

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
Opinion No. 95-06

September 26, 1995

The Committee has received a request for an opinion regarding the application of N.D.R. Prof. Conduct 4.2. The question presented is:

Do the Rules of Professional Conduct permit a lawyer who represents a claimant in a workers compensation claim to contact Workers Compensation Bureau (Bureau) personnel directly, when the claimant's lawyer has been advised that the Bureau has retained counsel on the claim, and the Bureau's retained counsel has directed the claimant's lawyer that all communication should be directed to the Bureau's retained counsel?

FACTS

The Bureau has recently begun contracting with private law firms to represent the Bureau on workers' claims. The Bureau, as well as a lawyer retained to represent the Bureau, have advised the requesting lawyer not to contact Bureau personnel directly with regard to any issue directly or indirectly related to the issue which is in litigation. The Bureau has advised the requesting lawyer that any direct contact with Bureau personnel, other than through the Bureau's retained lawyer, will be considered a violation of Rule 4.2.

Prior to the recently begun practice of contracting with private law firms, the Bureau had been represented on claims by assistant attorneys general. When the claims were handled by assistant attorneys general, it was common for claimants' lawyers to contact Bureau personnel directly, even though assistant attorneys general were known to represent the Bureau. As described by the requesting lawyer, the prior practice had been for the claimant's lawyer to contact a Bureau claims analyst or Bureau supervisor (or an assistant attorney general) "to seek resolution of the claim."

DISCUSSION

Rule 4.2 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.

Under the prior practice, the claimant's lawyer knew the Bureau to be represented, but communicated directly with Bureau personnel nonetheless, with the implied consent of the Bureau's lawyer. Under the current practice, the requesting lawyer knows the Bureau to be represented by another lawyer and does not have the consent of that other lawyer for direct communication with Bureau personnel. The question presented under Rule 4.2 is whether direct contact with Bureau employees is "authorized by law" in this situation.

Some jurisdictions recognize direct communications with a government agency as being within the scope of Rule 4.2's "authorized by law" provision. The Comment to Rule 4.2 includes the following:

[T]he 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. In addition, a lawyer may be authorized by law to communicate with the other party, for example, when the other party is a government agency.

In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(Emphasis added).

The requesting lawyer suggests that the language of the comment would permit unrestricted direct contact with government agency employees. To adopt that interpretation would effectively nullify the rule when a government agency is a party. The Committee declines to give more weight to the language of the comment than to the language of the rule itself.

The Alaska Bar Association Ethics Committee has interpreted Rule 4.2 to prohibit a lawyer who represents a party in litigation against a government agency from contacting the managing board of the agency regarding the client's settlement position. The opinion discusses the interplay between the language of the rule and the language of the comment:

Unfortunately, the Comment tends to blur the distinction regarding communications by the lawyer and communications by the party. The rule does not regulate the conduct of a party

not a lawyer. With regard to lawyers, the Comment authorizes direct contact with a government officer or agency without consent from the agency's attorney when the contacting lawyer is a "party" to the controversy and not acting in a representative capacity. Thus, when the lawyer is a party, no limitation on the First Amendment right to petition the government exists.

The principal issue is whether the reasons for the general prohibition against attorney communications with a represented party are sufficient to support the limitation on exercise of the right to petition one's government that may result from enforcement of the rule. Policy reasons advanced in support of the prohibition include preventing a lawyer from taking unfair advantage of a represented party by application of the lawyer's superior knowledge and skill, avoiding disputes regarding conversations that could force a lawyer to become a witness, protecting a client from making inadvertent disclosures of privileged information, channeling disputes through dispassionate experts, and preventing overreaching of an unprotected party.

Alaska Bar Association Ethics Committee, Opinion 94-1 (Jan. 7, 1994).

A recent formal opinion of the ABA Committee on Ethics and Professional Responsibility addresses communications with represented persons. Although primarily addressing communications in the context of criminal matters, the opinion includes the following:

When a corporation or other organization is known to be represented with respect to a particular matter, the bar applies only to communications with those employees who have managerial responsibility, those whose act or omission may be imputed to the organization, and those whose statements may constitute admissions by the organization with respect to the matter in question. Thus, a lawyer representing the organization cannot insulate all employees from contacts with opposing lawyers by asserting a blanket representation of the organization.

The bar against contacts with represented persons applies to all communications relating to the subject matter of the representation except those that fall within the narrow category of being "authorized by law." Communications "authorized by law" include communications that are constitutionally protected, and in addition, communications that are specifically authorized by statute, court rule, court order, statutorily authorized regulation or judicial decisional precedent.

Where direct communication with a government agency is considered to be "authorized by law" for purposes of Rule 4.2, that direct communication is subject to certain limitations. Case law and ethics opinions from certain jurisdictions interpret the "authorized by law" provision to allow unrestricted direct communication with a represented government agency only in matters unrelated to the pending matter.

