North Dakota against the California attorney.

This opinion is provided pursuant to Rule 1.2(B) of the 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 Stephen D. Easton and was approved by a unanimous vote of the Committee on February 23, 1997.

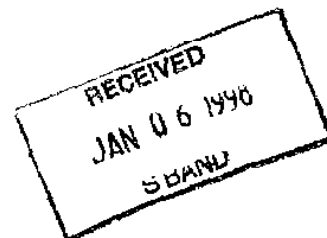


Alice R. Sehechal, Chair

[REDACTED]

January 5, 1998

STATE BAR ASSOCIATION ND
ETHICS COMMITTEE
PO BOX 2136
BISMARCK ND 58502



RE: ETHICS QUESTION

Dear Ethics Committee:

Please accept the following inquiries regarding the interpretation of the Rules of Professional Conduct:

1. Whether the Rules govern the conduct of an Attorney licensed in the State of California who threatens to represent additional claimants against a North Dakota-based corporation unless the corporation pays the California Attorney a sum of money and retains the attorney as a "consultant;" and
2. Whether the corporation's Attorney, who is licensed in the State of North Dakota, has a duty to report the aforementioned conduct of the California Attorney.

My inquiries are based on the following facts. I represent a North Dakota corporation against which a claim was brought and litigated in an arbitration proceeding in Fargo, North Dakota. The California Attorney represented the claimant in the arbitration proceedings and received a small award. Subsequently, the California Attorney contacted me stating he had been contacted by two other parties who may have claims against my client. The Attorney then stated he had a "deal" for my client. The Attorney explained the "deal" this way: the Attorney would agree not to represent any additional claimants against my client if my client would pay him \$60,000.00 and retain him as a "consultant." By facsimile letter sent to the California Attorney, I requested confirmation of the "deal" in writing. The California Attorney has not contacted me. My client is aware of the Attorney's conduct and is aware that I am requesting an interpretation of our Rules of Professional conduct.

If you need further information, please contact me.

Sincerely,
[REDACTED]

cc: Client