

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 92-7

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Withdrawn by Adv. Op. 2022-03

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]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: The restraints in Disciplinary Rule 7-104 (A) (1) on ex parte communication with a party who is represented by legal counsel do apply to an attorney's communications with a government party represented by counsel in the matter. For purposes of the rule a government party is an employee, public official or public body with authority to bind the government, to settle a litigable matter, or whose act or omission gave rise to the matter. For purposes of the rule the restriction on communication begins once government counsel has been brought into the matter.

Disciplinary Rule 7-104 (A) (1) does not prohibit an attorney from speaking at a public meeting on behalf of an individual or a group of citizens, or on behalf of himself or herself; however, the attorney should identify himself or herself, particularly when the communication involves a disputed matter in which the attorney is appearing before a government party who has consulted with counsel regarding the matter.

A government department or agency or its counsel should not give blanket instructions to all its employees not to communicate with counsel representing an adverse party unless the government's attorney is present.

When the government is a party represented by counsel, it would be improper under Disciplinary Rule 7-104 (A) (1) to send settlement offers or other communication directly to a government department or agency even if the original is served on the government's attorney.

OPINION: This opinion addresses questions regarding ethical restraints on an attorney's ex parte communication with a government party.

1. Do the restraints on ex parte communications in Disciplinary Rule 7-104 (A) (1) apply to an attorney's communications with a government party?
2. If Disciplinary Rule 7-104 (A) (1) does place restraints on an attorney's ex parte communications with a government party, would an attorney's communications to public officials at public meetings be considered communications authorized by law and excepted from the rule's prohibition? Specifically, would an attorney representing a client with an interest adverse to the county commissioners be permitted to communicate the client's position to the county commissioners at a public meeting without the prosecuting attorney being present?
3. In order to protect the interests of the government, may a government department, agency, or its counsel issue instructions to its employees not to communicate with an attorney representing an adverse party unless the government's attorney is present? Alternatively, may the government body or its counsel advise employees that they need not consent to communication with counsel representing an adverse party without the presence of the government's attorney?
4. May opposing counsel send a copy of a settlement offer or other communication directly to a government department or agency even if the original is served on the government's attorney?

General

Disciplinary Rule 7-104 (A) (1) of the Code of Professional Responsibility places ethical restraints on a lawyer's communication with a party known to be represented by a lawyer. The rule prohibits ex parte contacts with a party without the consent of counsel unless the communication is authorized by law.

DR 7-104(A) During the course of his [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 [she] knows to be represented by a lawyer in that matter unless he [she] has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The underlying purpose of Disciplinary Rule 7-104 is that "[t]he legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel." EC 7-18. Disciplinary Rule 7-104 serves a dual function of protecting an opposing counsel's access to witnesses while shielding access to those who should be considered parties.

Question 1

There is nothing within the Code of Professional Responsibility to suggest that an attorney's communications with a government party are exempt from the ethical restraints imposed by Disciplinary Rule 7-104. In fact, both commentary and case law indicate that an attorney's communications with a government party fall within the ambit of Disciplinary Rule 7-104 (A). A federal court, in an employment discrimination suit, applied Disciplinary Rule 7-104 to disqualify a plaintiff's attorney for communication with one of the defendants, the Assistant Chief of the University of Houston Campus Police, without seeking prior consent from defendant's counsel, the Attorney General's office. Shelton v. Hess, 599 F. Supp. 905, 911 (S.D. Tex. 1984). In commentary to the Model Code of Professional Responsibility there is discussion regarding identifying a party for purposes of DR 7-104 (A) (1) when the opposing side is a governmental entity. American Bar Foundation, Annotated Code of Professional Responsibility, 336 (1979) (Comment). Based on the above, it is the Board's opinion that the restraints of Disciplinary Rule 7-104 (A) (1) do apply to an attorney's ex parte communications with a government party.

Having concluded that the restraints of Disciplinary Rule 7-104 (A) (1) do apply to an attorney's ex parte communications with a government party, there remain several questions. First, it must be decided who within the government is considered a party for purposes of the rule. Second, it must be determined when a government party is considered represented by a lawyer in the matter for purposes of the rule. These determinations must be made with thoughtful consideration of the need for open communication between the public and the government and the need for fairness and efficiency in solving disputes.

A government party could be broadly defined so as to place restraints on ex parte communication with all government officials and employees. Or, party could be more narrowly defined so as to allow ex parte contacts with some employees. Both approaches have disadvantages. To restrict ex parte communications with all government employees and officials is impractical. It has the potential for chilling the free flow of information between the public and the government. It also hinders the opposing counsel's ability to gather evidence. On the other hand, a narrow definition of party, allowing ex parte contacts with some government officials and employees, increases the likelihood that the government attorney might need to rebut damaging assertions obtained from government employees by opposing counsel.

