

JUL 1993
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STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NO. 93-10

JULY 13, 1993

COPY
FOR YOUR INFORMATION
HOWE, KADY, GALLOWAY & HAUS
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DICKINSON, NORTH DAKOTA 58601

The Ethics Committee received a request for an opinion from
[REDACTED], [REDACTED]
North Dakota:

The question presented is whether a state's attorney may communicate with a defendant concerning a pending criminal matter without the presence or consent of the defendant's attorney, when the communication is requested by the defendant after his attorney advised him not to do so.

I. North Dakota Rule

Rule 4.2 of the North Dakota Rules of Professional Conduct applies when a lawyer communicates with a person who is represented by counsel concerning a matter in which both are involved. The rule states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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.

Rule 4.2 does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. See Comment to Rule 4.2.

II. ABA Practice Guide on Communication with Parties Represented by Counsel.

The Practice Guide provides as follows:

Prosecutors and their agents must refrain from contacts with represented criminal defendants. Unlike constitutional violations, however, a violation of this ethical prohibition does not necessarily lead to the suppression of evidence.

The Practice Guide further states:

Lawyers who violate the prohibition may face disqualification from the case, and certainly may be sanctioned for their misconduct. Courts are divided on whether statements taken in violation of the rule should be precluded from evidence, but the majority rule favors including otherwise admissible evidence and disciplining the lawyer instead.

As the Practice Guide suggests, the Rule 4.2 prohibition applies to prosecutors in the same manner as it does to lawyers in private practice.

III. American Bar Association Rules

Rule 4.2 of the ABA Model Rules of Professional Conduct is identical to the North Dakota rule.

The purpose of Rule 4.2 is to protect defendants from making decisions about legal questions they may not understand and which may affect the potential outcome of their case, and to preserve the integrity of the lawyer-client relationship. The fact that a defendant does not want to have his lawyer present does not excuse the lawyer from obtaining the consent of the defendant's lawyer. United States v. Batchelor, 484 F. Supp. 812 (E.D. Pa. 1980). In the context of criminal proceedings, the rule prohibits prosecutors from speaking with a represented criminal defendant without notice to the defendant's lawyer and either a reasonable opportunity to be present, or consent. Annotated Model Rules, p. 432. This prohibition applies even if the defendant initiates the communication and indicates he does not want his attorney present.

IV. Conclusion

One of the goals of Rule 4.2 is to prevent defendants from making decisions of major legal implications which they may not understand and which may potentially affect the outcome of their case without the advice of counsel. The fact that a defendant may state that he does not want his lawyer present will not excuse the requirement that the consent of the defendant's lawyer be obtained. The prosecutor faces potential disqualification if such a communication occurs. It is the communication with a party represented by another lawyer without that lawyer's consent which is relevant to Rule 4.2, not whether the defendant desires the meeting. To allow otherwise would be to defeat the purpose and goals of Rule 4.2.

This opinion is provided pursuant to Rule 1.2(B), North Dakota Rules for Lawyer Disability and Discipline. This rule states:

A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the Ethics Committee of the State Bar Association of North Dakota shall not be subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct which is the subject of the opinion or advisory letter.

This opinion was drafted by Brian R. Bjella and unanimously approved by the Ethics Committee on July 13, 1993.


MICHAEL J. MAUS
Chairperson

March 23, 1993

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I have also been informed that following the preliminary hearing in this matter you have requested all the county vouchers for my travel in the past 3 years. I can only conclude from this and your prior statements that you intend to attempt to influence this case by some form of media blackmail of me or my office. I can think of no other reason for your making your request. Be advised that if I am correct and should you persist in this approach to this case and mount personal attacks on me or my office to influence the outcome of this case, I will feel obligated to file a complaint with the ethics committee of the State Bar Board.

If you wish to discuss the matter further, please feel free to bring your client to the office at any time.

