LEO 1891 – Communication With Represented Government Officials

Question Presented

Are communications with represented government officials "authorized by law" for purposes of Rule 4.2?

Answer

The answer to the question presented is yes, as long as the communication is made for the purposes of addressing a policy issue, and the government official being addressed has the ability or authority to take or recommend government action, or otherwise effectuate government policy on the issue. A lawyer engaging in such a communication is not required to give the government official's lawyer notice of the intended communication.

This analysis will apply only to a narrow subset of government officials, those within the "control group" or "alter ego" of the government entity that were otherwise subject to the no-contact rule. A lawyer's communication with a low-ranking employee of a represented organization does not violate Rule 4.2 since that employee is not "represented by counsel." Therefore, it would be unnecessary to apply the government contact exception in that situation.

Prior Opinions

In Legal Ethics Opinion 1537 (1993) the Committee addressed a situation in which an attorney represented parents of a child under disability in a dispute with the child's school and school board over an individualized education program (IEP). Following a request for a due process hearing, the parents' attorney wanted to talk to the teachers and school professionals who have conducted evaluations as well as with the members of the team that develops the IEP. The parents' attorney asked the Committee to opine whether he could talk to persons such as teachers and evaluators who are employed by the school board, without the presence or prior approval of the lawyer who represents the school board. The Committee applied the "control group" test applied to communications with constituents of a represented organization now found in Comment 7 to Rule 4.2:

> The committee has consistently opined that it is not impermissible for an attorney to directly contact and communicate with employees of an adverse party provided that the employees are not members of the corporation's "control group" and are not able to commit the organization or corporation to specific courses of action that would lead one to believe the employee is the corporation's alter ego. *See, e.g.*, LE Op. 347, LE Op. 530, LE Op. 795, LE Op. 801, LE Op. 905; *Upjohn Co. v. U.S.*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).

Applying the "control group" test, the committee concluded:

> Thus, in the facts you present, the committee believes that it would not be improper or violative of DR:7-103(A)(1) for the lawyer representing the child and parents to directly contact school board employees who are not in a position to bind the school board to a course of action. The committee is of the opinion that the rule prohibiting an attorney's communication with adverse parties should be narrowly construed in the context of litigation with the government in order to

> permit reasonable access to witnesses for the purpose of uncovering evidence, particularly where no formal discovery processes exist. Opinion 332 (9/88), Ethics Committee of the Kentucky Bar Ass'n, ABA/BNA Law. Man. on Prof. Conduct 901:3905.

However, the committee also added some discussion, in what might perhaps be described as *dicta*:

> With respect to actions involving governmental agencies, the committee has previously opined that the disciplinary rule proscribing communications with adverse parties is not applicable in a case where persons are petitioning a legislative body [LE Op. 529]; and that, where an attorney is involved in litigation against a county board of supervisors, it would not be improper for the attorney to contact other county employees if they are fact witnesses not charged with the responsibility of executing board policy [LE Op. 777]. Furthermore, the committee has also opined that, where information is generally available to the public under the Freedom of Information Act, the status of litigant or litigant's counsel does not disenfranchise one from obtaining such information. *See* LE Op. 1504. *Frey v. Department of Health and Human Services*, 106 F.R.D. 32 (E.D. N.Y 1985).

Significantly, the parents' attorney in LEO 1537 did not seek to have *ex parte* interviews with "control group" employees of the school board, but only the child's teachers and evaluators. But in LEO 529 (1983), which the committee cited in LEO 1537, the committee concluded that:

> Even if an attorney knows that the County Attorney is the legal counsel to the Board of Supervisors, it is not improper for the attorney to contact directly a member of a County Board of Supervisors. DR:7-104 is applicable in an antagonistic or adversarial context and is not applicable in a case where persons are petitioning a legislative body.

