NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 652 - 8/27/93 (20-93)

Topic: Communications with adverse party; governmental entity.

Digest: Attorney may communicate with officials or employees of governmental entity that is represented by counsel in connection with a matter provided (a) the officials or employees lack the power to bind the entity; (b) the communication is directed to an attorney representing the entity in connection with the subject matter of the communication; or (c) the attorney concludes that he or she is authorized by law to make the communication.

Code: DR 7-104(A)(1); DR9-101(B)(1); EC 7-18.

QUESTION

Where a governmental entity is represented by counsel in a matter, may an attorney communicate with officials or employees of the governmental entity other than the appointed counsel?

OPINION

A company has been cited by the local regional office of a State Agency for its failure to file applications for certain operating permits required by law. The inquirer represents the company in the administrative enforcement proceedings commenced by the Agency as well as in connection with the company's current application for a permit for future operations.

The Agency recently proposed regulations that could, if adopted, affect the penalties for noncompliance with the provisions the company was charged with having violated. Proposed transitional regulations, if adopted, would enhance retroactively the

penalty the company now faces in the proceeding for its past violations. The inquirer believes that it is in the interests of the company that the proposed regulations not be adopted, and the inquirer has been directed by the client to take appropriate steps to oppose their adoption. In that regard, the inquirer contacted technical specialists and attorneys for the Agency to discuss the proposed regulations.

The government attorney handling the enforcement proceeding and the permit application process for the Agency has objected to the inquirer's communications with Agency personnel regarding the regulations on the ground that DR 7-104(A)(1) prohibits any contact with represented parties without the attorney's consent. The attorney has directed the inquirer to refrain from all future communications with Agency officials or employees without the attorney's consent.

This inquiry is governed by DR 7-104(A)(1), which provides:

> During the course of the representation of a client a lawyer shall not … [c]ommunicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

See also EC 7-18. As this Committee explained in N.Y. State 463 (1977):

> Where a person is represented by counsel, there is an absolute proscription which serves to bar any and all communications relating to the matter for which that person has retained counsel. In such instances, whether the communication amounts to the giving of legal advice or consists of a simple question is irrelevant. If a person is represented by counsel, absent such counsel's consent, the ethics of our profession require that no lawyer other than his own communicate with him on the subject of the representation and all forms of communication are proscribed.

The purpose of this well-established and respected rule is to preserve the proper functioning of the attorney-client relationship and to shield the adverse party from improper approaches. N.Y. State 607 (1990); see also N.Y. State 650 (1993).

Where the adverse party is a governmental entity, however, questions arise as to the proper scope of the prohibition contained in DR 7-104(A)(1), including issues raised by legal principles such as the constitutional right of citizens to petition their government, which are beyond the power of this Committee to consider. In addition, the decision of the New York Court of Appeals in *Niesig v. Team I*, 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990), which restricted the application of DR 7-104(A)(1) where the party sought to be contacted is an entity rather than an individual, must be taken into account in assessing the scope of the rule.

In the circumstances presented here, the inquirer plainly intends to communicate with the Agency during the course of the representation of a client, thereby satisfying two of the elements of DR 7-104(A)(1). The following issues remain, however:

(1) Are the individuals with whom the inquirer seeks to communicate "parties" within the meaning of the rule?

(2) Is the communication with respect to the proposed regulations a communication "on the subject of the representation" and, relatedly, is the Agency represented "in connection with" the proposed regulations?

(3) If the inquirer communicated with the Agency in a manner that would otherwise violate DR 7-104(A)(1), would the communication nevertheless be permitted under the "authorized by law" exception to the rule?

We answer these questions seriatim.

1. Governmental "Parties"

Few ethical questions have sparked as much debate in recent years as the application of DR 7-104(A)(1), which speaks only in terms of "parties,"[1] to corporations and other entities. In New York, the governing principle is that set forth in the *Niesig* decision:

> The test that best balances the competing interests, and incorporates the most desirable elements of the [various] approaches, is one that defines "party" to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel. All other employees may be interviewed informally.

76 N.Y.2d at 376, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498. This Committee has ruled that "a governmental unit has the same rights and responsibilities in a controversy as any other corporation or individual." N.Y. State 404 (1975); N.Y. State 160 (1970). It follows, then, that DR 7-104(A)(1), regardless of any other limitations on its scope, prohibits only communications with government officials who have the authority, individually or as part of a larger body, to bind the government or to settle a litigable matter, or whose act or omission gave rise to the matter in controversy. *See* N.Y. City 1991-4; Ohio Op. 92-7 (1992), indexed in ABA/BNA Lawyer's Manual on Professional Conduct at 1001:6856. Whether the person with whom the attorney wants to

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1 This Committee previously has opined that the use of the term "party" in DR 7-104(A)(1) does not limit the application of that term to litigants in pending proceedings. N.Y. State 607 (1990) .

communicate is a party is, therefore, a question of law that the inquirer must resolve before making the contemplated communications.

