

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

COPY

OPINION NO. 96-12

The Ethics Committee received a request for an opinion regarding the following:

In a civil action in which the party plaintiff is suing a county for negligence, does Rule 4.2 prohibit contact by the plaintiff's lawyer with the defendant's former county officials?

The requesting attorney does not describe or define the title or responsibility which the former county official(s) held. The requesting attorney would like to question the defendant's former county officials with regard to the following:

1. Facts, statements or reports that were provided to the county official.
2. What type of action was taken by the county concerning those facts or reports, etc.
3. What, if anything, that official may have said to any other county official or employee of the county which are ultimate issues in the case of negligence, but were not issues in any type of case or litigation at the time they were made.

Rule 4.2 of the North Dakota Rules of Professional Conduct provides that:

In representing a client, a lawyer shall not communicate about the subject matter 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.

In State Bar Association Of North Dakota Ethics Committee Opinion No. 92-13, it was the opinion of this committee 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." In that Opinion, this committee noted that neither Rule 4.2 nor its comment provide a basis for extending its coverage to former employees of a party. This committee was therefore unwilling to expand the literal scope of Rule 4.2 to include former corporate employees. See Opinion No. 92-13.

The comment to Rule 4.2 makes it clear that governmental agencies are included with the Rule's meaning of "party."¹ See SBAND Ethics Committee Opinion No. 95-06 (Rule 4.2 applies to whether attorney representing workers compensation claimant can contact employees of Workers Compensation Bureau). Thus, an opposing government agency, such as a county, should be treated the same as an opposing corporate party when determining what communications are prohibited by Rule 4.2. E.g. SBAND Ethics Committee Opinion NO. 95-06; ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT, Communications With Unrepresented Person at 71.305 (1995). See generally Frey v. Department of Health and Human Servs., 106 F.R.D. 32 (E.D.N.Y. 1985) (Court denied government agency's motion for protective order precluding plaintiff's counsel from communicating with government agency's employees); New York State Ass'n for Retarded Children v. Carey, 706 F.2d 956 (2d Cir.), cert. denied., 464 U.S. 915 (1983) (court held that under DR 7-104 Plaintiffs' counsel could interview state mental institutions's employees outside presence of defendant's counsel); Vega v. Bloomsburgh, 427 F. Supp. 593 (D. Mass. 1977) (plaintiffs' attorneys not prohibited under DR 7-104 from communicating with government agency's employees).²

Because Rule 4.2, in its present form, does not prohibit ex parte communications with unrepresented, former employees of an opposing corporate party, it follows that it does not prohibit ex parte communications with unrepresented, former county officials of an opposing government agency.

¹. In discussing what communications are not prohibited by Rule 4.2, the Comment explains that "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." (emphasis added).

². Case law interpreting DR 7-104(A) of the predecessor Model Code is persuasive because DR 7-104(a) is substantially similar to Model Rule 4.2. See ABA Annotated Model Rules of Professional Conduct, "Model Code Comparison." Specifically, DR 7-104(A) provides as follows:

During the course of his [or her] representation of a client a lawyer shall not:

- (1) Communicate or cause another to communicate on the subject of the representation with a party he [or she] knows to be represented by a lawyer in that matter unless he [or she] has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The Committee declines to render an opinion on whether the categories of questions posed by the requesting attorney (as outlined above) are proper under the ethical rules. Whether questions to an unrepresented, former county official of a represented, opposing government agency are appropriate requires an application of all the ethical rules, not just Rule 4.2, to the specific questions and factual circumstances. For example, the subject matter of a discussion with a former county official or former employee may still be protected by the attorney-client privilege. See, e.g., Porter v. Arco Metals Co., 642 F. Supp. 1116 (D. Mont. 1986) (ex parte contact with former employees proper so long as not concerning privileged matter). In S.B.A.N.D. Ethics Opinion No. 92-13, supra., this Committee cautioned "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 compliance with Rule 4.3, the Committee would caution an attorney when contacting unrepresented, former county officials 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 county is the adverse party.

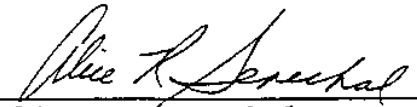
CONCLUSION

Rule 4.2, in its present form, does not prohibit ex parte communications with unrepresented, former county officials of an opposing government agency. Whether questions to an unrepresented, former county official of a represented, opposing government agency are appropriate requires an application of all the ethical rules, not just Rule 4.2, to the specific questions and factual circumstances.

This opinion is provided pursuant to Rule 1.2(B) of the North Dakota Rules for 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 Mark R. Hanson and was unanimously approved by the Ethics Committee following its meeting on September 19, 1996.

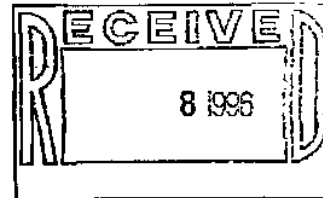


Alice R. Senechal
Chairperson

[REDACTED]

August 6, 1996

Alice R. Senechal
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Dear Ms. Senechal:

I very much appreciate the State Bar Association having sent Opinion No. 92-13. Such is helpful and a very good starting point for my question.

My specific case may or may not have a slight twist, depending on how the matter is viewed by the Committee. The exact question to be asked needs to be taken into the context of a party plaintiff suing a county for negligence. While it appears that former employees are not subject to the prohibition contained in Rule 4.2, the question remains whether or not a former county official would be able to be questioned about the following:

1. Facts, statements or reports that were provided to the county official.
2. What type of action was taken by the county concerning those facts or reports, etc.
3. What, if anything, that official may have said to any other county official or employee of the county which are ultimate issues in the case of negligence, but were not issues in any type of case or litigation at the time they were made.

The overall context of Rule 4.2 appears to indicate that the intent is to deal with current employees and officials for they are truly acting as the county or corporation in a particular case. Thus, once they're represented by an attorney, it stands that they cannot be interviewed. However, there appears to be no prohibition against former

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officials for they can no longer set policies of the county, their acts at the time of the interview cannot be imputed to the county, and they are merely being interviewed about facts, their observations or their opinions which are after their service to the county.

I think the Opinion 92-13 is an excellent starting point. It appears to allow me the authority to go ahead and interview those former county officials. Clearly, Opinion 92-13 allows me to interview the former employees and the only issue to resolve is whether or not it deals with county officials. If it is the opinion of the Committee that such opinion also applies to county officials, please advise and we will act accordingly.

Sincerely,

