

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS OPINION

Opinion No. 06-08

The Ethics Committee received a request for an opinion asking whether a waiver of confidentiality must be in writing acknowledging that an attorney working for the Commission on Legal Counsel for Indigents is required to disclose to the Commission financial information the attorney receives that may make the client ineligible. The request also supplied a proposed written waiver and requested an opinion if the waiver was sufficient.

FACTS

The Commission on Legal Counsel for Indigents (Commission) is created by N.D.C.C. ch. 54-61. The purpose of the Commission is to develop and monitor a process for providing state-funded legal counsel services for indigents. N.D.C.C. § 54-61-01(1). The law authorizes the Commission to develop standards for maintaining and operating regional public defender offices. N.D.C.C. § 54-61-02(1)(a)(2). A prior request letter provided factual information regarding the public defender offices. See SBAND Ethics opinion 06-07. A portion of this information is as follows:

In each office are attorneys who are employed full time by the State as public defenders. There is no direct supervision by the Commission as to the handling of specific cases. However, the Commission does have a fiscal policy which requires approval by the Commission prior to an attorney (whether a public defender or a contractor) incurring expenditures in excess of a certain dollar amount.

In addition the present request stated that the determination of whether an individual is eligible for indigent defense services is based upon employment and financial data supplied by the individual to the Commission on an application form. The Commission also informed the Ethics committee that the application is provided to the court to confirm eligibility and appoint indigent defense counsel. A portion of the application states: "I also understand that if I have supplied false information in the application, it may lead to criminal prosecution and conviction." If the attorney learns of financial information that is not privileged and is not probative of guilt or innocence of the client in the matter charged, the attorney is required to disclose it to the Commission which in turn discloses it to the court. All the financial information provided is open court record, which would include the additional financial disclosure required of the attorney which the Commission believes would disqualify the individual.

DISCUSSION

The issue regarding whether the waiver must be in writing cannot be answered without first determining whether the attorney representing the indigent defendant may be required to convey information to the Commission which will be disclosed in open court. Such disclosure could subject the indigent individual to prosecution for misstatements on the application as well as providing a basis for investigation on a potential myriad of other issues related to the financial information that the applicant discloses to the attorney.

Rule 1.6 of the North Dakota Rules of Professional Conduct, Confidentiality of Information applies and states "A lawyer shall not reveal, or use to the disadvantage of a client, information relating to representation of the client unless required or permitted to do so by this Rule...." Disclosure of confidential information may be permitted when the client consents *after consultation*. N.D.R.Prof.Conduct 1.6. Generally, blanket pre-waiver of a category of confidential information is not proper. See comments to N.D.R.Prof.Conduct 1.7 CONFLICT OF INTEREST: GENERAL RULE set out below in pertinent part:

Only in rare circumstances may a lawyer properly request a client to waive a conflict that may arise in the future. Advance waiver is not permissible for future conflicts described under paragraphs (a) or (b) of this Rule. The effectiveness of such waivers in other circumstances is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. ... In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict one for which consent is not allowed under paragraph (c).

Comments to N.D.R.Prof.Conduct 1.7

Such a pre-waiver requires the client to make legal determinations as to whether the information the client seeks to share with the attorney is within the purview of the pre-waiver and if the information is relevant to the issue on which the attorney is retained to defend the client. Hence the consent may only take place after consultation

about disclosure of the specific confidential information the client shares with the attorney.

The comment to Rule 1.6 N.D.R.Prof.Conduct states: "A fundamental principal in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." In this case, the requirement that the attorney, appointed to represent the client, disclose any and all information which may then disqualify the client from indigent defense services may have a severe impact upon the attorney-client relationship and impair the ability of the client to fully and frankly communicate with the attorney concerning the defense. In the proposed agreement with attorneys who contract with the Commission on Legal Counsel for Indigents there is a requirement that the contractor disclose to the Executive Director of the Commission any non-privileged information regarding financial resources which bears on the eligibility for counsel services unless the information is probative of the guilt or innocence of the client in the matter charged.

It is fairly easy to foresee a situation in which a client charged with a criminal offense must discuss prior potential offenses with the attorney. If that offense created an asset or a financial resource for the client that the attorney may be required to disclose, that financial information could potentially subject the client to criminal prosecution for another crime or investigation for tax related issues. Under the very terms of the application for indigent defense services it will subject the client to prosecution for providing false information in the application or failing to disclose new and additional resources as required. A portion of the application states as follows: "I also understand that if I have supplied false information in the application, it may lead to criminal prosecution and conviction." The client is also required to state that they understand they have a continuing responsibility to inform the court of any changes in the client's financial condition.

If the attorney is required to disclose confidential financial information to the Commission, which discloses it to the court, the attorney may be required as a witness concerning the financial disclosure. The attorney could potentially end up as a witness on a prosecution of the client based on confidential information that the client shared with the attorney. It is self-evident that result would not lead to full and frank communication between client and attorney.

On the other hand the failure by the attorney to disclose financial resource information provided by the client to the attorney, which may make the application false, places the attorney in the potential position of violating Rule 3.3 N.D.R.Prof.Conduct, Candor Toward the Tribunal. This Rule prohibits a lawyer from making a statement of fact or law that the lawyer knows to be false or offer evidence that the lawyer knows to be false. If the attorney acquires information from the client concerning financial resources which would make the application to the Court for indigent defense false the

attorney must encourage the client to disclose the false information to the court. If the client refuses to consent to the disclosure then the lawyer should seek to withdraw from representation without disclosure. "If withdrawal was not permitted, the lawyer may continue the representation and such continuation alone is not in violation of these rules...." Rule 3.3(d) N.D.R.Prof.Conduct.

In seeking to withdraw the attorney must follow Rule 1.16 N.D.R.Prof.Conduct. The attorney is required to seek to withdraw if "(3) the lawyer has offered material evidence in the testimony of the client and has come to know of its falsity and the client has refused to consent to disclosure of its false character to the tribunal"... Rule 1.16(a)(3) N.D.R.Prof.Conduct. In such a situation when the lawyer has sought to withdraw but the withdrawal is not permitted, the lawyer may continue representation without disclosure of the client's false testimony. See Rule 1.16(d) N.D.R.Prof.Conduct.

CONCLUSION

Based upon the facts provided in the request letter, the Ethics Committee finds that an attorney would violate Rule 1.6 N.D.R.Prof.Conduct by disclosing confidential financial information to the Commission knowing it would be provided in open court and could be used to the disadvantage of the client. A pre-waiver, even in writing, does not cure the disclosure of confidential information provided by the client. If the attorney learns the financial application provided to the court is false the attorney should encourage the client to correct the information. If the client refuses, the attorney should seek to withdraw. If the withdrawal is denied the attorney may continue to represent the client with no obligation to disclose the confidential information which may make the application false.

This opinion is provided pursuant to Rule 1.2(B) of the North Dakota Rules for Lawyer Discipline. This rules 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.

Id.

This opinion was drafted by Kent Reiersen and adopted by a unanimous vote on June 28, 2006. Committee members Frederick (Fritz) Fremgen and Dann Greenwood took no part in this opinion.


Mark Hanson, Chair