

**ALASKA BAR ASSOCIATION
ETHIC OPINION NO. 2017-2**

Attorney's Ability to Contact Government Official Who Is a Represented Party to Discuss Settlement or Other Policy Related to the Litigation

ISSUE PRESENTED

Is it ever ethically permissible for an attorney in a suit against a governmental body to contact a government decision-maker directly, even though that person is a represented party in the litigation?

SHORT ANSWER

The policy behind the rule barring contact with a represented party sometimes conflicts with the right of an individual or organization to use counsel to petition the government, a right that is not lost merely because litigation is ongoing. To answer the ethics question posed, the Committee must balance these two competing interests.

In conformity with the majority of jurisdictions that have considered this question, the Committee concludes that an attorney ethically may contact a represented decision-maker on behalf of a client in order to discuss a matter of government policy related to the lawsuit – such as conditions for settling the suit – but the attorney must give reasonable advance written notice of the substance of the intended communication to the attorney representing the government official in the pending litigation. Further, the attorney's communication may not seek facts for use in the litigation and must be limited to matters of government policy on which the attorney reasonably believes the official has the authority to take or recommend action.

This conclusion conflicts with statements contained in Ethics Opinion 71-1 and with the conclusion reached in Ethics Opinion 94-1. For the reasons discussed below, the inconsistent statements and conclusions in those earlier opinions are disavowed and superseded by the analysis in this opinion.

STATEMENT OF FACTS

In the situation presented to the Committee, Attorney represents a nonprofit organization that has sued the State of Alaska, alleging that the State enacted an unconstitutional law. The caption of the suit names as defendants the State of Alaska generally and, in her official capacity, the Commissioner of the Department that implements the challenged law. The State formally is represented in the litigation by the Attorney General; two Assistant Attorneys

General entered their appearances and have been responsible for the in-court activities related to the litigation.

Attorney's client prevailed in the litigation in the superior court, and Attorney would like to contact the Commissioner directly to attempt to persuade her to not to appeal the superior court's decision. Attorney believes that the personal approach could be more effective than discussing the issue with the Assistant AGs and asking them to relay the message to the Commissioner as their client.

Attorney wants to know if he may contact the Commissioner directly, as an exercise of his client's constitutional right to petition the government, or whether Rule of Professional Conduct 4.2 bars such direct contact absent consent by the Commissioner's litigation counsel.

For purposes of the analysis that follows, it does not matter if the Commissioner has final authority to settle the case and to choose not to appeal, or only the authority to recommend such action to another government official, such as the State Attorney General.

ANALYSIS

Alaska Professional Conduct Rule 4.2 states in full:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party or person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

The commentary to this rule reiterates that the rule does not prohibit a communication that is authorized by law. It states particularly that "Communications 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."¹

Rule 4.2 ensures that attorneys respect the choice of individuals and organizations that have chosen to be represented by counsel about a particular matter. The communication at issue here – the proposed contact with the Commissioner about the litigation – falls squarely within the prohibition of the

¹ Alaska Professional Conduct Rule 4.2, Commentary Para. 5 (as adopted in 2009).

rule, unless the communication is “authorized by law,” as that term is used in the rule and the commentary.²

The American Bar Association’s Standing Committee on Ethics and Professional Responsibility addressed the exact issue presented here in its Formal Opinion 97-408.³ The ABA Ethics Opinion recognizes and discusses the competing interests, on the one hand, of protecting a party who has chosen to be represented by counsel from being contacted directly by an opposing attorney and, on the other hand, of allowing a lawyer to assist a client in exercising her constitutional right to petition the government. The ABA Ethics Opinion concludes that the proper balance is to allow direct contact under certain limited conditions:

² Two exceptions to the no-contact rule do *not* apply to the facts at issue here, though they may apply in other circumstances.

First, Rule 4.2 allows communications concerning matters *outside* the pending litigation. Paragraph 4 of the commentary to the rule gives the example that a lawyer representing a party engaged in a suit against the government is not prohibited from contacting a nonlawyer representative of the government on a wholly different matter. *See also* Ethics Opinion 2006-1 (further discussing how the no-contact rule does not apply to communications with government officials unrelated to the matter in which the attorney represents himself or a client in a suit where the government is a represented party). That exception does not apply here, because Attorney wants to contact the Commissioner *about the litigation* in which Attorney represents one party and the Commissioner is a representative of the opposing party.

