

**ALASKA BAR ASSOCIATION
ETHICS OPINION 2006-1**

**Propriety of a Lawyer, Acting on the Lawyer's Own Behalf Regarding A
Matter Not in Litigation, Communicating Directly with Management of a
Corporation Or Other Institution that the Lawyer Knows or Should Know
is Regularly Represented by Counsel**

Introduction

The Committee was asked about the propriety of a lawyer, acting on his own behalf regarding a matter not in litigation, communicating directly with management of a corporation or other institution that the lawyer knows or should know is regularly represented by counsel.

Conclusion

For the reasons discussed below, the Committee concludes that such contact is not improper, so long as the attorney has not been advised that he or she should deal only with corporate counsel on that matter.

Analysis

Lawyers frequently act on their own behalf as consumers and citizens, and they interact with private and public institutions that have counsel on staff or that frequently retain counsel. Each of these situations requires the lawyer to decide whether he or she may contact employees or managers directly to address his concern, or whether the lawyer must contact only the institution's counsel. For example:

- A lawyer has a complaint as a consumer about a product or service received from a local company that the lawyer knows is regularly represented by in-house or retained counsel. May the lawyer address his complaint directly to management of the company, or must the lawyer communicate only with corporate counsel?
- A lawyer, as a newspaper reader, disagrees with the editorial policy of the local newspaper. She knows that the newspaper regularly retains counsel. May she contact the editors to discuss the policy, or must she contact corporate counsel instead?
- A lawyer, as homeowner, has a concern about the municipal government's failure to issue a building permit for which he applied. He knows that the municipality has a legal department. May the lawyer

directly deal with the supervisor of the permitting office, or must the lawyer communicate only with the municipality's attorneys?

Alaska Professional Conduct Rule 4.2 prohibits a lawyer, who is representing a client, from communicating about the subject of the representation with a party or person the lawyer knows to be represented by another lawyer in the matter, unless specifically authorized by law or by the other lawyer. In applying this rule when a lawyer wants to speak with representatives of a corporation or agency on his or her own behalf, and not on behalf of a client, the lawyer must answer three questions:

(1) Does Rule 4.2 apply in a situation where the attorney's "client" is herself?

The short answer to this question is "yes." In Ethics Opinion 95-7, this Committee concluded that Rule 4.2 applies to a lawyer who is a pro se litigant. In other words, when representing herself, for purposes of Rule 4.2, the lawyer may not act as if she is a "party" who is not bound by the ethical rules that govern lawyers' contact with represented individuals. Rather, even when representing herself, a lawyer is subject to the dictates of Rule 4.2.

(2) What does it mean to "know" that the institution is represented by counsel on a particular matter?

Alaska Professional Conduct Rule 9.1(f) explains that "knowing," for purposes of these rules, "denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Knowing that a company or agency has a legal department or ordinarily retains counsel when litigation is likely does not establish that the lawyer knows that company or agency is represented on a particular matter when the lawyer makes his or her first contact on a new issue.

A lawyer knows that the company or agency is represented on a particular matter if the lawyer is told by a representative of the company or agency that the matter has been assigned to a lawyer or referred to the legal department. Once a suit is filed, receipt of an entry of appearance from opposing counsel also clearly indicates that the party is now represented on that matter. In other situations, the lawyer must be guided by the circumstances, and, when in doubt, may ask for clarification. Ethics Opinion No. 98-1 contains further discussion of when a lawyer knows that an insurance company is represented by counsel.

(3) Does the communication concern a "matter" that is "the subject of the representation"?

Knowing that a company or agency is represented by a lawyer on one particular matter does not mean the lawyer knows, or must assume, that the company or agency is represented on a wholly different matter. Thus, the lawyer may continue to speak directly to employees and managers on topics unrelated to the matter on which the institution is known to be represented. The commentary to Rule 4.2 explains: “This rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating directly with nonlawyer representatives of the other regarding a separate matter.” The same principle applies to a lawyer representing himself in dealing with a government agency or private organization.

In the three examples set forth above, the key question posed in each instance is whether there is a “matter” that is “the subject of the representation.” An initial contact to attempt to obtain information or to resolve a conflict informally rarely involves a matter that is known to be the subject of representation. Consequently, lawyers, representing clients or themselves, ordinarily are free to contact institutions that regularly retain counsel in an attempt to obtain information or to resolve a problem informally. These sorts of contacts frequently resolve a potential dispute long before it becomes a “matter” that is “the subject of representation.” The above examples are all worded to suggest the inquiry occurs at the early stage of a consumer or citizen complaint. Inquiries directed to employees and managers would be proper in each instance.

Conclusion

The line between permitted contacts at the early stage of a potential matter and forbidden contacts after a dispute has sharpened and become a “matter that is the subject of representation” depends on the question discussed in the preceding section: Until the lawyer knows that an opposing counsel has been asked by the party to deal with the particular new matter, the lawyer is not prohibited from dealing directly with representatives of the party.¹

¹ Once an institution is represented by counsel on a particular matter, the lawyer may still ethically contact some employees or agents of the institution to discuss that matter, while being prohibited from having direct contact on that matter with others. This opinion does not address the sometimes complicated question of distinguishing between the employees of a corporation or agency who are considered representatives of the opposing party who may not be contacted on a matter that is the subject of the representation, and typically lower level employees who are not included within the ethical bar of Rule 4.2.

Approved by the Alaska Bar Association Ethics Committee on December 1, 2005.

Adopted by the Board of Governors on January 27, 2006.

The comment to Rule 4.2 states, “In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization.”