Thus, LEO 529 appears to authorize direct communications with a "control group" employee of a local government in the context of a citizen's right to petition a legislative body without the consent of counsel for the local governmental organization. However, in LEO 1537, the committee cited LEO 777, which reached an opposite position:

> It is unethical for an attorney involved in litigation against a county board of supervisors to directly contact an individual member of that board on matters relating to the litigation. It would not be unethical for said attorney to contact other county employees if such persons are fact witnesses not charged with the responsibility of executing board policy. [DR:7-103(A)(1); LE Op. 347, LE Op. 459 and LE Op. 530; See *Upjohn Corporation v. United States*, 449 U.S. 383, 101 S. Ct. 667 (1981)]

The Committee believes that the question is not whether the government official with whom the attorney wishes to communicate falls within the governmental body's "control group." Rather, the question is whether such a communication is "authorized by law" under Rule 4.2. If the lawyer or her client has a constitutional right to petition government or a statutory right under the Freedom of Information Act or other law to communicate with a government official about matters which are the subject of the representation, the

communication may be "authorized by law" regardless of whether the contacted government official is in the organization's "control group." If the government official with whom the lawyer wishes to communicate is not within the organization's control group, it is unnecessary to consider whether the communication is "authorized by law." Because the prior LEOs offer little guidance as to when contact with employees of a represented governmental organization is "authorized by law," the Committee turns to other authorities to address this issue.

Access to Government Officials

While it is clear that there is a "government contacts" exception to Rule 4.2, the contours and boundaries of that exception are not so clear. Comment 5 to ABA Model Rule 4.2 states "[c]ommunications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government." Virginia's comments do not include this language but prior legal ethics opinions do recognize some sort of exception for *ex parte* contacts with government employees. Unfortunately, in most jurisdictions including Virginia, the precise reach and limits of the "authorized by law" language in Rule 4.2 is not well-defined.

Leading ethics authorities cite the First Amendment's petition for redress of grievances clause (the "Petition Clause") as the foundation for any government contacts exception to the no-contact rule. Hazard & Hodes §38.8, at 38-16; Charles W. Wolfram, Modern Legal Ethics §11.6.2, 614 n. 58 (1986); *see* U.S. Const., amend. 1 ("Congress shall make no law respecting … the right of the people peaceably … to petition the Government for a redress of grievances."). In a representative democracy government, "effective representation depends to a large extent upon the ability of the people to make their wishes known to governmental officials acting on their behalf." *Protect Our Mountain Env't, Inc. v. Dist. Court of Cnty. of Jefferson*, 677 P.2d 1361, 1364–65 (Colo. 1984).

As one commentator explains, the no-contact rule seems at odds with a citizen's constitutional right to access her government officials:

> Requiring the consent of an adversary lawyer seems particularly inappropriate when the adversary is a government agency. Constitutional guarantees of access to government and statutory policies encouraging government in the sunshine seem hostile to a rule that prohibits a citizen from access to an adversary governmental party without prior clearance from the governmental party's lawyer.

Wolfram, *supra* at 614–15; *see also* Utah Ethics Op. 115R, at *2 (1994) (explaining that "it is more important to minimize the difficulties and obstacles that face private parties dealing with the government and its officials than it is to provide government agencies and officials with an insulating layer of attorneys").

ABA Formal Op. 97-408 attempts to define the scope of permissible *ex parte* communications with represented government officials as an exercise of the citizen's constitutional right to petition the government. In that opinion the ABA Ethics Committee stated:

> Model Rule 4.2 generally protects represented government entities from unconsented contacts by opposing counsel, with an important exception based on the constitutional right to petition and the derivative public policy of ensuring a

> citizen's right of access to government decision makers. Thus Rule 4.2 permits a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or to recommend action in the matter, provided that the sole purpose of the lawyer's communication is to address a policy issue, including settling the controversy. In such a situation the lawyer must give government counsel reasonable advance notice of his intent to communicate with such officials, to afford an opportunity for consultation between government counsel and the officials on the advisability of their entertaining the communication. In situations where the right to petition has no apparent applicability, either because of the position and authority of the official sought to be contacted or because of the purpose of the proposed communication, Rule 4.2 prohibits communication without prior consent of government counsel.