Second, in a suit against the government, Rule 4.2 allows contacting a government employee with knowledge relevant to a lawsuit, so long as the employee is a potential witness but not a representative of the government in that lawsuit. Paragraph 6 of the commentary explains that, in the case of a represented organization, the rule “prohibits communications by a lawyer concerning the matter with persons having managerial responsibility on behalf of an organization.” Ethics Opinion 2011-2 at 1 interprets “managerial responsibility” to mean that the person has “sufficient authority to speak on behalf of the organization and thus legally bind the organization.” *See also* Ethics Opinions 71-1 and 84-1 (both discussing how to determine which employees have managerial responsibility). The exception does not apply here, because the Commissioner is a person with managerial responsibility on behalf of the State. That is, the Commissioner personally has the authority to speak on behalf of the Department and to take actions that bind the Department.

³ *See* American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 97-408, *Communication with Government Agency Represented by Counsel* (Aug. 2, 1997) [hereinafter “ABA Ethics Opinion”].

Balancing the interests served by the no-contact rule against the constitutionally-based policy favoring citizen access to government decision makers, the Committee concludes that [Model] Rule 4.2⁴ does not prohibit a lawyer representing a private party in a controversy with the government from communicating directly with governmental officials who have authority to take or recommend action in the matter, provided the communication is solely for the purpose of addressing a policy issue, including settling the controversy. To give effect to the purposes of Rule 4.2 even in this situation, however, the Committee concludes that the lawyer must afford government counsel reasonable advance notice of an intent to communicate, in order to afford an opportunity for the officials to obtain advice of counsel before entertaining the communication.⁵

The ABA Ethics Opinion notes that government officials represented in litigation by counsel clearly are covered by Rule 4.2's ban on contacting a represented party, but the ABA Ethics Committee reasoned that strict application of a no-contact rule would frustrate an individual's right to petition the government through her chosen counsel.⁶ Discussing these two competing principles, and quoting from a New York City Bar Opinion, the ABA Ethics Opinion observes:

[G]overnment lawyers should not be able to block all access to government officials to the point of interfering with the right to petition for redress, but neither should attorneys for private parties be allowed to approach uncounselled public officials who may not know exactly what cases are pending against them, the status of those cases, the consequences of those cases, or the consequences their statements may have in those cases.⁷

At the time the ABA Ethics Opinion was drafted, the commentary to Model Rule 4.2 stated in pertinent part: "Communications authorized by law include, for example, the right of a *party* to a controversy with a government to

⁴ Model Rule 4.2, discussed in ABA Ethics Opinion 97-408, is identical to Alaska's Professional Conduct Rule 4.2.

⁵ ABA Ethics Opinion 97-408 at 2.

⁶ *See id.* at 4-5.

⁷ *Id.* at 6-7, quoting from Association of the Bar of the City of New York, Committee on Professional Ethics Opinion 1991-4 (quotation marks and punctuation alterations omitted).

speak with government officials about the matter.”⁸ This sentence is ambiguous with respect to whether the drafters intended only to recognize the personal right of a client to petition the government or whether instead the drafters intended to ensure that a party could petition the government through counsel.⁹ The ABA Ethics Opinion interpreted the “right of a party” to speak to the government’s decision-maker to encompass the right of the party to communicate with the government decision-maker through counsel, “else there would be no reason to deal with the issue in the context of a rule that applies only to lawyers.”¹⁰

Subsequent to the issuance of ABA Ethics Opinion 97-408, the commentary to Model Rule 4.2 was revised to acknowledge more explicitly that a client has a right to petition the government *through counsel*.¹¹ The 2002 revision deleted the sentence quoted above (which refers expressly only to “the right of a party”), and added the following sentence: “Communications 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.”¹²

As noted earlier, the ABA Ethics Opinion imposes two conditions on a lawyer’s right to speak to a represented government official on behalf of a client:

First, “the government official to be contacted must have authority to take or recommend action in the controversy, and the sole purpose of the communication must be to address a policy issue, including settling the controversy.”¹³ Thus, using a communication with the government official to seek discovery in the absence of government counsel is forbidden.

