IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Edwin W. F. Dyer, III,
and Anne E. Summers,
Members of the Bar of the
State of North Dakota,

Petitioners,

v. Supreme Court No. _____

The Disciplinary Board of the
Supreme Court of the State of
North Dakota, by and through its
Hearing Panel, Rebecca S. Thiem, Chair,
and Vince H. Ficek and Sheila C. Peterson,
Members,

Respondents.

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PETITION AND BRIEF FOR SUPERVISORY WRIT

* *

Petition in regard to Order on Motion to Compel

Hearing Panel
File No. 4773-W1-0806
4787-W1-0807
File No. 4773-W2-0806
4787-W2-0807

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STATEMENT OF JURISDICTION

Dyer and Summers invoke the original jurisdiction of the supreme court. They are respondents in a disciplinary proceeding (A. 83-86). They petition this court to issue a supervisory writ to a Hearing Panel for the Disciplinary Board. Dyer and Summers seek to vacate an order of the Hearing Panel compelling them to provide discovery which they contend is confidential (A. 107-109).

This discovery order of the Hearing Panel is interlocutory and may not be appealed before entry of the final order. N.D.R. Lawyer Discipl. 3.3.C (see Addendum 1-2). However, once production of the discovery is made, the production cannot be "unmade" by later appeal from the final order. See Lashkowitz v. Disciplinary Board, 410 N.W.2d 502 (N.D. 1987), and authorities cited therein. Dyer and Summers contend that the required disclosure, if confidential and not permitted by the North Dakota Rules of Professional Conduct, could not be undone on appeal from the final order. See Lashkowitz, at 507, VandeWalle, Justice, concurring in result. Therefore, there is no adequate remedy by law, and a writ should issue to protect this confidential information.

STATEMENT OF THE ISSUES

ISSUE FOR REVIEW

Did the Hearing Panel err by ordering Dyer and Summers to disclose confidential information?

STATEMENT OF THE FACTS

Dyer and Summers had an employee, Margaret Bryn Stepp, who stole money from the firm. Stepp took money given to her by clients, which, if properly handled, would have been deposited into the Dyer and Summers trust account. This conduct involved twelve clients, who were identified, and a total sum of $9,285.00. This money, since it was wrongfully taken by Stepp, never was deposited into the Dyer and Summers trust account. Stepp was fired by the firm and prosecuted criminally in Burleigh County with the assistance of the firm. (A. 1-12; see A. 17).

While the criminal case was pending, Stepp filed a complaint against Dyer and Summers with the Disciplinary Board (A. 13-14). Stepp claimed that Tara Taxis, the secretary for the firm, began showing Stepp the operating and trust account bank statements of the firm in discussions they had about Dyer and Summers misuse of client funds (A. 13). Stepp claimed, "There were many times there would be $100 or less in each [account]. We couldn't understand this as I was bringing in thousands of dollars in retainers. Clients were constantly complaining that they weren't receiving the balance of their retainers back when their cases were done. That was because there was no money in the trust. It happened many times. I can supply names of many unhappy clients." (A. 13) (emphasis added).

In the complaint, Stepp also alleged other monetary improprieties by Dyer, not involving the Dyer and Summers trust account, which appear to be items which could be independently investigated without delving into the bank records of Dyer and Summers (A. 13-14). Stepp also claimed, "Attorney Summers routinely had me settle things with opposing attorneys because 'they like (me).' I have many attorneys who would testify that they always worked with me." (A. 14) (emphasis added).

Dyer and Summers are unaware of whether the Disciplinary Board has obtained from Stepp the names of any clients or lawyers who would confirm her claims. Dyer and Summers do know that no deposition of Stepp has been done by Disciplinary Counsel. Dyer and Summers also know that Tara Taxis has not been interviewed by the Disciplinary Board or deposed by Disciplinary Counsel. Instead, the investigation of Stepp's complaint began by asking Dyer and Summers to produce their trust account records "for the period of time that Ms. Stepp worked at your office", "the individual accountings kept for each client's trust deposits", and "the bills that were sent for each client." (A. 15).

Dyer and Summers protested (A. 16-18). In their response, Dyer and Summers pointed to the fact that no client had been named in the Stepp complaint (A. 16), and no client had complained (A. 17). Dyer and

Summers contended that Stepp's complaint was void of credibility (A. 16) and in support of that contention gave their own factual response (A. 16-17); produced transcripts from Stepp's revocation of probation hearing (A. 19-34) and sentencing (A. 35-64), which included a statement by Summers (A. 58-62); and provided an Affidavit of Tara Taxis disputing the claims of Stepp (A. 65-68). Dyer and Summers stated they should not be compelled to turn over their trust account records (A. 16).

Stepp replied to the Dyer and Summers response (A. 69-72). Rather than provide the names of clients, Stepp wrote, "I'm unsure as to any further role I must play in this investigation" (A. 70).

In correspondence to Dyer and Summers, the Disciplinary Board persisted, "The only way in which we can properly investigate these allegations is to examine the monthly trust account statements provided by the bank, the individual trust account statements for each client, and the bills that were forwarded to these clients. . . [O]nce these allegations have been made, we have an obligation to investigate them further." (A. 73). Dyer and Summers again declined turning over the requested information, specifically stating that to do so would be a violation of Rule 1.6 of the North Dakota Rules of Professional Conduct as no client had complained or given consent for the disclosure, and further that Rule 1.15 of the North Dakota Rules of

Professional Conduct contained no provision for disclosure under the circumstances of the Stepp complaint (A. 75; see Addendum 3-11).

