

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 88-32

Issued December 16, 1988

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

SYLLABUS: Although DR 7-104(A)(1) states that an attorney shall not communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter, certain independent communications are not considered in violation of this rule. However, due to the difficulty in determining which communications are deemed independent, it may be in the attorney's best interest to refrain from conversation which even remotely touches upon the subject matter of the representation.

OPINION: We have before us your request for our opinion on the following question: at a real estate closing, is it a violation of DR 7-104(A)(1) for the purchaser's attorney to initiate or take part in discussions regarding matters of the sale, prior to the arrival of the seller's attorney?

DR 7-104(A)(1) states that,

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

This is further enforced by both Ethical Consideration 7-18 and ABA Model Rule 4.2 in substantially similar language.

The purpose of this blanket prohibition against communication between an attorney and an adverse party was to shield the adverse party from improper advances. Annotated Code of Professional Responsibility, at 332 (1979). Model Rule 4.2, although not binding in Ohio, is intended to protect the adverse party from the "superior knowledge and skill of the opposing lawyer." Annotated Model Rules of Professional Conduct, at 268 (1984).

The restriction on a lawyer's communication to a party represented by another lawyer, which is imposed by DR 7-104(A)(1), pertains to the specific subject matter of the representation. Annotated Code of Professional Responsibility DR 7-104(A)(1), at 333 (1979). Furthermore, Rule 4.2 of the Model Rules does not prohibit a lawyer from communicating with a party concerning matters outside the representation. Annotated Model Rules of Professional Conduct Rule 4.2, at 268 (1984).

Based on the foregoing, it is our opinion that communications between a lawyer and an adverse party, represented by a lawyer who is not present, can only be deemed violative of DR 7-104(A)(1) on a case-by-case basis. As it may be difficult to determine if a communication concerns a subject matter unrelated to the representation, and would therefore not be in violation of the rule, it may be best for the lawyer present to refrain from any conversation even remotely related to the subject matter of the representation.

This is an informal, non-binding advisory opinion based upon the facts presented and limited to questions arising under the Code of Professional Responsibility.