STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 15-05

THIS OPINION IS ADVISORY ONLY

QUESTIONS PRESENTED

The requesting Attorney represented Client in a divorce action. Client received certain household goods and furnishings pursuant to the judgment in the divorce action. Attorney was asked, and agreed, to pick up Client's tangible personal property and store the items "temporarily" until Client could return from out-of-state to take possession of the items. The Attorney has unsuccessfully attempted multiple times to contact Client. The Attorney did speak with Client on at least one occasion and Client agreed to make arrangement to take delivery of the property. But Client has not made arrangements to take delivery of the property and is now unreachable.

The Ethics Committee has been asked to render opinions on the following: Must Attorney continue to store Client's private property? What ethical obligations to the Client does Attorney have in relation to personal property the Attorney agreed to store "temporarily?"

OPINION

Based on the facts presented below, Attorney must continue to store Client's tangible personal property.

APPLICABLE NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT

Rule 1.15, N.D.R. Prof. Conduct: Safekeeping Property and Professional Liability Insurance Disclosure
Rule 1.3, N.D.R. Prof. Conduct: Diligence

FACTS PRESENTED

Attorney represented a Client in a divorce action. A settlement agreement was reached in the divorce action and was reduced to a Judgment. The Judgment provided that the Client was to receive certain household goods and furnishings in the spouse's possession. The Judgment went on to state that Client needed to arrange for picking-up the property within four months or the Client would forfeit the right to receive such property.

Prior to the four month deadline, and while Attorney was still acting in the scope of representing the Client, the Client asked that Attorney pick up Client's personal property and "temporarily" store them in Attorney's garage until the Client could arrange for the pick-up and transfer of the same back to Client's out-of-state home. Attorney states that this agreement took place in about July 2014.

Attorney has attempted to reach Client via Client's cell phone and e-mail multiple times. Attorney does have Client's mother's cell phone and was able to contact her on one occasion in February 2015. She stated that Client was in substance abuse treatment and gave Attorney a number to call to get a hold of Client. Client's mother also was very clear that this was "not her problem" and that Attorney needed to communicate with Client.

Attorney called the number provided by the Client's mother and spoke with Client. Client was apologetic, stating several times in the phone call: "I thought my parents had taken care of that." Client also stated: "I will take care of it right away," "sorry about that," and "I will call you back later today after talking to my counselor about getting out of here to take care of it." Attorney understood from speaking with Client that Client was going to arrange to fly to North Dakota, rent a trailer, pick up the personal property at Attorney's home, and drive the property back to Client's home out-of-state. Attorney has not heard from Client since about February 2015 and has been unable to contact Client.

The personal property of Client is "voluminous" and Attorney no longer wishes to store the Client's property in Attorney's garage. From the information provided by the Attorney, none of the subject property being stored is intangible property (e.g., money, checks, etc.). Attorney would like to know what he can ethically do with the Client's personal property.

DISCUSSION

It should be emphasized that this committee renders its opinion on the basis of the facts reported by the requesting attorney. There has been no independent review of the underlying facts and specifically of the underlying litigation. It is simply presumed for the sake of this opinion that the requesting attorney is correct in the information that has been provided.

An attorney has an obligation to protect the property of a Client. North Dakota Rules of Professional Conduct Rule 1.15 provides in relevant part:

> (a) A lawyer shall hold property of Clients . . . that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.... Other property shall be identified as such and appropriately safeguarded. Complete records of such . . . other property shall be kept by the lawyer in the manner prescribed in paragraph (h).
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> (d) Upon receiving, in connection with a representation, funds or other property in which a Client or third person has an interest, a lawyer shall promptly notify the Client . . . . Except as stated in this rule or otherwise permitted by law *or by agreement* with the Client, a lawyer shall promptly deliver to the Client . . . any funds or other property that the Client . . . is entitled to receive and, upon request by the Client . . . shall promptly render a full accounting regarding such property.
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> (h) A lawyer shall maintain or cause to be maintained on a current basis records sufficient to demonstrate compliance with the provisions of this Rule. Such records shall be preserved for at least six years after termination of the representation.