Disciplinary Counsel wrote to Dyer and Summers and argued they were wrong in their interpretation of Rule 1.6 (A. 76-77), and referenced back their self-report wherein they stated they welcomed an investigation into Stepp's theft from the firm (A. 76). Dyer and Summers responded, repeating their disagreement about Rule 1.6; and clarifying that the money Stepp stole was stolen before it was deposited into their trust account, and that all of the money of those clients was properly accounted for and resolved without complaint (A. 78-79). Disciplinary Counsel's reply to that Dyer and Summers response referenced N.D.R. Prof. Conduct 8.1(b), failing to respond to a lawful demand for information from a disciplinary authority (A. 80; see Addendum 12).

These matters went before the Inquiry Committee West. Dyer and Summers provided the committee with certain of the information discussed above (A. 81-82).

A Petition for Discipline was filed against both Dyer and Summers (A. 83-86). The petitions are the same. They allege a violation of Rule 1.15(c), "which provides a lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by

the lawyer only as fees are earned or expenses incurred"; and a violation of Rule 8.1(b), "which provides a lawyer shall not knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority." (A. 84, 86).

Dyer and Summers each filed an Answer (A. 87-90). The Answers are the same. Dyer and Summers denied that they removed client trust account money for their own use before fees were earned or expenses incurred. (A. 87, 89). They admitted being asked to provide trust account records, including client trust account statements and client bills, and not supplying that information, "for to do so would violate Rules 1.6 and 1.15 of the North Dakota Rules of Professional Conduct." Further, they denied violating Rule 8.1(b) "in that the demand for the trust account records is not lawful as no client has complained or given consent for the disclosure of this confidential information." (A. 88, 90).

Disciplinary Counsel then made a Request for Production of Documents on Dyer and Summers under Rule 34, N.D.R.Civ.P., requesting production of: "the monthly attorney trust account bank statements from September, 2005, through March, 2008; the individual trust account records for each client who had given you or your firm money deposited in the attorney trust account from September, 2005, through March, 2008; the

records of attorney time and expenses for each file for each client who had given you or your firm money deposited in the attorney trust account from September, 2005, through March, 2008; and the bills forwarded to clients from September, 2005, through March, 2008." (A. 91). Dyer and Summers objected to the Request: "Attorney-client privilege, confidentiality, and no client consent to release the requested information. No client complained against Dyer or Summers, nor has any client given consent for the disclosure of this confidential information. Dyer and Summers would violate Rules 1.6 and 1.15 of the North Dakota Rules of Professional Conduct if they disclosed this information." (A. 92-93).

Disciplinary Counsel made a Motion to Compel Discovery Under Rule 3.3, N.D.R. Lawyer Discipl., and Rule 37, N.D.R.Civ.P., and filed a supporting brief (A. 94-99). Dyer and Summers filed an Answer Brief (A. 100-106). A telephone conference hearing was held before the Hearing Panel (and Dyer and Summers do not remember the hearing being recorded) (A. 107). The Hearing Panel determined that "the attorney-client privilege does not bar the production of the records requested", and that "the confidentiality of such records can be protected by a confidentiality order." (A. 107). The Hearing Panel ordered the production of all of the information sought by Disciplinary Counsel except that from the client bills "may be

redacted the description of the work performed, but not the dates" (A. 107-108). The Hearing Panel further ordered, "The documents produced shall be kept confidential by Disciplinary Counsel and will not be disclosed to anyone or made public without a further order from the Hearing Panel." (A. 108). The Hearing Panel left open the ability of Disciplinary Counsel to make a motion for the redacted information (A. 108).

Disciplinary Counsel requested Dyer and Summers to comply with the order, as ordered, by December 14, 2009 (A. 110).

ARGUMENT

ISSUE FOR REVIEW

Did the Hearing Panel err by ordering Dyer and Summers to disclose confidential information?

Rule 1.15, N.D.R. Prof. Conduct, provides for lawyer trust accounts (see Addendum 7-11). Paragraph (a) of that Rule provides, in relevant part, "Complete records of such account funds and other property shall be kept by the lawyer in the manner prescribed in paragraph (h)."

Paragraph (h) provides, "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."

Paragraph (i) further provides, "A lawyer shall certify, in connection with the annual renewal of the lawyer's license and in such form as the clerk of the Supreme Court of North Dakota may prescribe, that the lawyer is complying with the provisions of this Rule."

Paragraph (n) provides, "Every lawyer practicing or admitted to practice in this State shall, as a condition thereof, consent to the reporting and production requirements of this Rule."

Dyer and Summers can see no provision of Rule 1.15 which allows or requires the production or disclosure of the information at issue in this case. Paragraph (d) provides that, upon request by the client or a third person entitled to receive property in the trust account, the lawyer "shall promptly render a full accounting regarding such property." Such is not the situation here.

Paragraph (j) provides for disclosure of the lawyer's professional liability insurance, and paragraphs (l) and (m) provide for overdraft notification in regard to trust accounts. However, no other provision exists which applies to the factual situation here.

Disciplinary Counsel has charged Dyer and Summers in this case with a violation of Rule 8.1(b), N.D.R. Prof. Conduct, for "knowingly fail[ing] to respond to a lawful demand for information from an admissions or

disciplinary authority" (see A. 84, 86). However, Rule 8.1(b) further provides, "except that this rule does not require disclosure of information otherwise protected by N.D.R. Prof. Conduct 1.6." (See Addendum 12). Dyer and Summers believe the issue before this Court is governed by Rule 1.6, N.D.R. Prof. Conduct (see Addendum 3-6).

Rule 1.6(a) begins with a broad sweep. "A lawyer shall not reveal information relating to representation of the client". Dyer and Summers contend the information sought by Disciplinary Counsel and ordered by the Hearing Panel is all "information relating to representation of the client". A lawyer "shall" not reveal this information.

