Ethics Opinion No. 94-1

Attorney Communication with the Managing Board of a Government Agency, Regarding Pending Litigation, Without the Consent of Counsel Representing the Agency.

The Committee has been requested to give an opinion as to whether it is proper for an attorney who represents a party in litigation against a government agency to make a presentation to the managing board of the agency regarding the clients' settlement position, without the consent of the attorney representing the agency. Under the facts presented to the committee, the attorney's desire to make the presentation is based on a belief that settlement offers made on behalf of the claimant have not been adequately communicated to the board by its attorney. (endnote 1)

It is the opinion of the Committee that the communication would violate of Rule 4.2 of the Alaska Rules of Professional Conduct.

Rule 4.2 provides as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party or person he knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. (endnote 2)

The preliminary issue is whether the managing board of the government agency is encompassed within the term "party" as used in Rule 4.2. Persons who might be considered to be the "party" in the context of communications with governmental representatives were addressed in Alaska Bar Association Ethics Opinion 71-1, in which the Committee advised that:

> (A)ttorneys may ethically communicate with employees of a governmental entity, so long as that communication is not made with employees of the entity who may reasonably be thought of as representing the entity in matters relating to the matter in controversy, and as long as the lawyer reveals to the employee his identity and representation and the connection between the representation and the communication.

In the context of private corporations, officers have uniformly been thought of as representing the entity in the controversy. Thus, for example, in ABA Formal Opinion 1410 (1978), it was held that officers and employees of a corporation should be considered parties, for purposes of DR 7-104(A)(1), if those officers and employees could commit the corporation by virtue of their authority. *See*, *Illinois State Bar Association Committee on Professional Responsibility*, Op. 85-12 (April 4, 1986) (includes top management persons with the responsibility of making any final decisions); *South Carolina Bar Ethics Advisory Committee*, Op. 86-10 (June 16, 1986) (board members of homeowners association are encompassed by term "parties" in a dispute with the association). If the board to which the presentation has the ability to

commit the agency or otherwise exercise control over decisions regarding litigation, it must be considered to be a "party" within the meaning of Rule 4.2.

The next issue is whether the right of the people to petition their government under the first amendment to the United States Constitution and Article I, section 6 of the Alaska Constitution, or any provisions of law that require governing bodies to provide an opportunity for public participation in meetings, compel an exception under Rule 4.2 whereby counsel is "authorized by law" to communicate with the governing body without the consent of its counsel. In that regard, the Comment to Rule 4.2 provides:

> 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 with non-lawyer representatives of the other regarding a separate matter. Also, *parties* to a matter may communicate directly with each other and a lawyer having independent justification for communication with the other *party* is permitted to do so. *Communications authorized by law include, for example, the right of a* ***party*** *to a controversy with a government agency to speak with government officials about the matter.* [Emphasis added.]

Unfortunately, this Comment addresses communications by both the "party" and the "lawyer," thereby tending to blur the distinction between the two with regard to permitted communications. Rule 4.2 does not regulate the conduct of a party who is not an attorney. With regard to attorneys, it is the Committee's opinion that the Comment interprets Rule 4.2 to authorize direct contact regarding a matter in controversy with a government officer or agency, without consent from the agency's attorney, when the contacting attorney is a "party" to the controversy, and is not acting in a representative capacity. Thus, where the attorney is a "party," there is no limitation on his or her first amendment rights.

However, it is the Committee's opinion that Rule 4.2 and the interpreting Comment do not authorize an attorney to advocate a clients' position relating to pending litigation directly to the governing officer or body of a public agency without the consent of the opposing counsel.

There are few interpretations or discussions of the "authorized by law" exception to Rule 4.2, and the available analyses do not clearly distinguish between rights of a "party" and the permissible scope of attorney representation. One commentator, for example, confuses these issues and concludes that prohibiting a lawyer for a private party in litigation with the government from conducting *ex parte* interviews with "relevant governmental officials" would permit the government agency's lawyer to veto discussions between "private parties and government official." 2 G. Hazard & W. Hodes, *The Law of Lawyering* §4.2:109 (2d ed. 1991). The limited available commentary

also does not adequately address different policies that should be considered depending on whether the communications in question involve pending litigation, or the role of the government official to whom the communications are directed, i.e. is this the decision maker? (endnote 3)

The principal issue faced by the Committee is whether the reasons for the general prohibition against attorney communications with a represented party regarding the subject of representation are sufficient to support the limitation on exercise of the right to petition one's government that may result from enforcement of the Rule to prohibit communications by an attorney representing a party with governmental decision makers concerning pending litigation.