2. Representation in the Matter

As a technical matter, the government is always represented by counsel. However, "if a governmental party were always considered to be represented by counsel for purposes of [DR 7-104(A)(1)], the free exchange of information between the public and the government would be greatly inhibited." Ohio Op. 92-7. There is no doubt that, in the circumstances presented here, the Agency is represented by counsel in connection with the enforcement proceeding and the permit application. Analytically, then, it must be determined whether either is the same "matter" as the process of promulgating regulations and, if not, whether the Agency is represented by counsel in connection with *that* matter.

DR 9-101(B)(1), which prohibits former government lawyers from representing private clients in connection with a "matter" in which the lawyer participated while a public officer or employee provides some guidance. Presumably, something that is a governmental "matter" for purposes of DR 9-101(B)(1) should also be a governmental "matter" for purposes of DR 7-104(A)(1), as both rules deal with the protections afforded governmental clients by the attorney-client relationship. In general, drafting regulations will not be the same "matter" as an enforcement proceeding even if one client is affected by both:

> [W]ork as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101(B) from subsequent private employment involving the same regulations, procedures, or points of law; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties.

ABA Op. 342 (1975).

It is true that, here, there is no temporal dislocation as there must be for DR 9-101(B)(1) to be operative; the rulemaking "matter" is proceeding contemporaneously with the enforcement and permit application "matters." In addition, a "particular situation and specific parties" are involved here, although only because the inquirer is conveying views in the rulemaking process that are intended to further his client's interests. On balance, however, we conclude that the fact that the Agency has designated counsel in the enforcement and permit application proceedings, standing alone, does not mean that the Agency is represented in all other matters relating to the inquirer's client, or in which the client has an interest, including the rulemaking process.

Importantly, the inquirer wishes to contact individual technical specialists and attorneys for the Agency with respect to the regulations. Presumably, the inquirer

wishes to speak with attorneys involved in the process of promulgating the regulations in question. Regardless of whether these attorneys have been designated to "represent" the Agency in the rulemaking process, the inquirer may contact them consistent with the inquirer's obligations under DR 7-104(A)(1). Correspondingly, the inquirer is free to communicate with the technical specialists unless the inquirer knows that the Agency has designated counsel in the rulemaking process, in which case the inquirer may still contact the specialists if the inquirer concludes that they are not "parties," as defined above.

We note that it may not always be obvious to an outside observer that a governmental attorney has been brought into a matter. Accordingly, the attorney seeking to contact a governmental entity in a matter involving potential adversity should identify himself or herself and the purpose of the communication so that the government employee or official would have the opportunity to inform the attorney that the government has designated counsel in connection with the matter. *See* Ohio Op. 92-7; Note, *DR 7104 of the Code of Professional Responsibility Applied to the Government "Party,"* 61 Minn. L. Rev. 1007, 1032 (1977).

3. "Authorized by Law"

In light of the foregoing, we do not have to consider whether the inquirer nevertheless could communicate with the Agency by virtue of the "authorized by law" exception in DR 7-104(A)(1), an issue this Committee has not previously addressed.[2]

CONCLUSION

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[2] In N.Y. State 404 (1975), we opined that a lawyer representing a petitioner before a board of education could contact members of the board who voted against the decision being contested without first obtaining the consent of the lawyer representing the board. The question presented, however, was "whether an individual member of a public body must be considered an adverse party in regard to a decision he opposed." The Committee stated:

> The overriding public interest compels that an opportunity be afforded to the public and their authorized representatives to obtain the views of, and pertinent facts from, public officials representing them. Minority members of a public body should not, for purposes of DR 7-104(A)(1), be considered adverse parties to their constituents whom they were selected to represent.
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> Thus DR 7-104(A)(1) is read as implicitly creating a limited exception to its otherwise broad prohibitions because a public body is involved and is not intended to extend beyond such public entities.

The opinion did not hold that the inquirer was "authorized by law" to contact the board members, but only that a member who had voted in favor of the inquirer's client could not be conisdered "adverse" for purposes of DR 7-104(A)(1).

The inquirer may communicate with Agency officials and employees in connection with the rule-making process provided those communications are directed to the attorneys, if any, who have been designated by the Agency to represent it in that matter, or to employees who lack the authority to bind the government.