In Scope [1], N.D.R. Prof. Conduct, it is written, in part:

> . . . Some of the Rules are imperatives, cast in the terms "shall" or "shall not". These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may", are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. . . .

Therefore, Dyer and Summers, at least to the initial command of Rule 1.6(a), have no discretion in the matter. The Rule is an imperative. They shall not reveal information relating to representation of the client.

Rule 1.6(a) goes on. It states, "A lawyer shall not reveal information relating to representation of the client unless the client consents". No client has consented to the production at issue here. The twelve clients identified to police as the clients involved in the Stepp thefts did not involve trust money. Further, because they are identified, Disciplinary Counsel could speak to them directly.

Rule 1.6(a) states further, "A lawyer shall not reveal information relating to representation of the client unless . . . the disclosure is impliedly authorized in order to carry out the representation". This, too, is not the factual situation here.

Rule 1.6(a) also states, "A lawyer shall not reveal information relating to representation of the client unless . . . the disclosure is required by paragraph (b) or permitted by paragraph (c)." Paragraph (b) is not at issue here. Paragraph (c)(1), (c)(2) and (c)(3) also are not at issue here.

In regard to Rule 1.6(c)(4), there is no "controversy between the lawyer and the client" here. There is no identifiable client, and no identifiable controversy. Also, there is no "civil claim against the lawyer

based upon conduct in which the client was involved" here. There is no foundation or predicate showing for this portion of Rule 1.6(c)(4) to apply.

Finally, Rule 1.6(c)(4) provides, "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to respond to allegations in any proceeding concerning the lawyer's representation of the client". Again, no client has been identified. No wrongdoing has been identified as to an identifiable client. Disciplinary Counsel seeks all information on all of Dyer and Summers clients, based on a general accusation of wrongdoing by a less than reliable source, and without any other investigation in an effort to provide corroboration to the accusation. This cannot be what this Rule envisions. Further, it appears Dyer and Summers have discretion in this matter not to reveal this information, and for that they cannot be disciplined.

Finally, no "other law" has been shown Dyer and Summers which would allow or require them to reveal this confidential information. See Rule 1.6(c)(5), N.D.R. Prof. Conduct.

The Comment to Rule 1.6 should also be discussed. "Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules." Scope [1], N.D.R. Prof. Conduct.

Comment [2] states in relevant part, "A fundamental principle in the client-lawyer relationship is that the lawyer must not reveal information relating to the representation without the client's consent." This language hearkens back to Rule 1.6(a).

Comment [3] states:

> This principle of lawyer-client confidentiality is given effect by related law, such as the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of lawyer-client confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. This rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by these Rules or other law.

This Comment supports Dyer and Summers contentions that the subject information is indeed confidential information and that the attorney-client

privilege applies. We know from attorney-client privilege that the privilege belongs to the client. It is also apparent from Rule 1.6 that the confidence belongs to the client. Again, this case does not present a situation where a client has consented to or waived the disclosure of confidential information.

Comment [4] is additional support for the position of Dyer and Summers that the information sought is confidential information. It states in relevant part, "Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person."

Finally, Comment [16] states, "A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer". Therefore, Dyer and Summers have made their objections to the sought after disclosures and have filed this petition. It is their duty. And, they believe, they have shown that Disciplinary Counsel and the Hearing Panel, under the facts of this case, are legally wrong.

Dyer and Summers have found no North Dakota Supreme Court case directly on point. In Disciplinary Board v. Dooley, 2001 ND 198, ¶ 11, 637

N.W.2d 1, the Court held, "Dooley's actions violate N.D.R. Prof. Conduct 1.6 which provides that unless required or permitted to do so, a lawyer shall not reveal information relating to the representation of a client, as Dooley communicated confidential information concerning the adoption to the father of his client." The Court has confirmed the broad language of the Rule, "information relating to the representation of a client". As Dyer and Summers see no authority requiring them or permitting them to reveal the production requested by Disciplinary Counsel and ordered by the Hearing Panel, Dyer and Summers believe it would be a violation of Rule 1.6 to do so.

State Bar Association of North Dakota, Ethics Committee Opinion No. 06-02, involves a request for production similar to the one at bar. The opinion provides no real guidance, however, except to state, "The attorney must decide as to each request for information as to each client or representation whether disclosure is authorized by Rule 1.6." The focus, therefore, is on each client. Here, because no client is identified, the Dyer and Summers response is the same as to all the clients – no client has given consent for the disclosure, and no authority exists requiring or permitting the disclosure.

State Bar Association of North Dakota, Ethics Committee Opinion No. 01-05, involves an issue of a trust account in a fact scenario different than the one at bar. However, the wording of the opinion reinforces the strength of the nondisclosure requirements of Rule 1.6 absent a clearly applicable exception.

Dyer and Summers, therefore, seek an order from the Supreme Court of North Dakota vacating the subject order of the Hearing Panel.

CONCLUSION

WHEREFORE, Dyer and Summers request that this court exercise its original jurisdiction and issue a supervisory writ to the Hearing Panel vacating its order to compel production of confidential information.

Respectfully submitted this 14 day of December 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I made service of a true copy of the foregoing document by hand delivery and mail, on this 14 day of December 2009, on:

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ADDENDUM

nor did it prevent the supreme court from imposing sanctions for an attorney's excessive billing. Discip. Bd. v. Hellerud (In re Hellerud), 2006 ND 105, 714 N.W.2d 38 (2006).

Scope of Review.

The court reviews disciplinary proceedings against attorneys de novo and the standard of proof required is clear and convincing evidence. However, the court also gives due weight to the findings and recommendations of the hearing panel. In re Jones, 487 N.W.2d 599 (N.D. 1992).

Each disciplinary case must be reviewed upon its own facts to determine what discipline is warranted. In re Jones, 487 N.W.2d 599 (N.D. 1992).

