STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 06-02

The Ethics Committee has been asked to render its opinion as to the applicability of client confidentiality requirements when responding to a request for information from another state's attorney discipline authority.

Applicable North Dakota Rules of Professional Conduct

Rule 1.6 Confidentiality of Information.

Rule 8.1 Bar admission and disciplinary matters.

FACTS

Attorney is admitted to the bar in North Dakota and Minnesota. Attorney maintains an IOLTA account as well as a personal trust account. Attorney is subject to an inquiry from the Minnesota Office of Lawyers Professional Responsibility, after writing a check on the IOLTA account, which "bounced." Attorney maintains it was a matter of taking the wrong check book.

In response to a request from the Minnesota Inquiry Board, Attorney reluctantly gave that authority all information regarding his personal trust account. Some of the deposits in that account were fees from clients. All fees from clients were from North Dakota clients, none were from Minnesota clients.

The Minnesota Inquiry Board has requested additional information regarding deposits made from or on behalf of various persons, including one estate, with three sets of requests as to those persons. The information requested includes the current address and telephone number of the person or the personal representative, whether the person is a client and the nature and inclusive dates of the representation, the source of the payment to the account, the purpose of the payment or funds, documents indicating the nature and purpose of those funds, the purpose of issuance of payments from or entitlement to those funds, whether the payment constituted client funds under Rule 1.15 of the Minnesota Rules of Professional Conduct, and why those funds were deposited to the trust account.

Attorney is of the opinion, after reviewing the Minnesota Rules of Professional Conduct and North Dakota Rules of Professional Conduct, that the information requested by the attorney for the Minnesota Inquiry Board violates the rules regarding preserving client confidences and violates attorney/client privilege.

Minnesota has requested that the Attorney provide the documentation or information requested or a letter or opinion of the North Dakota State Bar Association that the Attorney is under no obligation to do so.

ISSUE

The Attorney requests an opinion as to whether the Attorney "should produce the information requested or not produce it and whether in producing the information I will be in violation of the Rules of Professional Responsibility."

DISCUSSION

The scope of this opinion is limited to addressing the issue of whether disclosure of the requested information would violate the North Dakota Rules of Professional Responsibility.

Under Rule 8.1 of the North Dakota Rules of Professional Responsibility, a lawyer shall not, in connection with a disciplinary matter, "(b) Fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, **except that this rule does not require disclosure of information otherwise protected by N.D.R. Prof. Conduct 1.6."** (Emphasis supplied).

Rule 1.6 provides, in part:

> A lawyer shall not reveal, or use to the disadvantage of a client, information relating to representation of a 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 is necessary to the purpose.

The rule goes onto to list in paragraphs a through h circumstances under which revelation or use is authorized.

The Comment to the rule emphasizes the rationale for the rule, declaring, "A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation."

Rule 1.6(c) permits disclosure or use of information when "impliedly authorized in order to carry out the representation." Under *"Authorized Disclosure,"* the Comment gives the example that a lawyer may disclose information in litigation by admitting a fact that cannot be properly disputed or in negotiation by making a disclosure to facilitate a resolution. Rule 1.6(g) permits disclosure of information to comply with a law or court order.[1] Rule 1.6(h) permits revelation or information which has become generally known.

It is unclear from the letter requesting an opinion if any of the information by the Minnesota Board falls under circumstances when revelation or use is permitted.

In this case, at least one of the representations has to do with an Estate matter. Some, if not all, of the information requested may have already been disclosed relative to

[1] This opinion does not address whether disclosure is permitted in order to comply with Minnesota law.

that matter, pursuant to the probate code. See North Dakota Century Code, Chapter 30.1-03 (pertaining to notice, parties and representation of estate in litigation).

While Rule 8.1 does not allow disclosure of client information in violation of Rule 1.6, the requesting attorney cannot use Rule 1.6 to deny any and all disclosure if authorized by Rule 1.6. The attorney must decide as to each request for information as to each client or representation whether disclosure is authorized by Rule 1.6.

CONCLUSION

The Attorney should produce that information requested to the extent it would not be a violation of Rule 1.6.

This opinion was drafted by Peter K. Halbach and was approved by a unanimous vote of the Committee on the 21st day of June, 2006.

Mark Hanson, Chair