(Emphasis added).

The comments to the Rule further detail an attorney's obligation to maintain and preserve a client's property: "A lawyer should hold property of others with the care required of a professional fiduciary. All property that is the property of clients . . . must be kept separate from the lawyer's business and personal property." N.D.R. Prof. Conduct Rule 1.15, cmt. 1. And "[a] lawyer shall act with reasonable diligence and promptness in representing a client." N.D.R. Prof. Conduct Rule 1.3.

Rule 1.15 includes the duty to promptly deliver property to a client and there is an obligation to retain the property indefinitely until it can be returned to the owner. A prior ethics committee opinion does permit property to be returned to the client's authorized representative. *See SBAND Ethics Comm. Op. No. 1997-10* (allowing an attorney holding personal property of client to deliver the property to a person authorized by the client to receive the property).

Because Rule 1.15(d) provides that a lawyer "shall promptly deliver" to the client "other property," a lawyer must pay the costs associated with delivery, absent an agreement to the contrary. Further, N.D.R. Prof. Conduct 1.15(h) provides only that "records" be preserved for six years after termination of the representation. This provision should not be construed as suggesting that the property itself, if unable to be delivered in accordance with Rule 1.15(d), should only be preserved for six years following the termination of representation. The subject of Rule 1.15(h) are the records, not the property. The property, therefore, must be held and delivered to the client, unless other arrangements are agreed upon. N.D.R. Prof. Conduct Rule 1.15(a) and (d).

Here, Attorney and Client agreed that the property would be stored by Attorney "temporarily," until such time Client could make arrangements to take the property. "Temporarily" was not defined in the agreement. The ordinary definition of "temporary" is: "That which is to last for a limited time only, as distinguished from that which is perpetual, or indefinite, in its duration." BLACK'S LAW DICTIONARY 1464 (6th ed. 1990). At the same time, the agreement to store the property "temporarily" cannot mean that the Attorney who agreed to store the property is not also bound by the requirements of N.D.R. Prof. Conduct Rule 1.15, which require a lawyer to hold the property until the lawyer delivers it to the client. Stated another way, the qualifying word "temporarily" in the agreement between the Attorney and Client is essentially rendered meaningless because a lawyer has a duty under Rule 1.15 to hold the client's property with the same care as that of a fiduciary until such time the lawyer can deliver the property to the client.

North Dakota's Uniform Unclaimed Property Act ("Act"), N.D.C.C. Ch. 47-30.1, does not apply to tangible property. In addition to analyzing the statute, inquiry was made to the North Dakota Department of Trust Lands, which is the state agency that administers the Act, as to whether it accepts tangible property under the Act. The response from the Department was the only tangible property accepted are contents from safe deposit boxes deemed abandoned pursuant to the Act. *See* N.D.C.C. § 47-30.1-16 (including the only mention of "tangible" property in the Act and allowing such property held in a safe deposit box to be presumed abandoned after expiration of the rental period and the passage of three years). The Act is inapplicable to tangible property. Because the Act does not apply to tangible property, the conclusion of *SBAND Ethics Comm. Op. No. 02-01*, which involved a question of intangible property (money left in a law firm's trust account), is inapplicable to the scenario here that involves tangible property.

CONCLUSION

The Attorney must safeguard the Client's property until such time as the property can be delivered to the Client or the Client's authorized representative. There is no provision in North Dakota law that provides a lawyer an outlet to declare tangible property as abandoned and deliver it to the appropriate state agency in the same manner as is permitted by law for abandoned intangible property. The Attorney is obligated under N.D.R. Prof. Conduct Rule 1.15 to inventory and hold Client's property until such time an agreement can be reached with the Client to deliver the Client's property.

This opinion was drafted by Zachary E. Pelham and was unanimously approved by the Ethics Committee on the 28th day of July, 2015.

Douglas A. Bahr
Ethics Committee Chairperson

This opinion is provided under 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.