Inherent inconsistency in disciplinary board's finding of misrepresentation and issuance of admonition, absent explanation for disparity between serious misconduct found and mild sanction, was arbitrary and capricious, justifying grant of attorney's petition for leave to appeal. Toth v. Disciplinary Bd., 1997 ND 75, 562 N.W.2d 744 (1997).

Review.

Where disciplinary board dismissed action against attorney and did not file a report with the court, and disciplinary counsel objected to the dismissal, the supreme court reviewed the actions of the board under its inherent authority to discipline lawyers. In re Anseth, 1997 ND 66, 562 N.W.2d 385 (1997).

Standard of Review.

Subdivision (D)(8) means the arbitrary and capricious standard governs the court's initial decision to grant leave to appeal, and is applied only in reviewing procedural aspects of the disciplinary board's decision, rather than in reviewing the substantive evidence relied upon to support imposition of disciplinary sanctions. Toth v. Disciplinary Bd., 1997 ND 75, 562 N.W.2d 744 (1997).

Pursuant to review under N.D.R. Lawyer Discipl. 3.1F(1), even if an attorney's conduct did not rise to level of an intent to mislead or deceive an opposing attorney, a reprimand was proper under N.D. Stand. Imposing Law. Sanctions 3.0 and 5.13 because the clear and convincing evidence established that the attorney's amended answer constituted a statement known to be false under N.D.R. Prof. Conduct 4.1 and a misrepresentation under N.D.R. Lawyer Discipl. 1.2A(3) in that the answer implied that a party was still alive, when in fact the attorney had actual knowledge that she was deceased. Edison v. A Hearing Panel of the Disciplinary Bd. of the North Dakota Supreme Court & William P. Harrie, 2006 ND 250, 724 N.W.2d 579 (2006).

Time Limitations.

Though former subdivision (D)(4) of this rule (see now subdivision (D)(5)) provided that the hearing body should submit a report to the board within 60 days, N.D.R. Lawyer Discipl. 3.5(I) (see now N.D.R. Lawyer Discipl. 3.5(H)) provided that time was directory, not jurisdictional, and failure to observe prescribed time intervals did not abate any proceeding. Disciplinary Bd. v. Ellis, 504 N.W.2d 559 (N.D. 1993).

A 10-month delay in submitting a report after a hearing did not destroy the fundamental fairness of the disciplinary process; while the delay was troubling, due process only requires notice of the charges and an opportunity to be heard, and beyond these requirements, an expiration of a time period does not establish a constitutional infirmity mandating dismissal of the charges. Disciplinary Bd. v. McDonald, 2000 ND 87, 609 N.W.2d 418 (2000).

Waiver of Issue.

An issue not raised at the hearing will not be addressed for the first time on review. Disciplinary Bd. v. Ellis, 504 N.W.2d 559 (N.D. 1993).

Rule 3.2. Service.

A. **Petition.** Service of a petition upon the lawyer must be made by personal service, or by registered or certified mail at the last address shown in the roster of licensed attorneys maintained by the clerk of the court or other last known address. Service in all other respects is governed by the North Dakota Rules of Civil Procedure.

B. **Other papers.** Service of any other reports, papers, or notices required by these rules must, unless otherwise provided by these rules, be made in accordance with N.D.R.Civ.P. 5.

Rule 3.3. Discovery and subpoenas.

A. **Oaths.** Any member of the board or of a hearing panel in matters before it, and counsel in matters under investigation, may administer oaths and affirmations.

B. **Subpoenas.**

(1) Counsel, before any hearing or for a hearing and in accordance with N.D.R.Civ.P. 45, may compel by subpoena the attendance of witnesses, including the lawyer, and the production of pertinent books, papers, and documents. A lawyer, under N.D.R.Civ.P. 45, may compel by subpoena the attendance of witnesses and the production of pertinent books, papers, and

documents before a hearing panel after formal disciplinary proceedings are instituted.

(2) Subpoenas issued by counsel during the course of an investigation must clearly indicate on their face that the subpoenas are issued in connection with a confidential investigation under these rules and that it is regarded as contempt of court or grounds for discipline under these rules for a person subpoenaed to breach the confidentiality of the investigation. It is not a breach of confidentiality for a person subpoenaed to consult with an attorney.

(3) The district court of the district in which the attendance or production is required may, upon proper application, enforce the attendance and testimony of any witnesses and the production of any documents subpoenaed.

(4) Any attack on the validity of a subpoena issued under these rules must be heard and determined by the hearing panel before which the matter is pending or by the court in which enforcement of the subpoena is being sought.

C. **Discovery limited.** For 60 days following service of the petition in formal proceedings, counsel and the lawyer are entitled to reciprocal discovery, pursuant to the North Dakota Rules of Civil Procedure, of all matters not privileged. An extension may be granted by the chair of the hearing panel only upon a showing of good cause. Disputes concerning the scope and other aspects of discovery must be determined by the hearing panel before which the matter is pending. All discovery orders by the hearing panel are interlocutory and may not be appealed before entry of the final order.

D. **Witness fees.** Witness fees and mileage are the same as those provided for proceedings in the district court.

E. **Reciprocal enforcement.** Whenever a subpoena is sought in this state under the laws of another jurisdiction for use in lawyer discipline or disability proceedings, the chair of the board, upon petition, may issue a subpoena as provided in this section to compel the attendance of witnesses and production of documents.

Source: Amended effective July 1, 1999.

Rule 3.4. Threat of public harm.

A. **Transmittal of evidence.** Upon receiving of sufficient evidence demonstrating that a lawyer subject to the jurisdiction of the court:

(1) has committed misconduct or is disabled and

(2) poses a substantial threat of irreparable harm to the public,

counsel shall transmit the evidence to the court together with a proposed order for interim suspension.

