

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
Opinion No. 05-03
March 24, 2005

The Ethics Committee has been asked to issue an opinion on whether the Requesting Attorney has any further obligations to the court or the client after withdrawing from representation under N.D.R.Prof. Conduct 3.3(d).

I. Applicable North Dakota Rules of Professional Conduct

Rule 1.2 Scope of Representation
Rule 1.6 Confidentiality of Information
Rule 3.3 Candor Toward the Tribunal

II. Background Provided by Requestor

Requesting Attorney ("RA") represented Client in an adjudicatory proceeding. RA and Opposing Counsel ("OC") reduced to writing a negotiated settlement agreement that was finalized in the form of a Court Stipulation ("Court Stipulation"). Client visited RA's office to sign the finalized agreement. When Client insisted on hand delivering the agreement to the other party, RA became suspicious and asked Client if he had something he was not telling him. Client admitted to having a separate agreement with the other party. The separate "side agreement" had a different distribution of funds, resulting in a fundamentally different agreement.

The "side agreement" diverted money to the Client. Client was advised by RA to correct the Court Stipulation and to include the side agreement. Client was also asked to permit RA to disclose the side agreement to the Court and OC.

Client refused to alter the Court Stipulation or to permit RA to disclose the information. Client specifically indicated to RA that the information disclosed about the side agreement was protected by the attorney-client privilege.

RA informed Client of the potential tax and legal implications of the side agreement, which included the potential for fraud and well as other legal issues. RA tried without success to dissuade Client from executing the Court Stipulation.

In light of Client's refusal to correct the Court Stipulation or to disclose the side agreement, RA informed Client that he had no option but to withdraw immediately from representing him.

Client then signed the Court Stipulation and the signature page was sent to OC. Subsequently that day, RA wrote OC informing him that he would be withdrawing as the attorney of record. The same day RA filed a Motion to Withdraw, advising the Court

that an agreement had been reached, the Court Stipulation was signed by his client, and that no client harm was anticipated as a result of his withdrawal.

At the time of the Motion, Judgment had not yet been entered by the Court.

The Court granted RA's Motion to Withdraw and the case is now finalized.

III. Questions Presented

1. Is there an obligation to disclose the side agreement to the Court?
2. Is the communication regarding the "side agreement" absolutely protected by the attorney-client privilege?

IV. Discussion

The following relevant sections of the North Dakota Rules of Professional Conduct apply.

Rule 1.2 Scope of Representation.

...

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by these rules or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Comment to Rule 1.2 states in relevant part:

Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer should not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability.

Rule 1.6 Confidentiality of Information.

A lawyer shall not reveal, or use to the disadvantage of a client, information relating to the representation of the client unless required or permitted to do so by this rule. When such information is authorized by this rule to be revealed or used, the revelation or use shall be no greater than the lawyer reasonably believes necessary to the purpose. Such revelation or use is:

(a) required to the extent the lawyer believes necessary to prevent the client from committing an act that the lawyer believes is likely to result in imminent death or imminent substantial bodily harm;

...

(d) permitted to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in non-imminent death, non-imminent substantial bodily harm, or substantial injury or harm to the financial interests or property of another;

...

(f) permitted, except as limited by Rule 3.3(c), to prevent or to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services had been used without the lawyer's knowledge;

...

Rule 3.3 Candor Toward the Tribunal.

(a) A lawyer shall not:

...

(2) Offer evidence that the lawyer knows to be false.

...

(c) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall disclose this fact to the tribunal unless the evidence was contained in the testimony of the lawyer's client. . . .

- (d) If a lawyer has offered material evidence and comes to know of its falsity and the evidence was contained in the testimony of the lawyer's client, the lawyer shall make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer shall seek to withdraw from the representation without disclosure. If withdrawal is not permitted, the lawyer may continue the representation and such continuation alone is not a violation of these rules.

1. Is there an obligation to disclose the side agreement to the Court?

Because the side agreement alters the facts agreed to in the Court Stipulation, the submitted Court Stipulation is false. If the Court Stipulation is "evidence," Rule 3.3 applies.

Black's Law Dictionary defines evidence as "[a]ll the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." The term "Stipulation" is defined in Black's Law Dictionary as a "voluntary agreement . . . concerning disposition of some relevant point so as to obviate the need for proof." In other words, the Stipulation was a sworn agreement to avoid the necessity of presenting evidence to the Court. As such, it is the equivalent of a sworn statement attesting to a fact.

Accordingly, because the Court Stipulation involved the Client's offer of false evidence, Rule 3.3(d) governs this question. A lawyer's ethical obligation under Rule 3.3(d), if the client does not consent to disclosure after reasonable efforts to convince the client to do so, is to withdraw from representation "without disclosure." Thus, under the plain requirement so Rule 3.3(d), the RA does not have an obligation to disclose the side agreement to the Court. To the contrary, Rule 3.3(d) mandates that the RA seek to withdraw "without disclosure."

2. Is the communication regarding the "side agreement" absolutely protected by the attorney-client privilege?

The communication regarding the side agreement can be revealed only if it meets one of the exceptions in Rule 1.6.

Rule 1.6(a) describes when disclosure is mandatory; none of the situations in Rule 1.6(a) apply to the facts described by RA.

Rule 1.6(d) permits disclosure if the lawyer reasonably believes that a criminal or fraudulent act is likely to result in "substantial injury or harm to the financial interests or property of another." This is a factual determination the Committee cannot appropriately make. However, if RA reasonably believes that the failure to disclose the side agreement is likely to result in substantial harm to the financial interests of another, RA may, but is not obligated to, reveal the communication.

Rule 1.6(f) also permits disclosure of confidential communications “to prevent or to rectify the consequences of a client’s criminal or fraudulent act in the furtherance of which the lawyer’s services had been used without the lawyer’s knowledge.” This subsection does not apply for two reasons: first, the Court Stipulation was sent to OC and sent to the Court with RA’s knowledge not without it; and, second, Rule 1.6(f) prohibits disclosure of confidences if the limitations of Rule 3.3(c) apply. Rule 3.3(c) and (d) prohibit the disclosure because the Court Stipulation is equivalent to the Client’s testimonial offer of false evidence.

Accordingly, disclosure is permitted only if the RA believes that there may be substantial harm to the financial interests of another.

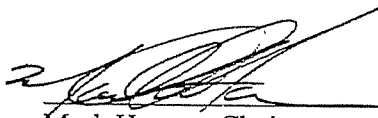
V. Conclusion

There is no obligation to disclose the side agreement to the Court; however, seeking to withdraw is mandatory. RA may not disclose the falsity of the Court Stipulation unless he believes it will cause another substantial financial injury.

This opinion is provided pursuant to Rule 1.2(B) North Dakota Rules for Lawyers Discipline, which states:

A lawyer 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 Adele Page and was unanimously approved by the Ethics Committee on April 11, 2005.


Mark Hanson, Chair