

LEGAL ETHICS OPINION 1389

COMMUNICATION WITH ADVERSE
PARTIES/UNREPRESENTED PARTIES:
ATTORNEY COMMUNICATING WITH
ADVERSE LITIGANT SUBSEQUENT TO
FINAL ORDER HAVING BEEN
ENTERED.

You have indicated that Lawyer X represented client in a custody, support, and visitation matter and Lawyer Y represented the opposing party. A final order was entered in the matter, subsequent to which, some months later, a problem arose regarding visitation. There had been no communication about (continued) representation following the final order. Lawyer X directly communicated with Lawyer Y's client regarding the visitation problem, without having sought Lawyer Y's prior consent.

You have asked that the Committee opine as to whether Lawyer X's conduct would be violative of DR:7-103(A)(1). In addition, you have inquired when and/or under what circumstances a lawyer can communicate with a party about the subject matter of prior litigation, following the entry of a final order in the litigation, when the lawyer knows the party to have been represented in that prior litigation, without the prior consent of the lawyer who had represented the party in that prior litigation. Furthermore, you inquire if the committee's view of such communication depends upon the nature of the prior litigation. Finally, you ask the Committee to opine if such communication would be violative of the Code of Professional Responsibility if the past representation had been in a non-litigation context.

The provisions of DR:7-103(A) mandate in pertinent part that, during the course of his representation of a client, a lawyer shall not:

"(1) ... 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; or

(2) give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client."

The Committee has earlier opined that it is improper for an attorney to send a letter to the opposing party concerning judgment matters during the appeal period from the general district court when the opposing party had been represented by counsel at trial, even though no appeal had yet been filed nor had opposing party's attorney indicated that any appeal would be filed. LE Op. 963.

The Committee has also opined that where a government attorney may communicate, under the terms of DR:7-103, with one who has or later will assert a claim against the

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attorney's agency, before proceeding to discuss the matter when the attorney does not know whether the person is represented by counsel, the attorney must disclose his own status as an attorney and must inquire whether the person wishes to have legal counsel present. LE Op. 482.

It appears to the Committee that the problem in question, i.e. visitation issues, is a continuing matter directly related to the original issues of custody support and visitation in which Lawyer Y represented the party opposing Lawyer X's client, since visitation is an issue inherently subject to modification by the court. Further, it appears to the Committee that Lawyer X's representation of his client is a continuing relationship. The Committee believes that, despite the final order, it would be imprudent for one spouse's [continuing] attorney to presume that the opposing spouse was no longer represented since courts generally retain an interest in matters of child custody and support in order to protect the interests of the children involved. It is the Committee's understanding that, despite the entry of a final order such matters may always be re-opened upon a claim of changed circumstances. Given these factors, it is the opinion of the Committee that it is improper for Lawyer X to communicate with the opposing party absent either Lawyer's Y's consent or leave of court, despite the issuance of a final Order in the original litigation, since the Committee opines that the entry of a final Order in the child custody, support and visitation matter did not terminate Lawyer Y's relationship with his client. See *Carpenter v. State Bar of California*, 292 P. 450 (1930). The Committee is of the opinion that the presumption should be that the attorney continues to represent the client.

You have also inquired as to what circumstances would permit communication, on the subject of prior litigation, by a lawyer with an opposing party previously represented in that earlier litigation, and whether the nature of the litigation has any bearing on the issue. The Committee has previously opined that where both parties to a lease agreement were represented by counsel during the drafting of the agreement, the pertinent provision of which required notices of default to be sent directly to the parties, such provision indicates the attorneys' implied consent to an attorney's direct communications with the adverse party. (See LE Op. 1375; see also LE Op. 1281. But see Va. Code § 8.01-314 ("... in any proceeding in which a final decree or order has been entered, service on an attorney shall not be sufficient to constitute personal jurisdiction over a party in any proceeding citing that party for contempt ... unless personal service is also made on the party.")) In addition, the Committee believes it would not be improper for an attorney to make direct contact with a previously represented party, following a final Order in that prior litigation, (1) where the attorney knows that the representation has ended through discharge by the client or withdrawal by the attorney, or (2) where, as permitted by DR:7-103(A)(1), the attorney is authorized by law to do so. It is the Committee's opinion that, absent such knowledge or leave of court, it would be improper for an attorney to communicate on the subject of the prior litigation with the previously-represented party, irrespective of the substance of the litigation.

The Committee opines that, if the attorney is without knowledge as to any current representation of a previously represented party, it would not be improper for the attorney

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to write to the party for the sole purpose of securing information as to such current representation. Should the attorney determine that the party is currently unrepresented, the Committee directs your attention to DR:7-103(A)(2), which mandates that a lawyer not give advice to an unrepresented person, other than the advice to secure counsel, if the interests of such person are even possibly in conflict with the interests of the lawyer's client. (See LE Op. 1149, LE Op. 1156, LE Op. 1235, LE Op. 1344.)

You have also asked if such communication would be violative of the Code of Professional Responsibility if the past representation had been in a non-litigation context. It is the opinion of the Committee that the nature of the representation is inconsequential under the mandate of DR:7-103 in that the intent of the proscription is to prevent both the "overreaching [of] a momentarily uncounselled client, ... [and] disrupting the trust and confidence between the [client] and the originally chosen lawyer" Wolfram, *Modern Legal Ethics* at 611, citing *Carter v. Kamaras*, 430 A.2d 1059 (R.I. 1981). Thus, the Committee finds that the communication you describe would be equally improper if the past representation of the adverse party had been in a non-litigation context.

Finally, the Committee opines that it is immaterial whether such direct contact is an intentional or negligent violation of the disciplinary rule. In re *McCaffrey*, 549 P.2d 666, 668 (Or. 1976).

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