B. **Immediate interim suspension.** At any stage of any proceeding, the court may enter an interim order immediately suspending the lawyer pending final disposition of the proceeding predicated upon the conduct causing the harm, or may order such other action as deemed appropriate. In the case of an interim suspension, the court may appoint a trustee under N.D.R. Lawyer Discipl. 6.4 to protect the interests of clients. In the case of an interim suspension, the court may order that a lawyer participate in the lawyer assistance program. Upon the request of the lawyer who is subject to counsel's request for interim suspension, the court shall provide the lawyer an opportunity to be heard before determining counsel's request. Upon request by counsel or the lawyer after entry of an interim suspension order, the court shall within ten days provide an opportunity for the lawyer to demonstrate that the order should not remain in force. Counsel shall be present and appear at these hearings.

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4.13 and 7.3. Discip. Bd. v. Hellerud (In re Hellerud), 2006 ND 105, 714 N.W.2d 38 (2006).

Resignation.

Where attorney admitted that he neglected the estate of his client, did not proceed zealously and did not preserve the identity of client funds and property, he was permitted to resign from the bar. Disciplinary Bd. v. Baird, 496 N.W.2d 552 (N.D. 1993).

Suspension.

Failure to diligently represent a client in a child support reduction matter was a violation of this rule and justified a six-month suspension. Disciplinary Bd. v. Raymond, 1997 ND 236, 571 N.W.2d 153 (1997). Attorney was suspended after he violated N.D.R. Prof. Conduct 1.5(a) and (b) where he accepted large cash payments from a client without a written fee agreement, fee statements, or correspondence detailing the terms of the representation of the client, did not give the client receipts, account for the funds, or refund any amounts that were unearned, and the attorney shredded his records, making it impossible to determine how much money he received from the client for legal services and the reasonableness of the fee. Disciplinary Bd. v. Chinquist (In re Chinquist), 2006 ND 107, 714 N.W.2d 469 (2006).

Worker's Compensation.

—Attorney's Fees Contract.

Where claimant entered agreement for attorneys to represent her in action against third party tortfeasor, and the method of determining the attorneys' fee was clearly set out in the agreement, the fact attorneys later entered a written agreement to represent the Worker's Compensation Bureau for its statutory subrogated interest for benefits when a claimant seeks recovery for injuries from third persons, did not render the agreement between claimant and her attorneys ambiguous, and claimant was bound to pay the fee according to the terms of the agreement. Jones v. Pringle & Herigstad, 546 N.W.2d 837 (N.D. 1996). Where the attorney fully disclosed to the claimant that his fee would be one-third of the gross amount of the recovery from the third party, and the record showed there were difficult issues in the case, the case was time-consuming, and special expertise was required to perform the necessary legal services, the fee arrangement was not unreasonable. Disciplinary Bd. of Supreme Court v. Dooley, 1999 ND 184, 599 N.W.2d 619 (1999). Attorney who executed a notice of legal representation which provided that attorney's sole remuneration for representing client before the Workers Compensation Bureau would be paid by the Bureau and who billed client after unilaterally terminating his representation committed a knowing violation of this rule, warranting a thirty-day suspension from the practice of law and an assessment of all costs of the disciplinary proceeding. Disciplinary Bd. of the Supreme Court v. Moe, 1999 ND 110, 594 N.W.2d 317 (1999).

Collateral References.

Excessiveness or adequacy of attorneys' fees in domestic relations cases, 17 A.L.R.5th 366.

Attorney's obligation to share fee award with party representing public interest, 43 A.L.R.5th 793.

Validity and enforceability of express fee-splitting agreements between attorneys, 11 A.L.R.6th 587.

Rule 1.6. Confidentiality of information.

(a) A lawyer shall not reveal information relating to representation of the client unless the client consents, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is required by paragraph (b) or permitted by paragraph (c). The duty of confidentiality continues after the lawyer-client relationship has terminated.

(b) A lawyer is required to reveal information relating to the representation of a client to the extent the lawyer believes reasonably necessary to prevent reasonably certain death or substantial bodily harm.

(c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(2) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of crime or fraud in the furtherance of which the client has used the lawyer's services;

(3) to secure legal advice about the lawyer's compliance with these Rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concern-

ing the lawyer's representation of the client; or
(5) to comply with other law or a court order.

COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during and after the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a potential client and Rules 1.8(b) and 1.9(c) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that the lawyer must not reveal information relating to the representation without the client's consent. While it is not a requirement, it is a preferable practice to obtain the client's consent in writing when consent is given. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] This principle of lawyer-client confidentiality is given effect by related law, such as the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of lawyer-client confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. This rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by these Rules or other law.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Impliedly Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (c)(1) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(e), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (c)(1) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

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[8] Paragraph (c)(2) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (c)(2) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

Disclosure to Secure Compliance Advice

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (c)(3) permits such disclosure because of the importance of a lawyer's compliance with these Rules.

Disclosure in Controversies Regarding the Lawyer's Conduct

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (c)(4) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

Disclosure Required by Law or Court Order

[12] When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If the other law requires disclosure, paragraph (c)(5) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent the client's written consent to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (c)(5) permits the lawyer to comply with the court's order.

Limits of Extent of Disclosure

[14] Paragraph (b) requires and paragraph (c) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (c) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (c)(1) through (c)(5). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (c) does not violate this Rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by paragraph (c). See Rules 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule.

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are

participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 5.1, 5.3 and 8.4(a).

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give written consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Lawyer Copying of Items Related to Representation

[18] For the lawyer's own purposes, including facilitation of any revelation that might be permitted by paragraph (c), a lawyer is permitted to make copies of items in a file. The lawyer may charge the client for this copying only if allowed by Rule 1.19. The protection of this Rule, and the circumstances in which revelation is required or permitted, are applicable to the lawyer's copy or copies.

