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New York State Bar Association
Committee on Professional Ethics

Opinion 1080 (12/22/15)

Topic: Communication with public officials

Digest: A lawyer who has been communicating with counsel for a municipality on a matter may not thereafter communicate with a public official with respect to the matter, even if the public official requests such communication, unless the lawyer obtains the prior consent of the municipality's counsel.

Rules: 4.2(a)

FACTS

1. The inquiring lawyer has represented various clients in the past regarding contested real property assessments. On those prior contested matters the lawyer communicated directly with the municipal assessor (the public official responsible for real property assessments) up to the point at which the attorney for the municipality became involved.

2. Now the inquiring attorney is handling a similar matter involving a contested real property assessment. Because the lawyer and the public official had substantial differences in the similar prior matters, the lawyer in the current matter decided to begin negotiations by communicating initially with the attorney for the municipality. Counsel for the municipality thereafter has made an appearance in the matter. None of the communications involved or will involve matters of policy relating to real property assessments. The assessor has the authority to bind the municipality, including the authority to settle the matter.

3. After the lawyer began the matter by communicating with the attorney for the municipality, the public official contacted the lawyer directly and requested the lawyer to communicate directly with him (the public official) on administrative matters even though the lawyer had already communicated with the attorney for the municipality.

QUESTION

4. Absent the prior consent of an attorney representing a municipality in a contested real property appraisal, may a lawyer communicate with a public official who is represented by counsel for the municipality once he has communicated about the matter with the municipality's counsel even though the public official has requested direct communication?

OPINION

5. Rule 4.2(a) of the Rules of Professional Conduct (the "Rules") prohibits a lawyer from communicating "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 prior consent of the other lawyer or is authorized to do so by law." This is commonly known as the "no-contact" rule. Rule 4.2(a) is substantially the same as former DR 7-104(A)(1) of the Code of Professional Responsibility.

6. This Committee first dealt with communications with public officials in N.Y. State 160 (1970). Applying DR 7-104(A)(1), we said that that a "governmental unit has the same rights and responsibilities in a controversy as any other corporation or individual." We concluded that "once there is an indication that counsel has been designated by a party, whether a governmental unit or otherwise, with regard to a particular matter, all communications concerning the matter must thereafter be made with the designated counsel, except as provided by law."

7. This apparently unambiguous interpretation of DR 7-104(A)(1) received some gloss in N.Y. State 404 (1975). There, the question was whether the lawyer for the petitioner before a board of education that was split on the matter being reviewed could contact the minority members of the board without the consent of the board's attorney. We noted that the crucial issue was whether an individual member of a public body must be considered an adverse party in connection with a decision he or she opposed. We concluded that they should not, and stated that the "overriding public interest compels that an opportunity be afforded to the public and their authorized representatives to obtain views of, and pertinent facts from, public officials representing them." Absent consent from opposing counsel, however, Opinion 404 said that "communications with members of a public body in an adversary proceeding should be made only in instances where the public official has indicated his or her desire to speak to opposing counsel."

8. Further gloss was added to our interpretation of the no-contact rule in N.Y. State 812 (2007). There, a developer had applied to a planning board for approval of a new shopping center. The planning board had power to issue binding determinations. The developer's attorney asked if he could communicate with members of the planning board about the shopping center, even though the planning board's counsel had not consented to such communication. We said that the no-contact rule prohibited the developer's attorney from communicating with planning board members unless either (1) the planning board members were not "parties" within the meaning of the no-contact rule or (2) the communication was otherwise "authorized by law."

9. As to whether the planning board members were "parties" we applied the standard set out in *Niesig v. Team I,* 76 N.Y. 2d 363, 374-75 (1990), which had interpreted the no-contact rule in the context of communications between a lawyer and employees of an opposing corporation. Judge Kaye, writing for the majority said:

> The test that best balances the competing interests, and incorporates the most desirable elements of the other approaches, is the 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.

10. Based on *Niesig*, we concluded in N.Y. State 812 that the no-contact rule prohibits communications with government officials who have authority, individually or as part of a larger body, to bind the government or to settle a litigable matter, or whose acts or omissions gave rise to the matter in controversy. Because the planning board in N.Y. State 812 had the power to issue binding decisions, we concluded that members of the planning board were parties under the no-contact rule.

11. As to whether the communications were "authorized by law," N.Y. State 812 explored the First Amendment right to petition the government. We adopted the approach taken in ABA 97-408 (1997), which had concluded that the "authorized by law" exception permitted counsel to engage in unconsented communications with government officials despite the no-contact rule if three conditions were satisfied: (1) the official has the authority to take or recommend action in the controversy; (2) the sole purpose of the communication is to address a policy issue; and (3) the lawyer seeking to communicate with the government official gives advance notice of the proposed communication to the lawyer representing the government so that the government lawyer has the opportunity to advise his or her client with respect to the communication, including whether to entertain it the communication at all. Rule 4.2, Comment [5] also addresses this issue. For a thorough discussion of ethics opinions relating to communications with public officials under Rule 4.2(a), see Roy D. Simon, Simon's *New York Rules of Profession Conduct Annotated* 1228-1233 (Thomson Reuters 2015 ed.).

12. Under the facts of N.Y. State 812, we concluded that that the proposed communication fell within the protection of the First Amendment and therefore was permitted.

13. We now apply Rule 4.2(a) and the opinions discussed above to the facts raised in this inquiry.

14. N.Y. State 160 teaches that "once there is an indication that counsel has been designated by a party, whether a governmental unit or otherwise, with regard to a particular matter, all communications concerning the matter must thereafter be made with the designated counsel except as provided by law." Here, counsel for the municipality has been designated by the municipality, and has filed an appearance in the matter. Consequently, all further communications must be with the municipality's counsel (or with the consent of such counsel) except as authorized by law. It does not matter whether the first contact with the government's attorney was initiated by the adverse party's attorney or whether the government official has expressly requested the adverse party to contact him directly.

15. N.Y. State 404 generally creates a narrow exception to the "prior consent" element of the no-contact rule where a public official has indicated his desire to have the lawyer communicate with him directly, and the public official is not an "adverse party" in the matter. But that exception does not apply here as the municipal assessor is an adverse party in the matter. The lawyer for the real property owner must therefore obtain prior consent from the municipality's lawyer before communicating directly with the assessor. In the absence of such consent the

lawyer may not communicate with the assessor even though the assessor requests such communication. As noted in Rule 4.2, Comment [2], the no-contact rule "applies even though the represented party initiates or consents to the communication."

16. Because the matter here does not involve municipal policy, N.Y. State 812 does not permit the communications at issue. The real property owner is not attempting to exercise a First Amendment right to petition the government. He is attempting to challenge the assessment of his real property as determined by the municipal assessor and perhaps to settle the matter directly with the assessor who has authority to bind the municipality. N.Y. State 812's three prong test (reflecting the exception for First Amendment rights discussed in paragraph 11 above) is not met here because, even if the property owner's attorney gives advance notice to the municipality's attorney, the "sole purpose of the communication" would not be to address a policy matter.

CONCLUSION

17. A lawyer who has been communicating with counsel for a municipality on a matter not involving policy may not thereafter communicate with a public official with respect to the matter, even if the public official requests such communication, unless counsel for the municipality gives prior consent.

(30-15)