Sincerely yours,

[REDACTED]

RE: [REDACTED]

Dear [REDACTED]

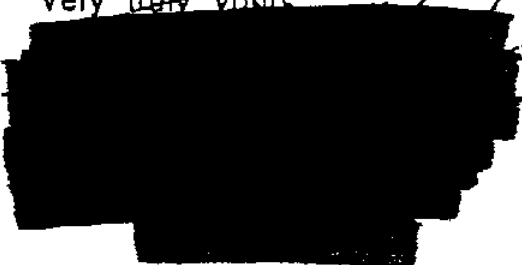
On February 12, 1993, as a matter of courtesy, I contacted you prior to the filing of [REDACTED] criminal complaint and did not have the warrant issued with the understanding that your client would appear at a date satisfactory to you. At that time I informed you that it was possible that [REDACTED] could keep his position at the [REDACTED] and be placed on probation with the court. Even though the charge was a felony, I had the authority from the attorney for the [REDACTED] to enter into a plea agreement that included [REDACTED] keeping his job at [REDACTED]. You advised this office that you were not interested in this type of agreement and that you were sending a letter to the local news media regarding the matter to tell your story. This is apparently after you had told the [REDACTED] that you intended to try this case in the news media and had turned down any agreement with the school to take care of the matter before it went as far as a criminal case.

I do not know if you have relayed the above offer to your client or not, however, my office has been informed that your client feels that he is into a situation that is more difficult than it needs to be and that this is due to your relationship with this office and me personally. This would be extremely unfortunate for your client. I can assure you that our relationship has nothing to do with the manner in which this case has been handled.

May 19, 1993
Murray G. Sagsveen
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I would appreciate your opinion as to how we should proceed in dealing with the defendant from this point on in personal contact or requests to visit with us directly on the matter. Thank you for assistance in this matter.

Very truly yours



Enclosure

May 19, 1993
Murray G. Sagsveen
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primarily with the effect of a deferred imposition of sentence on a felony and what kind of record it would leave him with versus a reduction to five counts of class A misdemeanor, for which I informed the defendant we would request a suspended jail sentence, thereby leaving him with a criminal record. When [REDACTED] left he indicated he was going to discuss the matter with his wife and wanted to know if I would agree to meet with them on the weekend to explain this in detail to his wife. I agreed to do so, however, [REDACTED] never made contact with me again.

The problem that I have, as I discussed with you on the telephone, is being in a position where I feel uncomfortable dealing with [REDACTED] without an attorney. However, I feel from my discussions that [REDACTED] would like to get this matter taken care of and put behind him. I have on this date of May 18, 1993, had contact from [REDACTED] indicating that [REDACTED] indicated to them that he would like the matter taken care of as soon as possible. I suggested to [REDACTED] from [REDACTED] that if he was still talking to [REDACTED] that he suggest that he contact other counsel if he so wished. I had indicated to [REDACTED] at our meeting in my office that it was always an alternative to seek a second opinion.

While I do not feel that I have overstepped my bounds, I do feel somewhat uncomfortable dealing directly with a defendant who is currently represented by counsel.

As I indicated in our phone conversation, this matter is further complicated by the fact that I am aware that [REDACTED] has a pending matter before the disciplinary board just prior to the trial of this matter. I find myself on the horns of a dilemma when I realize that should we obtain a conviction of [REDACTED] at trial I may be faced with a circumstance of having to defend [REDACTED], should he lose his right to practice law in the state of North Dakota if [REDACTED] were to appeal on the basis of inadequacy of counsel. While I cannot assume that [REDACTED] should or will lose his license to practice law, or have his practice restricted, it certainly puts our office in a very difficult situation.

93-10

May 19, 1993

Murray G. Sagsveen
316 N 5th Street
P.O. Box 1695
Bismarck ND 58502-1695

Fax: (701) 223-7387

Dear Mr. Sagsveen:

I am writing to you as chairman of the Ethics Committee regarding a case which is currently being handled by our office, namely the [REDACTED]

I find myself in a difficult position in this case. The defense counsel and I certainly have disagreements that go beyond this case.

As indicated in a letter of March 23, 1993, we had made an offer to [REDACTED] through his attorney at the outset which would provide that the State would basically recommend a deferred imposition of sentence. I have attached a copy of the letter to [REDACTED] for your information. It is now May 18, 1993, and I sit with a file in front of me that is over four inches thick with materials and statements that have been collected by our office. To date the defendant's counsel has made no requests under Rule 16 for any form of discovery.

On Thursday, May 6, 1993, at 2:14 p.m. a phone call was received by this office from [REDACTED] the defendant, requesting that I call him when I had a minute. By 2:30 p.m. that afternoon I had talked by phone with [REDACTED] and he requested an appointment with me and came to the office around 3:00 - 3:30 in the afternoon. I discussed with him at that time the fact that he was represented by counsel and he should have counsel present if he wished to do so. [REDACTED] at that time indicated that he had talked with [REDACTED] just prior to coming to my office, had been advised by his attorney not to come, but he informed his attorney that it was his life and that he was going to come and visit with me. [REDACTED] and I had a rather lengthy discussion dealing