Use of Confidential Information to the Disadvantage of Client or Former Client

[19] Use by the lawyer of confidential information to the disadvantage of a client or former client is governed by Rules 1.8(b) and 1.9.

Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee on 03/16/84, 05/23/84, 06/27/84, 08/17/84, 09/13/84, 10/19/84, 12/14/84, 02/08/85, 03/11/85, 04/26/85, 08/23/85 and 03/15/86; Minutes of the Joint Committee on Attorney Standards on 6/8/99, 9/16/99, 11/19/99, 3/23/00, 6/13/00, 9/15/00, 11/17/00, 6/12/01, 02/28/03, 02/27/04, 11/19/04, 06/14/05, 09/09/05.

Source: Amended effective August 1, 2006.

Disbarment.

Where attorney engaged in repeated violations of the North Dakota Rules of Professional Conduct and had a record for prior discipline orders, the supreme court ordered his disbarment from the practice of law and imposed costs and expenses in the amount of $5,691.89, and restitution in the amount of $956.50. Disciplinary Bd. v. Bailey, 527 N.W.2d 274 (N.D. 1995).

Disclosure of Confidential Information.

Attorney's communicating confidential information concerning an adoption to the father of his client was a violation of this rule of professional conduct, and 30 day suspension of the attorney was the appropriate penalty. Disciplinary Bd. v. Dooley, 2001 ND 198, 637 N.W.2d 1 (2001).

Former Clients.

Attorneys were disqualified from representing three plaintiffs against oil company, which was a former client, in action alleging breach of lease agreement with a counterclaim for quiet title and breach of fiduciary duty; attorneys' previous work and present responsibilities both involved rights to production proceeds, the plaintiffs' interests were materially adverse to the oil company's, and a layperson would perceive continued presentation as side-switching and a breach of loyalty. Cont'l Res., Inc. v. Schmalenberger, 2003 ND 26, 656 N.W.2d 730 (2003).

Rule 1.7. Conflict of interest: general rule.

(a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.

(b) A lawyer shall not represent a client when the lawyer's own interests are likely to adversely affect the representation.

(c) A lawyer shall not represent a client if the representation of that client might be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(d) Except as required or permitted by N.D.R. Prof. Conduct 1.6, a lawyer shall not use information relating to representation of a client to the disad-

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(l) Neither a lawyer serving as a fiduciary of an estate, trust, or conservatorship nor the lawyer's firm may serve as legal counsel for the fiduciary. This paragraph does not apply to United States Bankruptcy Court proceedings or to matters in which the decedent, trustor, beneficiary, or protected person is a spouse, child, grandchild, parent, grandparent, or sibling of the lawyer.

COMMENT

Lawyer as Fiduciary - Prohibition on Serving as Counsel

[22] Paragraph (l) addresses situations in which a lawyer may be asked to serve as both a fiduciary for an estate, trust, or conservatorship and as legal counsel for the requesting party. Situations in which a lawyer serves in both capacities represent a conflict of interest and present, whether by design or default, opportunities for overreaching, misappropriation, or other exploitation of the dual capacity relationship. The relationship of trust and confidence between lawyer and client and with respect to the lawyer as fiduciary generally requires that a lawyer not serve in both capacities. The prohibition in paragraph (l) would not apply to those situations in which there is a familial relationship between the lawyer and the decedent, trustor, beneficiary, or protected person or in United States Bankruptcy Court proceedings.

Reference:

Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee on 09/13/84, 10/19/84, 12/14/84, 02/08/85, 03/11/85, 04/26/85, 08/23/85, 09/20/85, 01/10/86, 01/31/86 and 03/15/86; Minutes of the Joint Committee on Attorney Standards on 02/28/03, 09/25/03, 11/14/03, 04/16/04, 08/06/04, 11/19/04, 06/14/05, 09/09/05, 06/10/08, 09/19/08, 11/07/08, 12/01/08.

Source: Amended effective August 1, 2006; Amended effective August 1, 2009.

Rule 1.15. Safekeeping Property and Professional Liability Insurance Disclosure.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be deposited in one or more identifiable interest bearing trust accounts in accordance with the provisions of paragraph (f). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer in the manner prescribed in paragraph (h).

(b) A lawyer may deposit the lawyer's own funds in a client trust account only for the purpose of paying bank service charges, fees associated with credit card payments, or wire transfers related to that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(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 or third person. 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 or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When, in the course of representation, a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(f) Each trust account referred to in paragraph (a) shall be an interest bearing trust account in an eligible financial institution selected by a lawyer in the exercise of ordinary prudence. An eligible financial institution is a bank, savings bank, trust company, savings and loan association, savings association, credit union, or federally regulated investment company authorized by federal or state law to do business in North Dakota and insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or the Federal Savings and Loan Insurance Corporation. Interest bearing trust funds shall be placed in accounts in which withdrawals or transfers can be made by the depositing lawyer or law firm without delay, subject only to any notice period which the depository institution is required to reserve by law or regulation.

(1) A lawyer who receives funds of clients or third persons shall maintain a pooled interest bearing trust account for deposit of all such funds received that are nominal in amount or expected to be held for a short period of time. The interest accruing on this account, net of any transaction costs, shall be paid to and administered by the North Dakota Bar Foundation in accordance with N.D.Sup.Ct.Admin.R. 24 of the Supreme Court of North Dakota. The North Dakota Bar Foundation holds the entire beneficial interest in all interest monies accruing on this account.

