

**STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE
OPINION NUMBER 00-05
June 27, 2000**

INTRODUCTION

The Ethics Committee has received a request dated May 25, 2000 for an opinion regarding communications with persons represented by counsel, Rule 4.2N.D.R. Prof. Conduct. The question is: Following a written directive, from a prosecutor to defense attorneys, stating that they are not to discuss pending cases with police officers unless approved by the prosecutor's office, whether subsequent discussions by defense counsel with city police officers and employees of the police department without appropriate approval by the appropriate prosecutor's office is a violation of Rule 4.2 N.D.R. Prof. Conduct.

FACTS

The requesting attorneys received a letter from the local assistant city attorney who is the primary prosecutor for violations of ordinances and statutes in municipal court. The letter states:

“Police Department has asked me to advise all defense attorneys in the area that any negotiations or discussions regarding the subject matter of any pending cases involving the Police Department must be done with the appropriate prosecutor's office.

Further, I have been asked to advise you that police officers and employees of Police Department have been advised not to discuss pending cases with defense counsel, unless such discussions are approved by the appropriate prosecutor's office. Any discussions by counsel in violation of this directive may be viewed as violation of Rule 4.2 N.D.R. Prof. Conduct.”

The requesting attorneys are primarily concerned about the threat of a claimed violation of Rule 4.2 N.D.R. Prof. Conduct, should they speak to an officer about a case during the course of an investigation.

DISCUSSION

Rule 4.2 N.D.R. Prof Conduct states:

“Communication with person represented by counsel: In representing a client, a lawyer shall not communicate about the subject of the

representation with a person 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.”

The comments following the rule contains the following language:

“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.”

The first consideration is to review the parties in a case involving the violation of an ordinance or criminal statute, brought by a government agency whose “law” has been broken. There is usually a victim. The enforcement division of the government agency, and its employees investigates the crime. The investigators usually become witnesses in the case. There is the defendant, the person accused of violating the “law”.

The government agency is typically, represented by the prosecutor hired by the governmental agency. The defendant is typically, represented by defense counsel. The law enforcement officers and employees and the victim typically are not directly or personally represented by anyone.

A second consideration is whether there are any rules, which distinguish a civil matter versus a criminal matter as it relates to the rules of conduct. Generally, there is no distinction. The exception is Rule 3.8 N.D.R. Prof. Conduct. It deals with the special responsibilities of a prosecutor. The rule provides that in a criminal case the prosecutor shall:

- (d) Disclose to the defense at the earliest practical time all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense, and, in connection with sentencing, disclosed to the defense and the tribunal, all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and...

Corporations and governmental agencies generally are treated the same in application of Rule 4.2 N.D.R. Prof. Conduct. Representation of a corporation does not automatically include the representation of its employees. Rule 1.13 N.D.R. Prof. Conduct. The lawyer employed or retained to represent a governmental entity represents the governmental entity as distinct from its officials or employees. Rule 1.18(a) N.D.R. Prof. Conduct. In applying Rule 4.2 to corporations it has been determined that it is improper for an attorney to have ex-parte communications with persons of the represented corporations having a managerial responsibility with the corporation whose

acts or omissions could be imputed to the corporation. The rule does not apply to employees whose acts would not bind the organization. SBAND Ethics Committee Opinions 95-05 (March 16, 1995) and No 95-06 (September 26, 1995).

Opinion 95-06 deals with facts where attorneys were contacting employees of the Worker's Compensation Bureau relating to matters, which were in litigation. The bureau had advised the requesting lawyers that any direct contact with bureau personnel, other than through the bureau's retained lawyer, would be considered a violation of Rule 4.2 N.D.R. Prof. Conduct. The Opinion contains the following language:

“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 the purpose of criminal or civil liability.”

To narrowly interpret this opinion would suggest that after notification by the prosecutor that the attorneys not speak to police officers or employees of the department, subsequent communication with the officers would be a violation of Rule 4.2 N.D.R. Prof. Conduct.

The committee of legal ethics and professional responsibility of the Pennsylvania Bar Association addressed a situation analogous to the facts in this case in ethics Inquiry 98-134. The question presented was:

“Whether you violated any ethical rules by attempting to speak with witnesses for the commonwealth prior to a preliminary hearing in a criminal matter.”