Second, the lawyer for the private party “must always give government counsel advance notice that [he or she] intends to communicate with officials of the agency to afford such officials an opportunity to discuss with government

⁸ American Bar Association Center for Professional Responsibility, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 at 534 (2006) (emphasis added).

⁹ See ABA Ethics Opinion 97-408 at 6 n.10 (discussing the language then in the commentary to Model Rule 4.2).

¹⁰ *Id.*

¹¹ See A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2005 at 539, 541.

¹² *Id.* at 539 (emphasis added).

¹³ ABA Ethics Opinion 97-408 at 7 (footnote omitted).

counsel the advisability of entertaining the communication.”¹⁴ Under the ABA Ethics Committee’s approach, this condition applies whether the lawyer intends oral or written communication with the government official.¹⁵

The ABA Ethics Opinion notes accurately that its conclusions generally conform with a majority of then-recent ethics opinions from other bar associations.¹⁶ The Opinion observes that some jurisdictions go further and, by rule, authorize a lawyer in litigation to communicate directly with any government official without notice to or consent from opposing counsel, either in all situations¹⁷ or when the attorney is communicating with an official who has the authority to redress a grievance of the attorney’s client.¹⁸

This Committee’s research has located other recent opinions that have taken the same general approach as the ABA Ethics Opinion, sometimes relying on a state comment that clearly authorizes a communication with a government official.¹⁹ The Committee has located no recent ethics opinion that forbids communications by a lawyer in the circumstances and with the conditions approved by the ABA Ethics Opinion. Legal scholars also have expressed the view that a lawyer should be authorized to speak directly to a represented government official when the purpose of the communication is to discuss a matter of policy, such as settling a case, and there is no attempt to obtain facts or admissions outside of the ordinary discovery process.²⁰

¹⁴ *Id.* at 7-8.

¹⁵ *See id.* at 8 (specifying that, if the lawyer intends to send a written communication, the lawyer must give government counsel a copy of the written material at a time and in a fashion that will afford counsel a reasonable opportunity to advise her client whether to receive the communication from the lawyer for the other side).

¹⁶ *See id.* at 5 n.7; *see, e.g.*, Association of the Bar of the City of New York, Committee on Professional Ethics Opinion 1991-4; N.C. State Bar Ass’n, Ethics Comm. Op. 202 (1995); Utah State Bar, Ethics Comm. Op. 115 (1993) & Op. 115R (1994).

¹⁷ *See* ABA Ethics Opinion 97-408 at 5 n.8, citing the predecessor to Cal. Rule of Prof. Conduct 2-100(C)(1) (which, like California’s current rule, provides that the general no-contact rule does not apply to communications with a public official, board, committee, or body).

¹⁸ *See id.*, citing District of Columbia Rule of Prof. Conduct 4.2(d).

¹⁹ *See, e.g.*, Alabama State Bar, Formal Ethics Op. 2003-03 (Sept. 18, 2003); District of Columbia Bar Ass’n, Ethics Op. 340 (May 2007); N.C. State Bar Ass’n, 2005 Formal Ethics Op. 5 (July 21, 2006).

²⁰ *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 101A (allowing contact with a represented government official “with respect to an

This Committee is persuaded that Alaska Professional Conduct Rule 4.2 and its commentary should be interpreted in the way the ABA Ethics Committee interpreted Model Rule 4.2: to strike a balance between protecting government officials against direct communications from opposing counsel and protecting individuals' rights to petition the government.²¹

The Committee believes that an absolute ban on direct communications with government officials represented in litigation goes too far as a matter of policy because it infringes on the right to petition the government through counsel, and such a view disregards the clear language of the commentary to Rule 4.2.

On the other hand, the Committee also believes that the cautions expressed in ABA Ethics Opinion 97-408 and by commentators are justified. Many government officials are inexperienced in litigation, they may not be fully informed about the facts of the litigation, and they may not fully understand the implications of discussing a matter directly with opposing counsel, rather than through their own attorney. Relaxing the no-contact rule too greatly could allow lawyers to take advantage of government officials who are willing to talk with them.