(2) All funds of a client or third person shall be deposited in the account specified in paragraph (f)(1) unless they are deposited in:

(i) A separate interest bearing trust account for the particular client or third person on which the interest, net of any transaction costs, will be paid to the client or third person; or

(ii) A pooled interest bearing trust account with subaccounting which will provide for computation of interest earned by each client's or third person's funds and the payment thereof, net of any transaction costs, to the client or third person.

(3) In determining whether to use the account specified in paragraph (f)(1) or an account specified in paragraph (f)(2), a lawyer should take into consideration the following factors when deciding whether the funds to be invested may be utilized to provide a positive net return to the client or third person:

(i) The amount of interest which the funds would earn during the period they are expected to be deposited;

(ii) The cost of establishing and administering the account, including the cost of the lawyer's services and the cost of preparing any tax reports required for interest accruing to a client's or third person's benefit; and

(iii) The capability of financial institutions described in paragraph (f) to calculate and pay interest on individual accounts or subaccounts.

(4) As to accounts under paragraph (f)(1), a lawyer or law firm shall direct the depository institution:

(i) To remit interest or dividends, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in accordance with an institution's standard accounting practice, at least quarterly, to the North Dakota Bar Foundation (the foundation); and

(ii) To transmit with each remittance to the foundation a statement showing the name of the lawyer or law firm for whom the remittance

is sent, the rate of interest applied, and the amount of service charges deducted, if any, and the account balance(s) of the period in which the report is made, with a copy of such statement to be transmitted to the depositing lawyer or law firm.

(g) Lawyers who are admitted to practice in a jurisdiction other than the State of North Dakota and lawyers who are associated in a law firm with at least one lawyer who is admitted to practice in a jurisdiction other than the State of North Dakota are exempt from the requirements of paragraph (f) if the lawyer or law firm maintains a pooled interest bearing trust account for the deposit of funds of clients or third persons in a financial institution located outside the state of North Dakota and the interest, net of any service charges and fees, from the account is being remitted to the client or third person who owns the funds, or to a non-profit organization or government agency pursuant to the laws or rules governing lawyer conduct of the jurisdiction in which the financial institution is located. This exemption shall not relieve a lawyer from any of the other obligations imposed by this rule.

(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.

(i) A lawyer shall certify, in connection with the annual renewal of the lawyer's license and in such form as the clerk of the Supreme Court of North Dakota may prescribe, that the lawyer is complying with the provisions of this Rule.

(j) The form required in subsection (i) shall also contain a provision for each licensed lawyer to certify (1) whether the lawyer represents private clients; (2) if the lawyer represents private clients, whether the lawyer is currently covered by professional liability insurance; and (3) whether the lawyer intends to maintain such insurance during the next twelve months. A lawyer shall notify the clerk in writing within 30 days if the lawyer's professional liability coverage lapses, is no longer in effect, or terminates for any reason, unless the policy is renewed or replaced without substantial interruption. This information shall be disclosed to the public upon request.

(k) Lawyer trust accounts, as referred to in paragraphs (a) and (f), shall be maintained only in eligible financial institutions approved by the Disciplinary Board. Every check, draft, electronic transfer, or other withdrawal instrument or authorization must be personally signed or, in the case of electronic, telephone, or wire transfer, directed by one or more lawyers authorized by the law firm.

(l) A financial institution, to be approved as a depository for lawyer trust accounts, shall file with the Disciplinary Board an agreement, in a form provided by the Board, to report to the Board if any properly payable* instrument is presented against a lawyer trust account containing insufficient funds, whether or not the instrument is honored. The Disciplinary Board shall establish rules governing approval and termination of approved status for financial institutions, and shall annually publish a list of approved financial institutions. No trust account may be maintained in any financial institution that does not agree to make overdraft notification reports. Any overdraft notification agreement must apply to all branches of the financial institution and may not be canceled except upon three days notice in writing to the Board.

(m) The overdraft notification agreement must provide that all reports made by the financial institution be in the following format:

(1) in the case of a dishonored instrument, the report must be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if a copy is normally provided to depositors;

(2) in the case of an instrument that is presented against insufficient funds but which instrument is honored, the report must identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

Reports must be made simultaneously with the notice of dishonor* and within the time provided by law for notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report must be made within five banking days of the date of presentation for payment against insufficient funds.

(n) Every lawyer practicing or admitted to practice in this State shall, as a condition thereof, consent to the reporting and production requirements of this Rule.

(o) Nothing in this rule precludes a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this rule.

COMMENT

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records of the funds must be kept regarding which part is the lawyer's.

[4] Paragraph (e) also recognizes that third parties, such as a client's creditor who has a lien on funds recovered in a personal injury action, may have lawful claims against specific funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

Reference:

Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee on 04/26/85 and 08/23/85; and Revised by the State Bar Association of North Dakota on 08/29/86 and approved by the Board of Governors on 09/06/86; Minutes of the Joint Committee on Attorney Standards on 11/14/03, 03/18/05, 06/14/05, 09/09/05, 06/10/08, 09/19/08, 11/07/08, 12/01/08.

Source: Amended effective August 1, 2006; further amended effective January 1, 2008; further amended effective August 1, 2009.

Suspension.

Attorney was suspended from the practice of law for three years because the attorney stipulated that his actions violated N.D.R.Prof. Conduct 1.3, 1.4, 1.5, 1.15, 8.1(b), and N.D.R.Lawyer Discipl. 1.2(A)(8), when the attorney stipulated that he was retained to represent a client in an immigration matter, did not complete the work nor return the unearned retainer and eventually returned $ 2,500 to the client after formal disciplinary proceedings were instituted against him, and the attorney stipulated that he represented a second client in an asylum matter, and a delay in notifying the client resulted in the client losing his opportunity for voluntary departure and an opportunity to file a petition for review. Disciplinary Bd. v. Vela (in re Vela), 2008 ND 42, 746 N.W.2d 1, 2008 N.D. LEXIS 42 (Mar. 17, 2008).

