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DOUGLAS E. CHRISTENSEN
OFFICE MANAGER

December 26, 1989

[REDACTED]

Dear [REDACTED]

RE: Advisory Opinion Regarding the Application of Rule 4.2
N.D.R.P.C.

The Ethics Committee of the State Bar Association of North Dakota has addressed and discussed the questions raised in your letter of December 8, 1989.

While not clear from your letter, the Committee has assumed for purposes of this letter opinion that the employees are current employees of the party. The Committee is not commenting on the applicability of Rule 4.2 in regard to statements taken from former employees. The Committee also has assumed that the party is represented by counsel at the time the employees were interviewed.

The Committee was of the opinion that if the employee being interviewed is in a managerial position on behalf of the employer or is an individual whose acts or omissions in connection with the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on behalf of the party, then a statement should not be taken from the employee of the party without the consent of that party's lawyer. In essence, the Committee was of the opinion that the Rule is not limited to employees who have an ownership or management interest in the business and is applicable, as set forth in the comments, to any employee whose act or omission in connection with the matter may be imputed to the organization for


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purposes of civil or criminal liability or whose statement may constitute an admission on behalf of the party. If the party's employee falls into either of these categories, and the party is represented by counsel, it is the Committee's opinion that Rule 4.2 would preclude contact with that employee without the consent of the party's attorney.

This letter opinion is issued to you for advisory purposes only and is not binding on you, the Court's of North Dakota, the Disciplinary Board, Grievance Committees, or any other member of the Bar of the State of North Dakota.

Sincerely,

Paul F. Richard
Chairman-Ethics Committee
State Bar Association of North Dakota

89-18

December 8, 1989

Paul Richard, Chairman
Ethics Committee of SBAND
P.O. Box 6017
Fargo, ND 58108-6017

Re: ADVISORY OPINION REGARDING THE APPLICATION OF
RULE 4.2 N.D.R.P.C.

Dear Mr. Richard:

This letter is a request to obtain an advisory ruling concerning the application of Professional Conduct Rule 4.2. The following hypothetical scenario will provide your committee with the facts needed to answer the questions posed at the end.

Party A owns a restaurant and employs several cooks and waitresses, none having an ownership interest in Party A's business. Party A's restaurant burns down while Party A's employees are on the premises. A lawsuit is commenced and it is alleged that a piece of food preparation equipment malfunctioned and caused the fire. Party A's lawsuit alleges that Party B, the manufacturer and/or Party C, the distributor of the food preparation equipment were either negligent, breached their warranties, or are strictly liable for the damage done to Party A's restaurant.

Party C obtains counsel and begins preparation and discovery of the facts of the claim and the possible defenses available to Party C. Party C obtains a statement from two of Party A's employees without the knowledge and consent of Party A's attorney while trying to find out what happened on the day the fire occurred.

Party C's attorney uses the statement at a later date at the deposition of Party A's employee to impeach the employee.

Question presented:

Does the conduct of Party C's attorney in obtaining a statement from an employee of a party, violate Rule 4.2 and subject the attorney to disciplinary action?

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Sentinel, Lundberg, Erickson
Marci & McLean, Ltd.

Paul Richard
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We have reviewed the rule as contained in the rule book published by West Publishing Company, along with the comments which follow the rule.

It appears to us that Rule 4.2 indicates that there can be no communication between an attorney and an adverse party once litigation has been commenced without opposing counsel's permission. However, the rule does not indicate that it is a violation of the rule to obtain statements from regular employees who have no ownership or management interest in the business.

However, the comment section of Rule 4.2 does seem to indicate that any and all persons employed by, agents of, or connected in any way with the party are subject to the rule, and thus cannot be interviewed without opposing counsel's permission.

Your prompt attention to this matter will be greatly appreciated by all concerned and if you have any questions regarding this matter, please don't hesitate to contact me.

Yours truly,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]