A good balance is reached by ABA Ethics Opinion 97-408, under which the lawyer who intends to contact a government official represented in litigation first must advise opposing counsel of the substance of the intended communication *and* must limit the communication to matters of policy. The requirement of reasonable advance written notice of the intended communication ensures that the government's litigation attorney has the opportunity to advise the government official about whether to schedule a meeting or to read and respond to a letter from the opposing attorney; at the same time, the rule ensures that a government attorney cannot block the government official from making his or her own decision about receiving a direct communication from opposing counsel on a matter of policy related to the ongoing litigation. The restrictions also ensure that the non-government

issue of general policy"); Geoffrey C. Hazard & Dana Remus Irwin, *Toward a Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 818-22 (2009).

²¹ Even without this opinion, an attorney in litigation against the government clearly may ask the government's litigation counsel to ask his client, the government official, for an opportunity to meet to discuss settlement or other policy related to the litigation; ordinarily, such a request should be conveyed to the client. An attorney *must* relay a specific settlement proposal. See Alaska Professional Conduct Rules 1.2(a), 1.4(a) & (b), and accompanying comments.

attorney does not use the informal communication as a substitute for formal discovery; gathering facts or admissions is forbidden.²²

Although the Committee is persuaded by the policy and reasoning of the middle-ground approach reflected in ABA Ethics Opinion 97-408, the Committee does not write on a clean slate in 2017. Before ABA Ethics Opinion 97-408 was issued, this Committee adopted an opinion embracing a stricter rule. In Ethics Opinion 94-1, the Committee was asked whether it is ethically permissible for an attorney who represents a party in litigation against a government agency to make a presentation to the managing board of the agency in order to set forth the client's settlement position, without having first received consent from the agency's litigation attorney. The Committee concluded that such a presentation would violate Rule 4.2.²³ The Committee was influenced by the commentary of that time, which matched the commentary to Model Rule 4.2 at the time.²⁴ Unlike the ABA Ethics Committee, this Committee interpreted the commentary narrowly, reading it to allow a *party* – but not a lawyer for a party – to petition the government during litigation.²⁵ However, the Committee also concluded that, if a government official involved in litigation requested the attorney for the opposing party to make a presentation on the matter being litigated, then the attorney ethically could attend a meeting and speak with the official so long as the attorney gave advance notice of the invitation to the government official's counsel and provided a copy of any material the attorney planned to present to the official.²⁶

The Committee now finds several bases for rejecting the narrow conclusion of Ethics Opinion 94-1. First, the Committee in 1994 did not have

²² This opinion, authorizing limited contact with a representative of the opposing party in litigation, does *not* authorize *ex parte* contact with an adjudicator, even in an administrative proceeding where the same person, such as a Commissioner, is both the adjudicator and a person with managerial responsibility for the state agency that is a party in the proceeding.

²³ See Ethics Opinion 94-1 at 1.

²⁴ That is, the Alaska commentary to Rule 4.2 in 1994 contained the sentence “Communications authorized by law include, for example, the right of a *party* to a controversy with a government to speak with government officials about the matter,” and not the substitute sentence adopted in 2002: “Communications 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.” (Emphases added.) See Ethics Opinion 94-1 at 2.

²⁵ See Ethics Opinion 94-1 at 2-5.

²⁶ See *id.* at 6.

the benefit of the analysis in ABA Ethics Opinion 97-408, which, as discussed earlier, authorized counsel to petition the government on behalf of a client in litigation even in the face of the then-ambiguous commentary, if two important restrictions are observed. This Committee in 1994 allowed communications with similar restrictions if the invitation to communicate was initiated by a government official, but the Committee did not adopt a comparable middle ground, such as the ABA Ethics Opinion adopted, when the attorney and her client wished to initiate the direct communication.²⁷

Second, and more important, the commentary to Rule 4.2 has changed since Ethics Opinion 94-1 was adopted. The current Alaska commentary tracks the revised commentary to Model Rule 4.2 and now unambiguously refers to the client's right to petition the government through counsel.