Many policy reasons have been advanced in support of the prohibition against attorney communication with a represented adverse party. These include preventing an attorney from taking unfair advantage of a represented party by application of the attorney's superior knowledge and skill [*Complaint of Korea Shipping Corp.*, 621 F.Supp. 164, 167 (D. Alaska 1985)]; avoidance of disputes regarding conversations which could force an attorney to become a witness; protecting a client from making inadvertent disclosures of privileged information or from being subjected to unjust pressures; helping settle disputes by channeling them through dispassionate experts; preventing situations giving rise to the conflict between the lawyer's duty to advance a client's interests and the duty not to overreach an unprotected party; and providing parties with a rule that most of them would choose to follow in any event. Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests*, 127 Pennsylvania Law Review 683, 686-87 (1978-79).

These concerns are most obvious in situations involving verbal communication in the absence of opposing counsel where a strong risk exists that a lawyer may elicit damaging statements from, or conclude an ill-advised settlement with, a represented party who is effectively deprived of advice of counsel. In other situations, such as written communications, the concerns are less apparent, but those communications are nevertheless prohibited. *See*, ABA Ethics Opinion 1348 (August 19, 1975) (sending copies of settlement offers to a represented adversary is improper). Many of the concerns would seem to be diminished in the context of a presentation to a government agency, particularly if that presentation is made in a public meeting.

Perhaps the best statement of the policy behind Rule 4.2, however, and one which encompasses all of the other reasons for the rule, is that it is designed to permit an attorney to function adequately in his or her proper role and to prevent the opposing counsel from impeding performance as the legal

representative of the client. *E.g.*, *Obeles v. State Bar*, 108 Cal. Rptr. 359, 510 P.2d 719, 722-23 (1973). An attorney is not entitled to directly communicate his or her version of the applicable facts and law to an adverse party represented by counsel. That party has retained counsel based on a determination that skilled assistance is necessary to evaluate the facts and applicable law, to develop the strengths of the client's position, and to permit the client to avoid direct demands and communications from the opponent. Direct communications by opposing counsel with a represented adverse party usually would be made only for the purpose of by-passing the party's counsel in the hope of obtaining an advantage or opportunity that would not otherwise be available or to advocate a position that was not persuasive when presented through the party's counsel. The direct communication may distort the strengths or fairness of the communicating party's position and overstate the risks to the other party, thereby serving to undermine the adverse party's confidence in his or her attorney and perhaps create beliefs, fears or impressions that cannot later be corrected by that party's counsel. Those concerns clearly apply in the context of a presentation to a government agency.

The committee believes the first amendment right of a citizen to petition the government does not "authorize" attorneys to directly communicate with the governing body of an agency on the citizen's behalf regarding a matter in litigation. This position is supported by *Walters v. National Assoc. of Radiation Survivors*, 574 U.S. 337, 105 S.Ct. 3180 (1985). *Walters* involved first amendment challenges, based on free speech and right to petition, to a federal statute which limits to $10 the fee that may be paid to an attorney or agent who represents a veteran seeking benefits for service connected death or disability. In upholding the validity of the statute, the court determined the statutory claim process provided claimants with an opportunity to make a meaningful presentation and that significant governmental interests favored limitations on speech. The governmental interests that were found to out-weigh the first amendment rights were the desire to keep proceedings non-adversarial, because there were few complex cases, and a policy against veterans sharing their awards.

Similarly, many other agency proceedings are relatively simple in nature and intended to be suitable for lay presentation of issues. Any argument that an attorney is necessary to communicate complex issues regarding pending litigation invokes the countervailing policies set forth above. Rule 4.2 clearly does not restrict the "party's" right to petition its government by personally appearing before the governing body, and the lawyer is not prohibited from suggesting such an appearance.

Additional support for the limited impairment of the right to petition government is found in *In re Vollintine*, 673 P.2d 755, 757 (Alaska 1983). That case approved a restraint imposed by the Code of Professional Responsibility

on the first amendment right of free speech. The attorney in that case was disciplined for authoring correspondence containing intemperate and harassing statements regarding government employees involved in resolving his client's allotment claim. In rejecting a claim that the attorney's freedom of speech rights outweighed the restrictions created by the Code of Professional Responsibility, the court quoted from the concurring opinion of *In re Sawyer*, 360 U.S. 622, 79 S.Ct. 1376 (1959), where Justice Stewart said:

> [A] lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.

