

State Bar of South Dakota

Ethics Opinion 97-4

June 2, 1997

- **Rules 1.2; 1.6**
- **Subject: Client confidences; Disclosure of confidential information.**
- **Summary: Attorney must not reveal client's confidential information unless required by the Rules or other law. In such case, attorney must advise client of the need to disclose and if client does not authorize disclosure, attorney must withdraw.**

**FACTS**

You represent the son of a couple who purchased land on a contract for deed and gave a mortgage to finance the purchase to a separate entity. Son/client has farmed the land for several years; purchased the vendor's interest in the contract for deed; made some improvements in the property and paid some taxes. However, son/client has not paid rent or made the delinquent payments to the lender holding the mortgage. In addition, son/client gave a promissory note to the surviving parent for an operating loan in a prior year, which loan has not been repaid.

The mortgage lender is now litigating foreclosure in federal court in a case commenced after December 1, 1993.

Your client and the other parties in the litigation have been deposed and the operating loan has not been disclosed or discovered. No formal discovery request or deposition question reasonably required its disclosure. Your client recently disclosed the note to you and the fact of the default. Your client has refused to authorize you to disclose the loan or note evidencing it.

You ask for this Committee's opinion whether any disclosure need be made or whether you may follow your client's instruction.

**OPINION**

The Rules of Professional Conduct [Rule] appear at SDCL 16-18 Appx. Rule 1.6 provides: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." The Comment to Rule 1.6 makes the rule of confidentiality applicable "not merely to matters communicated in confidence by the client but also to all information relating to the representation ... ." Thus, there is no question but that the communication of the loan and note provided by the client is privileged pursuant to Rule 1.6. However, disclosures required by the rules are necessary to carry out the representation.

Rule 1.2(a) commands a lawyer to "abide by a client's decisions...subject to paragraphs... (d) and (e)." In addition, Rule 1.2(e) requires the lawyer who "knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client ..." of the lawyer's limitations.

By Order dated December 30, 1993, entitled "In The Matter Of The New Federal Rules Of Civil Procedure", the new federal rules were made "fully applicable to all civil actions...filed on or after December 1, 1993." Specifically, parties are required "without awaiting for a discovery request" to provide, among other things, "a copy of, or a description...and location of, all documents...relevant to disputed facts..." FRCivP 26(a)(1)(B). Disclosure must only be made of material "relevant to disputed facts alleged with particularity in the pleadings." FRCivP 26(a)(1). In addition, disclosures must be supplemented if a "party learns that in some material respect the information disclosed is incomplete or incorrect and if corrective information has not otherwise been made known to the other parties..." FRCivP 26(e)(1)(a). These disclosure requirements are the "functional equivalent of court-ordered interrogatories." FRCivP 26, Committee Note. 1993 Amendment.

If, and only if, you determine that the note is relevant to disputed facts alleged with particularity in the pleadings, the federal rules require your client to disclose the note and the Rules of Professional Conduct preclude you from failing to disclose it to the Court. Rule 3.3(b) continues your disclosure obligation "to the conclusion of the proceeding and appl(ies) even if compliance requires disclosure of information otherwise protected by Rule 1.6."

The Committee believes that your inquiry turns on whether the loan is relevant to any issue actually raised in pleadings in the litigation. We cannot determine from the facts you presented and cannot study the litigation in enough detail to determine if the loan is, in fact, relevant. You must determine if the loan is relevant to the pled issues in the case.

If you determine that the loan is not relevant, to the pled issues, it is the opinion of the Committee that you must keep your client's confidence and follow his instructions to not disclose.

On the other hand, if you determine that the loan is relevant, your duty to the Court supersedes the confidentiality and instructions obligations and you are obligated to prevent or rectify your client's indication to suppress the note.

Likewise, if you determine the loan is relevant to the pled issues, it is this Committee's opinion that you may not proceed in your representation of the client without disclosing the note. Then, client should be advised that it must be disclosed, and if client does not authorize its disclosure, you must withdraw.

We note your request that this opinion not be published. That decision is not made by this Committee.

**Lonnie R. Braun**  
Chair, Ethics Committee  
State Bar of South Dakota