Third, with the benefit of hindsight, the Committee finds that Ethics Opinion 94-1 has some shortcomings that should limit its applicability. That opinion cites *Walters v. National Association of Radiation Services*²⁸ as support for the conclusion that the right to petition the government does not include the right to petition through counsel.²⁹ However, *Walters* holds only that a federal statute violated neither the due process clause nor an individual's right to access the courts when it limited to \$10 the fee that could be paid to a lawyer representing a client in proceedings before an agency.³⁰ The case is not persuasive precedent for restricting the right of clients in litigation to use their counsel to petition the government to settle a case, after the clients engaged counsel to represent them in litigation against the government.

Despite these criticisms, the Committee respects, agrees with, and reaffirms much that is stated in Ethics Opinion 94-1 about the values expressed by Rule 4.2 and the importance of abiding strictly by the Rule when an attorney wishes to obtain information from a government official with managerial responsibility regarding the facts at issue in pending litigation. However, the Committee now formally disavows the conclusion of Ethics Opinion 94-1 and substitutes the conclusion of ABA Ethics Opinion 97-408: an attorney for a party in litigation against a governmental body may contact a represented government official to discuss policy related to the litigation, including whether to settle the case or to pursue an appeal, provided the

²⁷ The RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 101A, cmt. b, cites Alaska's Ethics Opinion 94-1 as an outlier for taking the position "that the general anti-contact rule applies to all dealings with an employee of a represented government agency."

²⁸ 473 U.S. 305 (1985).

²⁹ See Ethics Opinion 94-1 at 4.

³⁰ See 473 U.S. at 320-35.

attorney first gives reasonable advance written notice of the substance of the intended communication to the government official's litigation counsel and limits the communication to policy matters.

Inconsistent language in Ethics Opinion 71-1 also must be considered. That opinion reflects this Committee's first attempt to address the question of which government officials are "parties" in a suit between citizens and a governmental body. To a large extent, it is the predecessor of Ethics Opinion 2011-2, which discusses how to determine which employees have managerial responsibility; those conclusions in Ethics Opinion 71-1 are not implicated by the analysis in this opinion.³¹ However, Ethics Opinion 71-1 also contains some very broad language about communications regarding litigation with the government officials who are the decision-makers regarding that litigation.³² That language is inconsistent with the conclusions of this opinion, and, to that limited extent only, Ethics Opinion 71-1 also must be disavowed and its analysis superseded by this opinion.

To answer squarely the question presented at the outset, the Committee concludes that, provided Attorney first gives reasonable advance written notice of the substance of the intended communication to the Assistant Attorney Generals who are handling the litigation, Attorney then may write to the Commissioner personally, or call the Commissioner's office to attempt to make an appointment to speak in person about policy, so that Attorney then can convey directly the reasons the client believes the State should not appeal the adverse judgment. To be "reasonable," the advance written notice typically will identify the specific government official to be contacted, the date of the proposed contact, and the substance of the intended communication, and it will be sent far enough in advance of the proposed contact that the government attorney has the opportunity to give advice to the official on how to respond to the contact.

The Committee notes that, in the situation presented, the person to whom counsel wishes to speak – the Commissioner – has "managerial responsibility on behalf of the organization" and has the authority, on her own or in conjunction with others, to take or to recommend the action that Attorney requests for settling or concluding the case.³³ Further, because the superior

³¹ See Ethics Opinion 71-1 at 1-4.

³² See, e.g., *id.* at 3, 4 (final sentence of opinion).

³³ To be very clear, this opinion does not intend to suggest that the Commissioner is necessarily the only person with "managerial responsibility" for the State in the hypothetical example. Attorneys must review the opinions cited in footnote 2 above to determine for a particular case who qualifies as a representative of the governmental party in litigation.

court litigation has concluded, there is little risk that the communication could be used for improper fact-finding. Thus, Attorney would be representing his client in exercising the client's right to petition the government, and, because the communication is "authorized by law," the communication would not violate Rule 4.2. Attorney must, however, restrict his communications to policy matters – i.e., those that fairly fit within the constitutional right to petition the government; he may not use the conversation to gather facts, and he must abide by all other ethics rules, including the prohibition on false and misleading statements.³⁴

Approved by the Alaska Bar Association Ethics Committee on April 6, 2017.

Adopted by the Board of Governors on September 7, 2017.

³⁴ See Professional Conduct Rule 8.4(c).