The Committee is of the opinion that the phrase "authorized by law" does not apply to all laws of general application permitting communications. Rather, to be effective as an exemption from Rule 4.2, a provision of law authorizing direct attorney contact with a represented government agency must specifically allow the communication, except in those circumstances such as communications during hearings or during the conduct of discovery where the authority, if not clearly expressed, can be implied. (endnote 4) Laws requiring agencies to permit public participation or comment in meetings do not require or specifically authorize the type of communication in question.

Although various rules might be imposed to deal with differing aspects and means of communication with the governing body of an agency regarding pending litigation, or the results of such communications, the enforceability of a rule and the likelihood of voluntary compliance are best insured by a uniform rule that is easily applied. There are no significant policies supporting an attorney's right to communicate on behalf of a client, regarding pending litigation, directly with a represented party and, therefore, unless such communications are specifically authorized by law or consented to by counsel for the other party, they are prohibited, even when opposing counsel is present or available. (endnote 5)

Several related aspects of this issue deserve brief discussion. It is obvious that the governing body of an agency can direct its attorney to consent to a request for appearance transmitted through the attorney for the agency, or it might direct its attorney to invite opposing counsel to appear before the body if that course of action appears appropriate. Rule 4.2 obligates an attorney to abide by a request or direction of that nature from the client.

The party may also, consistent with the right to petition government, solicit the governing body or its members to request a presentation by the party's attorney. However, the attorney may not solicit an invitation to appear before

the body to discuss pending litigation, nor may the attorney suggest that course of action to the client. If an attorney receives an unsolicited invitation to appear before the governing body of an agency to discuss pending litigation, the attorney may make the presentation, but he is obligated to give the attorney representing the agency reasonable prior notice of the invitation or request, and provide the agency attorney with copies of any materials provided to the board.

Summary

In summary, it is the opinion of this committee that:

1. A party is not prohibited by Rule 4.2 from communicating with a decision making body of a government agency regarding pending litigation, without consent of the attorney for the body, whether or not the party is represented by counsel.

2. An attorney who is a party to litigation has the same rights as any other party, including the right to communicate as set forth in paragraph 1 above.

3. An attorney representing a party may not communicate regarding litigation pending against a government agency or officer directly with a government official or body having decision making authority concerning that litigation, without the consent of the attorney representing the official or governing body. (endnote 6)

4. If an attorney representing a party in litigation with a government agency is requested by its governing body or other person having decision making authority to meet and discuss the matter in litigation, the attorney may attend the requested meeting, but the attorney must give reasonable notice of the invitation to the attorney representing the agency, and provide such attorney with a copy of any material to be presented to the agency body or official.

Approved by the Alaska Bar Association Ethics Committee on December 2, 1993.

Adopted by the Board of Governors on January 7, 1994

Endnotes:

1. The obligation to communicate serious settlement offers is set forth in Rule 1.4 and the related Comments. The issue is not otherwise dealt with in this opinion.

2. Rule 4.2 is substantially identical to its predecessor, DR 7-104(A)(1), and some of the authorities discussed in this opinion relate to interpretations of that disciplinary rule.
3. Where the government official to whom the communication is directed does not have the ultimate authority to determine the course of pending litigation, and is not a member of a body vested with that authority, the Committee agrees with those opinions holding that an attorney should give notice to the government's counsel prior to communication with the government official and that any submissions made to the government official should be given to such counsel.
4. See "Communication with Adverse Party: Worker's Compensation Carrier Contacting Claimant," Oregon Opinion 437 (September 1981), permitting oral communications only when "required by the statute" and directing other "authorized communications" be in writing with a copy to counsel representing the claimant.
5. Texas similarly interpreted Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct, which is specifically applicable to communications about the subject of representation to an ". . . entity of government the lawyer knows to be represented by another lawyer regarding that subject . . .," as prohibiting a telephone conversation with an individual city counsel member expressing disapproval of the city's settlement offer in negotiations for settlement of litigation against the city. It does not appear that the "authorized by law" exception to the Rule had any effect on the decision. State Bar of Texas, Professional Ethics Committee Opinion 474 (Texas June 20, 1991).
6. This opinion does not prohibit an attorney representing a party from communicating with the Alaska State Legislature or any committee thereof regarding a matter in litigation, without the consent of the Attorney General's Office or special counsel for the legislature, so long as neither the legislature nor the legislative body is a party to the litigation.