

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NUMBER 92-13

DATE: OCTOBER 15, 1992

The Ethics Committee received a request for an opinion from Mr. [REDACTED], Attorney at Law, [REDACTED], North Dakota, regarding the following inquiry:

Does the prohibition of Rule 4.2 with respect to contacts by a lawyer with employees of an opposing corporate party extend to former employees of that party?

The analysis logically begins with the text of Rule 4.2, which provides that a lawyer shall not communicate about the subject matter of representation with a party he/she knows to be represented by another lawyer without the consent of the other lawyer or authorization by law to do so. North Dakota Rule of Professional Conduct 4.2. The comment to Rule 4.2 notes that the Rule applies to corporate parties and further clarifies the application of the Rule as to current employees or agents of the corporate party. The comment explains the Rule as prohibiting communications with (1) persons having a managerial responsibility on behalf of the organization; (2) anyone whose acts or omissions could be imputed to the organization; and (3) anyone whose statements may constitute an admission on the part of the organization.

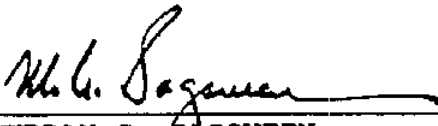
However, Rule 4.2 is silent as to former employees.

As noted in ABA Formal Opinion 91-359 dated 3/22/91 in dealing with the same issue, there are persuasive policy arguments for extending Rule 4.2 to cover certain classifications of former corporate employees. However, neither Rule 4.2 nor its comment provide a basis for extending the coverage to such former employees. Just as the ABA Committee was not willing to do, this Committee is not willing to issue an opinion expanding the literal scope of Rule 4.2 to include such former corporate employees.

Accordingly, the Committee's opinion is that the prohibition of Rule 4.2 with respect to contact by an attorney with employees of an opposing corporate party does not extend to former employees of such a party.

The Committee reiterates the cautions of the ABA Formal Opinion 91-359 pertaining to Rules 4.4. and 4.3. Specifically, the Committee cautions that an attorney contacting any unrepresented former employee must take care not to seek to induce the former employee to violate the privilege attached to attorney/client communications to the extent of his or her communications as a former employee with his or her former employer's counsel in which the privilege would belong to the former employer. In regard to Rule 4.3, the Committee would caution an attorney when contacting former employees to make clear the attorney's position in the action giving rise to the contact, including the identity of the lawyer's client and the fact that the person's former employer is the adverse party.

This opinion was drafted by Robert J. LaBine and unanimously approved by the Ethics Committee on October 15, 1992. Chairperson Murray G. Sagsveen did not participate in the Committee's action.


MURRAY G. SAGSVEEN
Chairperson

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September 11, 1992

North Dakota State Bar Association
Ethics Committee
Attn: Murray Sagsveen
P. O. Box 1695
316 North 5th Street
Bismarck, ND 58501

Dear Murray:

I am hereby requesting an opinion of the North Dakota Ethics Committee regarding an ethical matter. Since you are the chairman of the Ethics Committee, I am directing this inquiry to you, as chairman of the Ethics Committee. I assume that the Ethics Committee has procedures in order to resolve any question of any conflict of interest by virtue of the fact that you are my partner.

My specific question relates to Rule 4.2 of the Rules of Professional Conduct. Specifically, Rule 4.2 provides that a lawyer shall not communicate about the subject of representation with a party whom the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. My inquiry is specifically as follows:

Does the prohibition of Rule 4.2 with respect to contacts by a lawyer with employees of an opposing corporate party extend to former employees of that party?

I enclose for your use and information a copy of Formal Opinion 91-359 issued March 22, 1991, in which this specific question was considered by the ABA. You will note that the ABA reached the conclusion that the prohibition of Rule 4.2 does not extend to former employees of that party. In reaching this conclusion, the ABA Committee considered and rejected the argument that the contacts cannot be made if the former employee had managerial responsibilities concerning the matter in litigation. The model

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rule considered is exactly the same as North Dakota Model Rule 4.2. I believe that I could rely upon this ABA rule. However, to avoid even the appearance of impropriety, I am requesting from the North Dakota State Bar Association Ethics Committee their opinion as to whether they agree with ABA formal opinion 91-359.

Yours very truly,

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Enclosure

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