According to the ABA opinion, permissible *ex parte* communication with a represented government official must satisfy three conditions. First, the sole purpose of the communication must be to address a policy issue. Second, the government official whom lawyer seeks to contact must have the authority to take or recommend action in the matter. Third, the lawyer representing the private party must give the government's lawyer reasonable advance notice of her intent to communicate with such officials. This Committee agrees that the first two conditions appropriately balance the interests protected by Rule 4.2 with the interest that all constituents have in access to government and the ability to petition the government for the redress of grievance. However, the requirement of advance notice of the communication is not grounded in the text or comments of Rule 4.2 and therefore the Committee does not interpret the rule to require advance notice to the government lawyer of otherwise-permissible communications to government officials.

The Purpose of the Communication Must Be to Address a Policy Issue

As to the first requirement, courts and state ethics committees have routinely permitted lawyers to inquire with government officials about the rationales behind their policy positions, or to lobby government officials for the passage of a law, statute, or regulation favorable to their clients. The communication may be proper even if the policy or issue relates to the subject of a claim or controversy in which the client and government are represented by counsel. *See, e.g.*, *United States ex rel. Lockyer v. Haw. Pac. Health*, 490 F. Supp.2d 1062, 1089 (D. Haw. 2007) (holding that defendants' counsel's engagement in *ex parte* email conversations with employees at the Centers for Medicare and Medicaid Services, a represented party, about general policies behind the "incident to" rules under Medicare Part B, as opposed to specific facts concerning the litigation, fell within the government contacts exception to Rule 4.2); *MacArthur v. San Juan Cnty.*, 2001 BL 14076, No. 2:00-cv-00584-BSJ (D. Utah March 6, 2001) (entering a protective order precluding counsel from contacting a county commissioner on an *ex parte* basis regarding anything other than policy matters); Ohio Supreme Court Ethics Op. 92-7, at *3–6 (1992) (concluding that communications by lawyers at public board or commission meetings on behalf of an individual or group of citizens fall within the "authorized by law" exception, but advising the attorney to first identify herself when the communication involves a disputed matter before a represented government party).

For example, the State Bar of South Dakota Ethics Committee held that a lawyer representing the board of a municipality may lobby the city council, mayor, and other city entities and officials to pass an ordinance modifying the board's power and authority without the city attorney's permission pursuant to Rule 4.2. South Dakota Ethics Op. 98-9 (1998). The Committee reasoned that efforts to obtain a legislative change in favor of a client do not violate Rule 4.2 because such efforts relate "solely to government officials acting on a legislative question rather than in an adjudicative or negotiation capacity." *Id*. at 1.

In North Carolina, some lawyers successfully obtained a sign variance for their clients from a town board of adjustment and the town appealed. The North Carolina State Bar advised the lawyers that they could write the elected members of the town council to request that they place the desirability of the pending appeal on the agenda for the next town council public meeting. North Carolina Ethics Op. 202, at *1–2 (1995).

Likewise, in *Am. Canoe Ass'n, Inc. v. City of St. Albans*, 18 F. Supp.2d 620 (S.D. W. Va. 1998), defense counsel moved to prohibit the plaintiff's counsel from discussing settlement with members of the city governing body. Denying the motion and citing favorably to ABA Formal Op. 97-408, the court reasoned that "[g]overnment remains the servant of the people even when citizens are litigating against it. Thus, when citizens deal with government agencies, several sorts of direct contact are 'authorized by law' and permissible." *Id.* at 621. Similarly, Alabama Ethics Op. 2003-03 (2003) advises that a lawyer hired to defend the State Board of Education in a lawsuit filed by a County Board of Education may directly communicate with the members of the County Board to discuss settlement of the pending lawsuit without obtaining the consent or approval of the Board's attorney.

On the other hand, some authorities have enforced the "no contact rule" where a lawyer has contacted government officials whose statements, acts or omissions may bind their governmental employer, for the purpose of developing evidence for use in litigation, or gaining useful admissions against interest. *United States v. Sierra Pac. Indus.*, 759 F. Supp.2d 1215, 1217 (E.D. Cal. 2011).

