

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NO. 96-10
August 7, 1996

COPY

The Ethics Committee has been requested to issue an opinion as to whether the Requesting Attorney must withdraw from representation of the client under the following facts:

FACTS

The Requesting Attorney is representing a party in litigation. The Requesting Attorney's client is making direct contacts with an opposing party who is represented by another lawyer in the litigation.

The contacts concern matters related to the lawsuit. The Requesting Attorney neither encouraged nor precipitated the contacts.

ISSUES

1. Does the Requesting Attorney have a duty to demand that the client stop the contacts?
2. If the client does not stop the contacts, does the Requesting Attorney have any duty to withdraw from representing the client in the matter?

APPLICABLE RULES

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.

Rule 8.4(a) states:

It is professional misconduct for a lawyer to:

- (a) Violate or attempt to violate these Rules, knowingly assist or induce another to do so, or do so through the acts of another;
...

A third party represented by another lawyer is given broad protection. In general, a lawyer is entirely barred from any representational contact with a person represented by another lawyer. Contact is permitted only when the other lawyer has consented or the direct contact is authorized by law. An example of the latter would be service of a summons or other legal notice upon a person already represented by counsel. The prohibition is founded upon the possibility of unfair advantage that might result if lawyers were free to exploit the presumably vulnerable position of represented but unadvised parties.

By its terms, Rule 4.2 only prohibits contacts by a lawyer. The Rule does not prevent one party from communicating with another. See, *American Bar Association Formal Op. 92-362* (1992).

In 1932, the American Bar Association issued an opinion that an attorney may not, without consent of opposing counsel, sanction an attempt by his client to reach a compromise settlement by direct communication with an adverse party. *American Bar Association Committee on Professional Ethics and Grievances, Formal Op. 75* (1932). The Opinion held that a lawyer must attempt to restrain the lawyer's client from contacting the opposing party. In 1962, the ABA stated that *Formal Op. 75* applies even if the opposing parties are husband and wife in non-litigated matters. *American Bar Association Informal Op. 524* (1962). However, in 1984, the American Bar Association withdrew these opinions. *American Bar Association Formal Op. 84-350*.

In 1992, the American Bar Association considered the issue of whether a lawyer could advise his or her client to contact an adverse party directly regarding settlement matters, especially where it is

suspected that a settlement offer made through the opposing party's lawyer has not been transmitted to the opposing party. *American Bar Association Formal Op. 92-362* (1992). The Opinion specifically stated that, while a lawyer may not make direct contacts with an opposing party, the client is not subject to the same restrictions. Indeed, the Opinion suggested that there are circumstances in which a lawyer is required to advise his or her client to make direct contact with the adverse party. However, the Opinion left open the broader question of the circumstances under which a lawyer may or may not advise a client to contact the adverse party.

California Formal Op. 1993-131 took a more cautious position. It stated that a lawyer may counsel a client concerning direct communication with an opposing party but may not initiate the suggestion that the client do so. Furthermore, the lawyer may not suggest the content of the communication by "scripting" it.

Some have taken a contrary view and interpreted Rule 8.4(a), or similar Rules, to mean that a lawyer may not encourage the client to communicate directly with the other client on the basis that this would constitute violating an ethical rule through the acts of another. See, for example, *Formal Op. 1991-2 of the Committee on Professional & Judicial Ethics of the Association of the Bar of the City of New York*, 7 Law.Man. Prof. Conduct 189 (1991).

Additional authorities discussing the issue include Geoffrey C. Hazard, Jr. and W. William Hodes, *The Law of Lawyering* 2d (1996) and Charles W. Wolfram, *Modern Legal Ethics* (1986).

CONCLUSION

Rule 4.2 prohibits a lawyer from contacting the adverse party. It does not prohibit a client from doing so. However, client contacts may not be used to circumvent the rule. Here, there is no

indication of any such attempt. Therefore, it is the Opinion of the Committee that the Requesting Attorney does not have a duty to demand that the client stop the contacts with the adverse party. It follows that the Requesting Attorney does not have any duty to withdraw from representing the client if the client persists in such contacts.

This opinion is provided pursuant to Rule 1.2(B), *N.D.R. Lawyer Discipline*, which states:

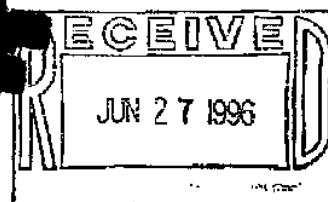
A lawyer who acts with good faith and reasonable reliance on a written opinion or advisory letter of the ethics committee of the association is not subject to sanction for violation of the North Dakota Rules of Professional Conduct as to the conduct that is the subject of the opinion or advisory letter.

This opinion was drafted by Jay Fiedler and was approved by the Committee on August 7, 1996.



Alice R. Senechal, Chair

96-10



June 21, 1996

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RE: Ethics Opinion Request

Dear Ms. Senechal:

In view of your latest correspondence, I have revised my question as follows:

If my client is making direct contacts with an opposing party who is represented by another lawyer in a lawsuit, and these contacts are about matters related to the lawsuit, and I did not know about them until the opposing lawyer called me, do I have a duty, under the Rules of Professional Conduct 4.2 and 8.4(a), to demand that my client stop the contacts? If my client does not stop the contacts, do I have any duty to withdraw from representing my client in the matter, or, if I have a duty to tell my client not to make the contacts, is communicating that to the client sufficient?

Thank you for your consideration.

Sincerely,

[Redacted signature block]

[Redacted text]