

COMMUNICATION WITH ONE OF
ADVERSE INTEREST: PROSECUTOR
SENDING LETTER TO DEFENSE
COUNSEL REGARDING PLEA
AGREEMENT AND FORWARDING A
COPY OF THE LETTER TO THE
DEFENDANT.

You have advised that Client "X" is represented by Attorney "A" in a criminal matter. Prosecutor has reason to believe that "A" has not communicated with "X" regarding to plea agreement offer made by prosecutor and the offer is about to expire.

You have inquired as to the propriety of the prosecutor writing a letter to "A" reminding him of the expiration date and sending a copy of the letter to "X".

The appropriate and controlling disciplinary rule relative to the prosecutor's sending of such a copy is DR:7-103(A)(1) which prohibits a lawyer, during the course of his representation of a client, from communicating 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.

The Committee has earlier opined that the applicable provisions of the Code of Professional Responsibility absolutely bar direct contact between an attorney and opposing party, further indicating that "[n]either the fact that the attorney is representing himself nor his claim that the [opposing] attorney is wrongfully withholding information from [his client] would constitute an exception to the rule." (emphasis added) (See LE Op. 521) In addition, the Committee has opined that it would be improper for a buyer's attorney in a real estate transaction to present a power of attorney to a seller who is represented by counsel, unless seller's attorney has consented to the same. (See LE Op. 1149; see also LE Op. 963 and Maryland State Bar Association Ethics Opinions Nos. 77-49 (February 28, 1977) and 77-68 (May 25, 1977))

Although those earlier opinions considered the application of the disciplinary rule in the context of civil matters, the Committee is of the view that sending a copy of the letter as described in your inquiry is similarly improper and proscribed by DR:7-103(A)(1) in criminal matters. The Committee expressly adopts the conclusion of ABA Informal Opinion 1373 and finds that constitutional protections which afford a criminal defendant a right to counsel underscore the need for the prosecutor to communicate with the defendant solely through defense counsel.

The Committee is further of the view that, since the proscription of DR: 7-103(A)(1) is eminently clear, the prosecutor's belief that defense counsel may not have communicated the plea agreement offer to the defendant does not constitute sufficient reason for an exception. Furthermore, it is clear that defense counsel is required to keep his client reasonably informed about matters in which his services are being rendered and to inform his client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter. (See DR:6-101(C) and (D); see also LE Op. 1264) It is therefore the Committee's opinion that where the prosecutor has reason to believe that the defense counsel is not communicating the offer to the defendant, such information should be brought to the attention of the appropriate disciplinary authorities as required by DR:1-103.