The bottom line is that a lawyer communicating with a represented government official must be communicating about some policy issue, even if the resolution of that policy issue directly affects or includes the settlement of the lawyer's client's matter. On the other hand, a lawyer may not communicate with a represented government official solely for the purposes of gathering evidence unless the lawyer has the consent of the government lawyer or the communication is otherwise authorized by law, such as formal discovery procedures that might allow direct contact with a represented person. The fact that a communication begins with an appropriate and authorized purpose does not authorize further communication that is not permitted by Rule 4.2. A lawyer who engages in a communication about policy issues must terminate or redirect the communication if the communication crosses the line into improper evidence gathering.

The Government Official's Level of Authority

Even if the purpose of an intended *ex parte* communication with a government official is to address a policy issue, ABA Formal Ethics Op. 97-408 requires that the communication be

made with government officials having authority to take or recommend action in the matter. That is, the official must have the power to redress the client's grievances.

To appreciate the full context of ABA Formal Op. 97-408's level of authority requirement for the government contacts exception, it is helpful to consider Rule 4.2's application to organizations generally. Counsel for an organization, be it a corporation or government agency, cannot unilaterally claim that she represents all employees on current or future matters as a strategic device. North Carolina Ethics Op. 2005-5, at *2 (2006). For organizations, such as government agencies, the no-contact rule only applies to a few categories of employees considered the lawyer's clients because of their authority in the organization or their involvement or participation in the particular matter. *Id.*

Significantly, Rule 4.2 only applies to persons who may be regarded as the "alter ego" of the organization or who fall within the organization's "control group"—any employee who because of their status or position has the authority to bind the organization. See Comment 7 to Rule 4.2. Therefore, the level of authority requirement potentially affects only a narrow subset of government officials that were otherwise subject to the no-contact rule. A lawyer's communication with a low-ranking employee of a represented organization would not violate Rule 4.2 since that employee is not "represented by counsel." Therefore, it would be unnecessary to apply the government contact exception in that situation.

To satisfy the level of authority requirement, the government official must have the authority to decide the matter or policy question addressed in the communication, or to grant the remedy being sought by the contact. In other words, the government official must have the authority to take or recommend action on the policy matter at issue, or the ability to effectuate government policy on the matter. This inquiry is obviously fact-intensive. The safest course of action, especially when the communication is not directed at an elected or other high-level official within the government agency, is to conduct the necessary due diligence to confirm the identity of the individual who possesses the requisite level of authority to decide the matter at issue.

Advance Notice of the Proposed Communication

Finally, ABA Formal Ethics Op. 97-408 requires the lawyer representing a private party to provide the government's lawyer reasonable advance notice of her intent to communicate with such officials.

The Committee concludes that the notice requirement of the ABA opinion is not based on the rule or comments, and is not uniformly accepted by state ethics committees or even the drafters of ABA Formal Op. 97-408. See Illinois Ethics Op. 13-09, at *4 (2013) (rejecting the notice requirement because "it is strictly a creation of the ABA's Opinion and is not mandated by Rule 4.2"); ABA Formal Ethics Op. 97-408, at 8 n. 12 (observing that several committee members drafting Formal Op. 97-408 believed that advance notice should be permissive, not mandatory). The conclusion of the Committee is that, under the circumstances addressed in this opinion, communications with government officials are "authorized by law" under Rule 4.2, and the plain text of the rule and comments do not put any further conditions on a lawyer making a communication that is authorized by law.

While advance notice of the communication is not required, where uncertainty exists as to whether the intended *ex parte* communication falls within the government contacts exception, providing advance notice to opposing counsel may reduce the chances of provoking a court or disciplinary action if the communication is ultimately challenged. *See, e.g., United States ex rel. Lockyer*, 490 F.Supp.2d at 1089 (finding that counsel's communication fell within the Rule 4.2 exception for communications with government officials, but suggesting that the "better practice" would have been for defense counsel to notify opposing counsel prior to initiating those communications).

Conclusion

The First Amendment and other law authorizes certain communications with represented government officials that would otherwise be prohibited by Rule 4.2. Accordingly, a lawyer who represents a client in a dispute with a government body may communicate directly with a represented government official if the purpose of the communication is to address a policy issue, and the government official has the authority to recommend or take action in the matter. The lawyer is not required to give notice to the government lawyer before having such a communication.