

LO 87-14

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BISMARCK, N.D. 58502-1695
(701) 223-2711

December 29, 1987

[REDACTED]

Re: Ethics Request

Dear [REDACTED]

The Ethics Committee of the State Bar Association of North Dakota addressed the questions raised in your letter of December 3, 1987, at its meeting on December 29th.

We also considered the letter which we received from Attorney [REDACTED] dated December 11, 1987.

There was some question whether your request was within the jurisdiction of the Ethics Committee because it did not relate so much to the ethical responsibility of an attorney as to that of a claims analyst. We also felt there were insufficient facts and too general of a problem presented for us to give a clear opinion on the questions presented.

We do strongly advise you that Rule 4.2 of the Code of Professional Responsibility applies to all attorneys, including government attorneys, and any employees under the direct supervision of those attorneys. Attorneys in your office and persons working under their supervision should be guided by that rule and all of the rules of professional responsibility.

Some of the specific questions presented may be more properly addressed to the Unauthorized Practice of Law Committee chaired by Jim Geyer, or the Administrative Law Committee chaired by Dave Evans. It may simply be a case of the Workmen's Compensation Bureau needing to sit down with members of the practicing bar and work out guidelines for communications between claims analysts, claimants and their attorneys which would be mutually acceptable.


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I hope this letter is responsive to your request.

Sincerely,

Pat Ward

Patrick J. Ward, Chairman
Ethics Committee, State
Bar Association of North
Dakota

PJW:gb


[REDACTED]

December 11, 1987

DEC 16 1987

[REDACTED]

Mr. Pat Ward
Chairman Ethics Committee
ND State Bar Association
PO Box 2136
Bismarck ND 58502

ZUCER L CLIN PJW

Dear Pat:

Our firm recently obtained a copy of the December 3, 1987, letter written to you by Assistant Attorney General [REDACTED] of the North Dakota Workers Compensation Bureau requesting your Committee's opinion relative to the application of DR 7-104 to the Bureau's attorneys.

Since our firm is responsible for raising this issue with the Bureau, we are awaiting your Committee's opinion with great interest. However, we take great exception to [REDACTED] characterization of the issue and its context. Therefore, we request you and your Committee's indulgence as we present our side of the problem.

We have never contended that DR 7-104 prohibited all contact by Bureau staff with our clients without our prior consent, nor have we ever complained to the Bureau about claims analysts responding, without our prior consent, to routine questions posed to them by our clients (although perhaps you can tell us whether we should object, at least in instances in which the Bureau had already reduced or denied a claim for benefits). Furthermore, we have never objected to Bureau claims analysts directly notifying our clients, without our prior consent, about routine medical appointments and availability of vocational services (although again, perhaps we should object, at least in instances where benefits have already been reduced or denied).

As you know, by statute, the Bureau pays claimant's attorney's fees only when benefits have been "reduced or denied," thus, we rarely, if ever, get involved before the Bureau unless that is the posture of the case. In that instance, the Bureau has already taken a legally adversarial position to our clients' position, prior to the point where we object to direct Bureau contact with our clients.

Mr. Pat Ward
December 11, 1987
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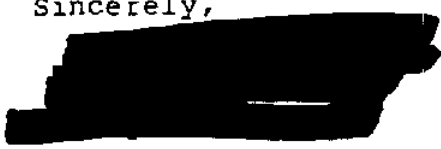
Examples of suspect direct Bureau contact with our clients, after reduction or denial of benefits and after we have filed a Notice of Legal Representation with the Bureau, protested are as follows:

1. A telephone call by a claims analyst to our client for the sole purpose of questioning whether our client had actually had an office conference with her attorney and, if so, how long the consultation lasted; *ackg on will*
2. Letters to our clients directing them to obtain and/or provide certain medical evidence, often specifically indicating the Bureau legal department as the source of the request; and
3. A letter from a Bureau attorney to an attorney in our firm, with a copy sent directly to our client, suggesting that her advice was not in the best interest of her client and her services were no longer necessary.

There is no question that once benefits have been reduced or denied, Bureau attorneys are representing the Bureau's position and we are representing the claimant's adverse position. Furthermore, Bureau attorneys cannot do an end run around their ethical responsibilities by directing or allowing other Bureau staff to make the impermissible contacts, no more than our firm's attorneys can avoid ethical responsibility under DR 7-104 by asking a secretary or a paralegal to make otherwise impermissible contacts.

We look forward to your Committee's opinion on this question and hereby request a copy of that opinion when it becomes available.

Sincerely,





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Office of Attorney General
Workers Compensation Bureau

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December 3, 1987

Mr. Pat Ward
Chairman Ethics Committee
State Bar Association
P.O. Box 2136
Bismarck, North Dakota 58502

Dear Mr. Ward:

Recently, certain attorneys in Bismarck have raised an issue which has not, to my knowledge, been addressed before. The attorneys contend that DR 7-104 prohibits any contact from any member of the bureau without their prior consent. Currently, bureau claims analysts provide "customer service" to all claimants who call requesting answers to questions about their claims. The analysts also contact claimants directly to notify them about medical appointments and vocational services. Obviously, if DR 7-104 applies to this agency, I am under an obligation to advise my client that this conduct is impermissible unless the analyst has obtained prior consent from the claimant's attorney.

However, in light of the Supreme Court's mandate that the bureau act in its quasi-judicial capacity as fact finder, and not as an adverse party, Steele v. North Dakota Workers Compensation Bureau 273 N.W.2d 269,702 (N.D. 1978), there is question whether DR 7-104 applies to this agency. An opinion from the Ethics Committee is therefore sought.

Very truly yours,

[Redacted signature block]

DJH/md

Dict. 12/2/87
Trans. 12/2/87