In that situation the defense attorney attempted to talk with state witnesses. He was interrupted by the attorney for the state who informed him, that he felt that he had no right to talk with these persons, and that if he persisted, the prosecutor would file an ethical complaint against him. The prosecutor was adamant in his position.

The opinion refers to their Rule 3.8, which is the same as our Rule 3.8 N.D.R. Prof. Conduct addressing the special responsibility of the prosecutor as cited above. The opinion further states:

“One of the clearest propositions in Pennsylvania Criminal Practice is that the attorney for the commonwealth, in his or her role as such has a much greater responsibility than simply as an attorney for a private party. (Citation Omitted) It is likewise well established that a prosecutor is not the attorney for the victim, or for witnesses. While the prosecutor, under Pennsylvania Statutory Provisions, has certain special responsibilities to crime victims, (Citation Omitted), these are not identical with responsibilities to a client, nor is the victim a client under any definition of that term in ethical authorities.

Accordingly, it is improper for an attorney for the commonwealth to tell a victim not to speak with the defense attorney, under Pa. R. P. C. 3.4, let alone attempt to interfere with your attempt to interview other witnesses. All the authorities this writer has consulted have been unanimous in stating that, as a general rule, it is completely improper for a prosecutor to interfere with defense counsel’s access to relevant information from witnesses, including victims. “Proceedings on either constitutional, statutory, ethical, or other or unspecified rationales, the courts in the reported decision have always invariably recognized a defense right to interrogate witnesses prior to trial without interference by the prosecutor.” Annot. “Interference by prosecution with defense counsels pretrial interrogation of witnesses.” 90 A.L.R. 3d 1231, 1237 (Footnotes Omitted).

Other authorities support this view of the issue, for example, the respected treatise The Law of Lawyering states that it is improper for a prosecutor to request a police officer and a witness to refuse to talk to a defense attorney. Hazard & Hodes, The Law of Lawyering, Section 3.4: 705. Similarly, the ABA/BNA Lawyer’s Manual on Professional Conduct, states that the prosecutors may not discourage witnesses from speaking to defense counsel. ABA/BNA Lawyer’s Manual on Professional Conduct, 61: 614, 715-716. This conclusion was recently supported by noted ethics commentator and Pennsylvania attorney, Samuel Stretton, who stated in a recent column that, “[i]t is absolutely clear without any gray area that a witness can not be told or instructed not to speak to the lawyer for the defendant.” Stretton, “Ethics Forum”, Pennsylvania Law Weekly, December 7, 1998, p 25.

It is important to reiterate that if an attorney talks to such a witness that attorney must always be cognizant of Rule 4.3 N.D.R. Prof. Conduct, and clearly identify himself and his involvement in the case.

SUMMARY

There are some distinctions between a civil and criminal type action. The prosecutor in a criminal action is subject to the special provisions of Rule 3.8 N.D.R. Prof. Conduct. The tone of that rule is set forth in the comments which state:

“Prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations

to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. This responsibility also obligates the prosecutor to promptly make available to the defense information, which is known, material and favorable to the defendant's position. Discovery of such information by the prosecutor confers no property right in the same upon the prosecutor; rather, in the interest of seeing that the truth is ascertained and all proceedings justly determined, the defense should be accorded ready access to any such information."

Police officers are witnesses in a criminal case and not a persons represented by counsel. Therefore discussions with police officers would not be a violation of Rule 4.2. The comments of Rule 4.2 suggest that governmental officials of a representative agency may be contacted. Representation of a governmental entity is distinct from representation of its officials or employees.

CONCLUSION

It is the opinion of the committee that the attorneys requesting the opinion, would not violate Rule 4.2N.D.R. Prof. Conduct if they should speak to a police officer about a case, in which they are representing a defendant, notwithstanding the prosecutor's written notice prohibiting such ex-parte contact provided, the defense attorney properly identifies himself and his purpose to the police officer as required by Rule 4.3 N.D.R. Prof. Conduct, and that attorney does not try to improperly influence the witness as prohibited by Rule 3.4 N.D.R. Prof. Conduct.

This opinion is provided pursuant to Rule 1.2 (B) of the North Dakota Rules for Lawyer Discipline. The 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 Gerald D. Galloway and was unanimously approved by the Ethics Committee on June 27, 2000.

Mark Hansen, Chairman