The broad approach has been rejected in both case law and advisory opinions. In Vega v. Bloomsburgh, a federal district court did not consider certain employees of defendant state officials to be parties to an action so as to preclude plaintiff's attorneys from speaking to employees without the presence of counsel. 427 F. Supp. 593, 595 (D. Mass. 1977). The court in rejecting the defendants' theory that the employees should be considered as parties to the litigation stated that

[t]here has been no showing, however, that the individual employees are represented by the Attorney General in this litigation, that their interests are adverse to those of the plaintiffs, or for that matter consistent with those of the defendants. Although the defendants might have some interest in being protected from the statements of their employees, this interest will be adequately served by the presence of the defendants' attorney during the formal stages of discovery. Moreover, the interest which they may have in their own protection is outweighed by the first amendment interests of their employees.

Id. at 595.

Ethics committees have also chosen the more narrow application of the rule. According to a Kentucky ethics committee, government counsel should be protected under the rule, but other considerations, including the policy of encouraging access to witnesses for purpose of uncovering evidence, go against allowing government lawyers to block all contact by opposing counsel. Kentucky Bar Ass'n Op. 332 (1988). Thus, the Kentucky committee advised that a lawyer representing a government office or department in litigation may not prevent opposing counsel from contacting all employees of the government office or department. Id. A New York committee advised that a lawyer representing a plaintiff in a suit against a government agency could interview, outside the presence of and without notice to the agency's counsel, prison guards who witnessed an incident, but the lawyer generally could not have ex parte communications with agency supervisory officials whose acts or omissions may be imputed to the agency for purposes of liability, nor with officials who have the authority to settle the dispute. Ass'n of the Bar of the City of New York, Formal Op. 1991-4 (1991). Id.

A narrow definition is preferable for several reasons. Defining all government officials and employees as parties would restrict access to communication with all government employees. It would also run counter to government obligations to promote public justice, to supply information to the public, and to be responsive to the public view's on how government should operate. See Note, DR 7-104 of the Code of Professional Responsibility Applied to the Government "Party", 61 Minnesota Law Review, 1007, 1023 (1977). Accordingly, this Board advises that for purposes of Disciplinary Rule 7-104 (A) (1), a government party is an employee, public official or public body with authority to bind the government to settle a litigable matter, or whose act or omission gave rise to the matter.

Once the government party is defined the next determination is when the party is considered "represented by a lawyer in that matter" for purposes of triggering the ethical restraints imposed by the rule. Technically, the government is always represented by counsel. However, if a government party were always considered to be represented by counsel for purposes of the rule, the free exchange of information between the public and the government would be greatly inhibited.

According to textual and historical notes, a tentative draft of Disciplinary Rule 7-104 contained a section [DR VII-4§(b)] that read "[a] public official or a public board, committee, agency, or other public body acting in an official capacity is not represented by a lawyer within the meaning of . . . [the rule] until counsel has been brought into the matter." American Bar Foundation, Annotated Code of Professional Responsibility, 332 (1979). This language was not adopted and its exclusion was not explained. Nevertheless, at least one ethics committee has taken this approach. See, New York State Bar Ass'n, Op. 160 (1970). Similarly, it has been suggested that "until the government's attorney has been contacted about a particular dispute, opposing counsel should be allowed to proceed as if the government were not a represented party." Note, DR 7-104 of the Code of Professional Responsibility Applied to the Government "Party", 61 Minnesota Law Review, 1007, 1031-32 (1977). This Board agrees. The Board advises that for purposes of Disciplinary Rule 7-104 (A) (1) a government party is considered represented by counsel once government counsel has been brought into the matter.

In conclusion to Question One, it is this Board's opinion that the Disciplinary Rule 7-104 (A) (1) prohibition on ex parte communication with a party who is represented by legal counsel does apply to an attorney's communications with a government party represented by counsel in the matter. For purposes of the rule a government party is an employee, public official or public body with authority to bind the government, to settle a litigable matter, or whose act or omission gave rise to the matter. For purposes of the rule the restriction on communication begins once government counsel has been brought into the matter. However, since it might not always be obvious to the opposing counsel whether or not a government attorney has been brought into the matter, the attorney should identify himself or herself and the purpose of the communication, so that the government employee, public official, or public body would have the opportunity to inform the attorney that the government's counsel has been brought into the matter. At the point when the attorney knows of the government's representation, the attorney would have the ethical duty to seek consent by opposing counsel in order to communicate with the government party on the matter.

Question Two

Within DR 7-104 (A) (1) there are two stated exceptions to the restrictions imposed on ex parte communications with a party known to be represented by counsel. Such communication can occur if the attorney has the consent of the lawyer representing such other party or is authorized by law to do so. The requester asks whether communications at public meetings are "authorized by law" and thus are excepted from the rule's prohibition.

Public meetings allow the free flow of information between citizens and their government. Thus, under Ohio law, meetings of public bodies are open to the public. See Ohio Rev. Code Ann. §121.22 (Baldwin 1991). Section 121.22 (C) states "[a]ll meetings of any public body are declared to be public meetings open to the public at all times." Public bodies are defined in Section 121.22 (B) (1) to mean "any board, commission, committee, or similar decision-making body of a state agency, institution, or authority, and any legislative authority or board, commission, committee, agency, authority, or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution." Section 121.22 (A) of the Ohio Revised Code requires "public officials to take official action and to conduct all deliberations upon official business only in open meetings, unless the subject matter is specifically excepted by law." One noted exception to the requirement of a public meeting, found within Section 121.22 (G) (3), is that the members of a public body may hold an executive session for conferences with an attorney for the public body concerning disputes involving the public body that are the subject of pending or imminent court action."

