

Ethics Opinion No. 84-11

Communication by Attorney with Government Employee Regarding Subject Matter of Litigation Without Consent of the Government's Attorney.

The Ethics Committee has been asked whether Alaska Bar Association Ethics Opinion No. 71-1, relating to communications with employees of parties, prohibits an attorney from communicating with a governmental employee in the following circumstances. The attorney, representing a public interest organization, has commenced suit against the Legislative Affairs Agency and three of its employees alleging that denial of access to the Legislative Teleconference Network violates various constitutional rights of the plaintiff. Plaintiff's counsel wishes to interview the Juneau Teleconference Manager, who is not a defendant in the lawsuit, without the consent of counsel for the defendants.

The relevant provision of the Code of Professional Responsibility is DR 79-104(A)(1) which provides as follows:

During the course of his representation of a client, a lawyer shall not:

Communicate or cause another to 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.

Ethics Opinion 71-1, which was based upon Canon No. 9 and interpretations of DR 7-104 (A)(1), which had not yet been adopted by the Alaska Bar, interpreted the scope of those rules as follows:

[A] lawyer is ethically permitted to communicate with employees of a governmental entity concerning a matter in controversy between the party represented by the lawyer and the 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 related to the matter in controversy*, and assuming that full disclosure of the lawyer's representation and the connection of that representation and the connection of that representation to the communication is made. [Emphasis added.]

The prohibition relating to communications by an attorney with a party represented by counsel have been adopted in substantially the same form in Rule 4.2 of the Model Rules of Professional Conduct adopted by the American Bar Association in 1983. The comment to Rule 4.2 supports the position stated in Opinion 71-1 and provides some additional guidance. That comment provides in part:

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, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent of that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

Rule 3.4(f), referred to in that comment provides that:

A lawyer shall not:

(f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

- i. That person is a relative or an employee or other agent of a client; and
- ii. The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving some information.

The job description of the Juneau Teleconference Manager includes:

1. Contact with legislators.
2. Supervises and trains Juneau Teleconference staff.
3. Responsible for scheduling, preparation of backup materials for teleconference.
4. Develops procedures and forms to insure efficient operation.
5. Responsible for routine trouble reporting.
6. Moderates audio and video teleconferences.
7. Explains Division policy for routine questions.
8. Responsible for community development (general publicity, scheduling, questions) in Juneau.
9. Reports regularly to Coordinator.

In coordination with the Anchorage Teleconference Manager, the Juneau Manager has a joint responsibility for equipment repair and inventory, and moderator update and orientation. The Juneau Teleconference Manager is hired by and responsible to the Teleconference Coordinator. In turn, the Teleconference Coordinator is responsible for determining teleconference policy, supervising teleconference staff, and other matters. The Teleconference Coordinator reports regularly to the Director.

Based on the foregoing, it does not appear that the Juneau Teleconference Manager is a person who may reasonably be thought of as representing the

entity in matters related to the matter in the controversy, nor would she be thought of as having managerial responsibility on behalf of the Legislative Affairs Agency or the Teleconference Network. Similarly, it would not appear, utilizing as a guideline the standards applicable under Rule 4.2 of the Model Rules of Professional Conduct, that the acts or omissions of the Juneau Teleconference Manager would be imputed to the Legislative Affairs Agency or the named defendants for purpose of civil liability or that the employee's statements would constitute an admission on the part of the organization. In fact, the answer filed by the state, while admitting certain representations made by the Juneau Teleconference Manager, specifically denies that those statements accurately reflected the Legislative Teleconference Network policies and procedures.

Based on the foregoing, it is the opinion of the Committee that plaintiff's attorney may seek to interview the Juneau Teleconference Manager without the consent of the attorney representing the named defendants, and such conduct will not violate the Code of Professional Responsibility. Conversely, it is the opinion of the Committee that the attorney for the defendants may request the Juneau Teleconference Manager to refrain from being interviewed by the attorney for plaintiff or from voluntarily giving any relevant information to plaintiff or its attorney. There is no indication that the employee's interest will be adversely affected by refraining from giving any such information and the employee's interests, if any, in the context of this litigation, would appear to be identified with the interests the party defendants.

Whether an employee of an entity may reasonably be thought of as representing that entity in matters related to the matter in controversy is a determination that must be made based on the facts and circumstances of each particular situation. Accordingly, the result reached by the Committee is limited to the factual situation presented.

Adopted by the Alaska Bar Association Ethics Committee on November 1, 1984.

Approved by the Board of Governors on November 9, 1984.