Law Reviews.

Deference to a Hearing Panel?: Emerging Trends in the Disciplinary Decisions of the

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Supreme Court of North Dakota - 2004-2007, 83 N.D.L.Rev. 887 (2007).

Rule 1.16. Declining or terminating representation.

Suspension.

Attorney who abandoned her clients and moved to Montana from North Dakota to follow her husband and children, who had moved there without her, and who failed to answer the petition for discipline, violated N.D.R.Prof. Conduct 1.1, 1.3, 1.4, 1.16(b), and 8.1(b), and was suspended from the practice of law for 18 months. Disciplinary Bd. of the Supreme Court of North Dakota v. Nemec (In re Nemec), 2008 ND 216, 758 N.W.2d 660, 2008 N.D. LEXIS 216 (Dec. 3, 2008).

Attorney's conduct violated N.D.R.Prof. Conduct 1.1, 1.3, 1.4, and 1.16, and a six-month suspension was an appropriate sanction under N.D. Stand. Imposing Law. Sanctions 4.42(a) because the attorney knowingly failed to perform services for a client and caused injury or potential injury to a client. Disciplinary Bd. v. Tollefson (In re Tollefson), 2008 ND 177, 755 N.W.2d 912, 2008 N.D. LEXIS 175 (Sept. 23, 2008).

ADVOCATE.

Rule 3.1. Meritorious claims and contentions.

Standby Counsel.

Where, in his defense for theft, defendant alleged that standby counsel should have assisted him in issuing subpoenas for various government agents, including FBI agents and agents from the Department of Homeland Security, but defendant failed to demonstrate that these witnesses had any favorable or relevant testimony to support a legitimate defense to the theft charge, defendant's rights were not violated when standby counsel did not issue the subpoenas requested by defendant; standby counsel remained an officer of the court and had the duty to raise only issues which were not frivolous, and counsel could not participate in the abuse of legal procedure. State v. Curtis, 2008 ND 108, 750 N.W.2d 438, 2008 N.D. LEXIS 112 (June 5, 2008).

Rule 3.3. Candor toward the tribunal.

Suspension.

Sixty-day suspension, under N.D. Stand. Imposing Law. Sanctions 7.2, was appropriate because there was clear and convincing evidence that an attorney failed to notify a client of his suspension from the practice of law, made false statements of compliance to the tribunal, and engaged in the unauthorized practice of law, in violation of N.D.R.Prof. Conduct 1.4, 3.3, 5.5(a) and N.D.R.Lawyer Discipl. 4.5, 6.3. Disciplinary Bd. v. Stensland (In re Stensland), 2009 ND 77, 764 N.W.2d 438, 2009 N.D. LEXIS 78 (Apr. 30, 2009).

Law Reviews.

Deference to a Hearing Panel?: Emerging Trends in the Disciplinary Decisions of the Supreme Court of North Dakota - 2004-2007, 83 N.D.L.Rev. 887 (2007).

Rule 3.4. Fairness to opposing party and counsel.

Law Reviews.

Deference to a Hearing Panel?: Emerging Trends in the Disciplinary Decisions of the Supreme Court of North Dakota - 2004-2007, 83 N.D.L.Rev. 887 (2007).

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS.

Rule 4.1. Truthfulness in statements to others.

Misrepresentation.

Evidence supported the finding that an attorney violated N.D.R.Prof. Conduct 4.1, which prohibited the making of false state-

06/13/95, 09/15/95, 12/01/95, 06/11/96, 06/08/99, 09/16/99, 11/19/99, 03/23/00, 06/13/00, 09/15/00, 11/17/00, 06/11/02, 09/12/02, 11/15/02, and 06/24/03.

Source: Amended effective March 1, 1997; further amended effective March 1, 2004; further amended effective August 1, 2006.

MAINTAINING THE INTEGRITY OF THE PROFESSION.

Rule 8.1. Bar admission and disciplinary matters.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) Knowingly make a false statement of material fact; or

(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.

COMMENT

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the lawyer-client relationship, including Rule 1.6 and, in some cases, Rule 3.3.

Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee on 12/13/85; Minutes of the Joint Committee on Attorney Standards on 09/24/04, 04/08/05, 06/14/05.

Source: Amended effective August 1, 2006.

Continuing to Practice Law.

Attorney who was found to have knowingly and intentionally continued to practice law subsequent to the effective date of her suspension was immediately disbarred from the practice of law. Disciplinary Bd. v. Larson, 512 N.W.2d 454 (N.D. 1994).

Failure to notify clients of suspension.

Attorney was required to fully comply with N.D.R. Lawyer Discipl. 6.3(A), not just substantially comply. When an attorney failed to notify his clients that he had been suspended from the practice of law, he not only violated rule 6.3, but he violated N.D.R. Prof. Conduct 8.1 by representing to the supreme court that he had fully complied with rule 6.3. Disciplinary Bd. v. Giese (In re Giese), 2006 ND 13, 709 N.W.2d 717 (2006).

Suspension.

Failure to diligently represent a client in a child support reduction matter was a violation of this rule and justified a six-month suspension. Disciplinary Bd. v. Raymond, 1997 ND 236, 571 N.W.2d 153 (1997). Sixty-day suspension was appropriate where an attorney violated, among other rules, N.D. R. Prof'l Conduct 8.1(a) by knowingly making false statements of material fact to an Inquiry Committee. Johnson v. Johnson, 2007 ND 203, — N.W.2d —, 2007 N.D. LEXIS 204 (Dec. 19, 2007).

Rule 8.2. Judicial and legal officials.

(a) A lawyer shall not knowingly, or with reckless disregard as to its truth or falsity, make a false statement concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.