Opinions from certain other jurisdictions concentrate on the responsibilities of the government agency employee with whom the direct contact is made. The New York State Bar Association's Committee on Professional Ethics has interpreted Rule 4.2 to allow direct communication with a government agency employee only when the employee lacks the power to bind the government agency. New York Ethics Opinion 652 (1993). Minnesota, under the former DR 7-104, defined a "government party," for purposes of that rule, as an employee, public official, or public body with authority to bind the government to settle a litigable matter, or whose act or omission gave rise to the matter. See Note, DR 7-104 of the Code of Professional Responsibility Applied to the Government "Party," 61 Minn. L. Rev. 1007, 1023 (1977). Similarly, the Florida Ethics Committee determined that consent of the government agency's counsel is required before adverse counsel may communicate with agency management or agency employees whose acts or omissions may be imputed to the government agency or whose statements may constitute admissions by the agency. See Florida Ethics Op. 87-2 (1987).

Based on its review of other jurisdictions' interpretation of Rule 4.2, it is the opinion of the Committee that, after having been advised that a government agency is represented by retained counsel and after having been directed by the agency or by the retained counsel that all communication should be directed through retained counsel, a lawyer may have direct contact with an employee of a government agency only if (1) the contact concerns a matter unrelated to the matter for which the agency has retained counsel, or (2) the contact is made with an employee who does not have the power to bind the agency, who does not have responsibility for making decisions in the matter for which the agency has retained counsel, whose acts or omissions are not the subject of the matter for which the agency has retained counsel, and whose acts or omissions could not be imputed to the agency for purposes of criminal or civil liability.

Under the facts presented by the requesting lawyer, the Committee assumes the desired direct contact concerns the matter for which the Bureau has retained counsel. The Committee recognizes that there may be several different aspects of a workers compensation claim, and that the Bureau may have retained counsel only to handle a certain aspect over which there is a current controversy. For example, the Bureau may have retained counsel to

handle a controversy over a permanent partial impairment award, and while that controversy is pending an issue may arise over the claimant's right to payment for certain medical expenses. The Committee declines to determine whether different aspects of a claim are the same or different matters for purposes of Rule 4.2. To make that determination would require a fact intensive inquiry, and might require that a fact intensive inquiry be conducted on a case by case basis.

Since the requesting lawyer refers to the past practice of direct contact with Bureau personnel for purposes of resolving a claim, the Committee assumes the requesting lawyer wishes to contact Bureau employees who have power to bind the agency or who have responsibility for making decisions in the matter for which the Bureau has retained counsel. The Committee is of the opinion that the direct contact for purposes of resolving the claim, absent consent of retained counsel, would be prohibited under Rule 4.2.

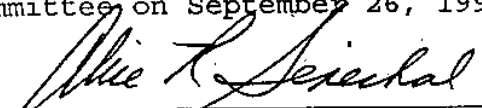
CONCLUSION

After a lawyer representing a claimant in a workers compensation claim has been advised that the Workers Compensation Bureau is represented by retained counsel on the claim, and the Bureau's retained counsel has directed that the claimant's lawyer direct all communication to retained counsel, the claimant's lawyer is prohibited by Rule 4.2 from having direct contact with Bureau employees concerning the matter for which the Bureau has retained counsel if those Bureau employees have power to bind the agency or responsibility for making decisions in the matter for which the Bureau has retained counsel, or if those employees' acts or omissions are the subject of the matter for which the Bureau has retained counsel, or if acts or omissions of the employees could be imputed to the agency, absent consent of the Bureau's retained counsel.

This opinion is provided pursuant to Rule 1.2(B), N.D.R. Lawyer Discipline, which 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 Alice R. Senechal and Wayne T. Anderson and was approved by the Committee on September 26, 1995.


Alice R. Senechal, Chair

The Comment, in part, states as follows:

This Rule prohibits a lawyer from communicating with a person known to be represented by another lawyer without the consent of that person's lawyer. This Rule does not, however, prohibit communication with the 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. In addition, a lawyer may be authorized by law to communicate with the other party, for example, when the other party is a government agency. Emphasis added.

There is no doubt from the above quoted comment that the claimant's attorney may contact the Bureau regarding a separate matter involved in a claim. First of all, a Worker's Compensation claim contains numerous issues. Rarely is the "issue in litigation" not indirectly related with all the other issues involved in the claim. Consequently, even contact on other issues in a claimant's claim could potentially become an ethical minefield.

The crux of the dilemma, and the question presented to the committee is: "If a claimant's attorney communicates with Bureau personnel on a matter in litigation rather than through the private attorney, is it a violation of Rule 4.2? The emphasized portion of the comment above, would seem to indicate that as the Bureau is a "government agency" a claimant's attorney does not violate Rule 4.2 in contacting the Bureau even on a related issue.

Having researched North Dakota law on this issue we can find no guidance. I did review the Minnesota Rules of Professional Conduct, specifically Rule 4.2, which is identical to the North Dakota Rule 4.2. However, the Minnesota "Comment" is somewhat more instructive. The pertinent portion of the comment to the Minnesota Rule 4.2 reads as follows:

Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter. Emphasis added.

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It is noted, the comment to the Minnesota Rule 4.2 is much more instructive on the issue of contact with a government agency and officials during litigation with that government agency.

We thank you in advance and look forward to your opinion at the earliest possible convenience given the considerable amount of litigation pending between the Bureau and its privately hired attorneys and this firm.

very truly yours

For the Firm

cc: Sandra Tabor