Disciplinary Rule 7-104 (A) does not elaborate on what communication is to be considered "authorized by law." However, in the comment to Rule 4.2 of the Model Rules of Professional Conduct, a rule substantially similar to Disciplinary Rule 7-104 (A), it is stated that "[c]ommunications 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."

Since a lawyer can be helpful in presenting a citizen's view to the government, he or she is sometimes called upon by an individual or a group of citizens to speak on their behalf at a public meeting. Disciplinary Rule 7-104 should not be applied so as to chill the free flow of information necessary for an effective government. Therefore, the Board's opinion is that Disciplinary Rule 7-104 (A) (1) does not prohibit an attorney from speaking at a public meeting on behalf of an individual or a group of citizens, or on behalf of himself or herself; however, the attorney should identify himself or herself, particularly when the communication involves a disputed matter in which the attorney is appearing before a government party that has consulted with counsel regarding the matter.

In answering the specific question raised within Question Two, it is the Board's advice that it is permissible for an attorney representing an interest adverse to a government board or commission to attend a public meeting of that board or commission and communicate his or her client's position without the government's attorney being present. The attorney in addressing the board or commission should identify himself or herself. This provides the board or commission opportunity to notify the attorney whether or not counsel has been brought in on the matter and allows the board or commission to seek assistance of its counsel in responding to disputed matters.

Question 3

The requester asks whether, in order to protect the interests of the government, a government department, agency, or its counsel could instruct its employees not to communicate with counsel representing an adverse party without the government's counsel present. In the alternative, the requester asks whether the government department, agency, or its counsel could advise employees that they need not consent to communication with counsel representing an adverse party without the government's counsel present.

There is no rule within the Code of Professional Responsibility that provides direct guidance in answering the questions raised. However, Rule 3.4(f) of the Model Rules of Professional Responsibility states that a lawyer shall not "request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." Correlation tables for this rule cite to the following provisions within the Code of Professional Responsibility: EC 7-27; DR 1-102 (A) (5); DR 7-104 (A) (2); DR 7-109 (B). Perhaps most pertinent are EC 7-27 stating that "a lawyer should not advise or cause a person to secrete himself [herself] or to leave the jurisdiction of a tribunal for the purposes of making him [her] unavailable as a witness therein," and Disciplinary Rule 1-102 (A) (5) that a lawyer shall not "[e]ngage in conduct that is prejudicial to the administration of justice." [See also, ABA Standards Relating to the Administration of Criminal Justice, Prosecution Function Standard 3-3.01(c) wherein the prosecutor must not discourage communications between prospective witnesses and defense counsel.]

One federal court held that a memorandum by a government agency barring employees from speaking with plaintiffs' attorneys even if the employee expressed an interest and willingness to do so, impinged on the employees' first amendment rights. Vega v. Bloomsburgh, 427 F. Supp. 593, 595 (D. Mass. 1977). The court instructed the government agency to issue a notice to rescind the memorandum and issue a notice to the employees

informing them that they may, if they wish, agree to be interviewed by plaintiffs' counsel to discuss those activities which relate to the subject matter of this litigation. This memorandum shall make explicit that no employee will be subject to disciplinary action on account of meeting with plaintiffs' counsel; and

. . . the new memorandum . . . may include a statement that employees are free to refuse to meet with plaintiffs' counsel, and may, "if they wish," seek to have a lawyer from the Department present at such discussions. The statement should make clear that such decisions are for the employee to make and that the defendants take no position one way or the other on the matter.

Id. at 597.

It is this Board's opinion that a government department, agency or its counsel should not give blanket instructions to all its employees not to communicate with counsel representing an adverse party without the government's counsel present.

Question 4

The requester asks whether an opposing counsel may send a copy of a settlement offer or other communication directly to the government department or agency even if the original is served on the government's attorney. In addressing a related issue, one ethics committee has advised that a lawyer representing a plaintiff in a claim against the state may not, without consent of defense counsel, initiate settlement discussions with a division of a department of the state that handles the state's insurance risks even though the division is a public entity. State Bar of New Mexico, Op 1988-2 (undated). A Pennsylvania ethics committee has advised that a lawyer may not forward settlement offers to an opposing party even if the opposing counsel has failed to notify his or her client of the offer. Pennsylvania Bar Ass'n, Op. 88-152 (undated).

The government as a party is protected by the ethical restraints of Disciplinary Rule 7-104. Therefore, this Board's opinion is that under Disciplinary Rule 7-104 (A) (1) when the government is a party represented by counsel it would be inappropriate to send settlement offers or other communication directly to a government department or agency even if the original is served on the government's attorney.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.