

STATE BAR ASSOCIATION OF NORTH DAKOTA

ETHICS COMMITTEE

OPINION NUMBER 95-1

DATE: March 16, 1995



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

Does the prohibition of Rule 4.2 with respect to contacts by a lawyer with a party represented by another lawyer extend to persons employed by that party or by the same company as that party.

The clinic with which a defendant physician is currently associated is not a party to the litigation and the inquiring attorney wishes to contact the clinic administrator to ask whether the defendant physician is represented by a personal attorney in addition to the attorney hired by the physician's insurance company.

The analysis begins with the text of North Dakota Rules of Professional Conduct Rule 4.2, which provides that a lawyer shall not communicate about the subject matter of representation with a party he or she knows to be represented by another lawyer without the consent of the other lawyer or authorization by law to do so.

The rationale on which Rule 4.2 was formulated was identified in *Wright v. Group Health Hosp.*, 103 Wash.2d 192, 691 P.2d 564, 576 (1984):

The purposes of the rule against ex parte communications with represented parties are "preserving the proper functioning of the legal system and shielding the adverse party from improper approaches." (Citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 108 (1934)).

The purpose of the intended contact is to find out if the party represented in litigation by counsel provided by his insurance company also has a personal attorney. This relates to the subject matter of the representation. Therefore, a direct contact with the represented party would be clearly prohibited. However, neither Rule 4.2 nor its comments preclude contacts with employees of a represented individual under the circumstances presented or with co-employees who work for the same company as a represented party, where the company is not a party to the litigation. It is therefore the opinion of the Committee that the lawyer may, without violating Rule 4.2, make an inquiry of an employee or co-employee of the represented party under the

circumstances presented, regarding whether the represented party has a personal attorney.¹

While Rule 4.2 does not preclude a contact with employees or co-employees of a represented party under these circumstances, it does serve to limit the nature and extent of such contacts. The Committee is of the view that the prohibition against communications with a represented party about the subject of the representation extends to both direct and indirect communications. Thus, the lawyer would violate Rule 4.2 by using an employee or co-employee of the represented party as a conduit or intermediary to communicate with the represented party -- either to gather or transmit information.

The Committee would further caution that if the lawyer makes a contact with an employee or co-employee of a represented party under these circumstances, he must take care to avoid any misunderstanding on the part of the person contacted. See Rule 4.3. Thus, the Committee would caution the lawyer to make clear his role in the action giving rise to the contact, including the identity of the lawyer's client and the fact that the person about whom the call is being made is an adverse party.

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 association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This opinion was drafted by Michael J. Maus and unanimously approved by the Ethics Committee on March 30, 1995.


Michael J. Maus
Chairperson

¹Different rules may apply where the represented party is an organization. See Rule 4.2, comment.

95-1

January 31, 1995

CONFIDENTIAL

Mr. Michael J. Maus
Attorney at Law
P. O. Box 370
Dickinson, N. D. 58602.

Re: Ethics Query.

Post-it Fax Note	7671	Date	2/2/95	Pages	1
To	Shadi Taber	From	Michael J. Maus		
Co/Dept		Co.	HH/AM		
Phone #		Phone #	227-2101		
Fax #	224-1621	Fax #	227-4745		

Dear Mr. Maus:

Your fine article, in the Gavel, begggs for questions, so, here's one.

First of all, I cannot find in the Rules of Professional Conduct, an answer to my predicament.

I represent a client, in a medical negligence action, against a doctor. The doctor formerly practiced in [REDACTED] but is now in another city in North Dakota. As I understand the situation, the doctor has agreed that the case should be settled; however, the insurance company has been dragging its heels, for longer than I care to admit, and won't come up to what it will take to settle.

QUERY: I would like to contact the clinic, where the doctor now works, to learn if the doctor has a personal attorney; and, in turn have the attorney call me, or for me to call the attorney, on a matter that would be beneficial to the doctor, i.e., to apprise the doctor of his rights against the insurance company, for bad faith. Would this be permissable?

The insurance company no longer insures the doctor, nor the clinic, where he presently practices. The attorney representing the doctor, for the insurance company, practices in Bismarck.

What else would you like to know? Please let me hear from you.

Very truly yours,
[REDACTED]