

## **Ethics Opinion No. 71-1**

### **Propriety of Communication with an Employee of a Governmental Entity by a Lawyer Engaged in Litigation Against that Governmental Entity.**

The Committee has been asked for its opinion on the question of whether a lawyer engaged in litigation against a governmental entity may communicate with an employee of that entity on a subject related to the litigation without the consent of the government's lawyer.

Before responding to this question, the Committee wishes to note that the Code of Professional Responsibility as adopted by the American Bar Association and as recommended for adoption to the Alaska Supreme Court by the Alaska Bar Association at its 1970 convention, has not yet been promulgated by the Alaska Supreme Court. Therefore, the existing authority for this opinion must be the Canons of Professional Ethics as originally promulgated by the Alaska Supreme Court. On the assumption that it would be helpful to the profession, however, the Committee will also express its opinion based upon the Code of Professional Responsibility.

The Committee has been unable to locate any opinion, formal or informal, of the American Bar Association which disposes of the question posed, with particular reference to governmental entities. Since both Canon 9(see endnote 1) of the Canons of Professional Ethics, and DR 7-104(A)(1)(see endnote 2) of the Code of Professional Responsibility are expressed in terms of communication with an opposing party, the obvious problem is to what extent a party may be equated with its agents or employees. In the opinions of the American Bar Association and the Committee on Ethics of the Bar Association of the City of New York, an implicit distinction seems to have developed between the types of communication which may be engaged in, and the employees that can be communicated with. In several opinions of the Ethics Committee of the American Bar Association, all of which are rather old, a literal interpretation of the Canon was adopted, which strictly observed the distinction between the parties and employees of parties and therefore held that counsel was ethically permitted to interview employees of a party concerning the facts of the matter in dispute without the permission of opposing counsel, so long as no misrepresentation was made to the employee concerning the identity of the interviewer or the purpose of the interview. It should be noted that all of these opinions dealt with situations in which the interviewer was seeking factual information from the employee. This viewpoint, even as to persons with authority to bind the entity, seems to have the tacit approval of Drinker in his treatise on legal ethics. Drinker, *Legal Ethics* 85 (1935).

There is a second group of ABA opinions, which tend to be more recent, which do not draw such a hard and fast distinction between parties and employees of parties. These opinions, which typically deal with the situation in which counsel is dealing with an insurance adjuster concerning settlement of a claim, and therefore have overtones of the Canons dealing with the delegation of professional responsibility to laymen, indicate that as to this situation, and as to employees which are representing the entity as to the matter in controversy, these employees should be treated for purposes of Canon 9 as though they were parties, and no contact should be made without the consent of opposing counsel.

In general, it would seem that DR 7-104 (A)(1) would be consistent with both sets of opinions by the American Bar Association. It should be pointed out, however, that there is one distinction between the Canons and the Code of Professional Responsibility in this respect. The interpretation of Canon 9, dealing with the contact with the opposite party, has been significantly influenced by Canon 39, which sets out a party's right to interview witnesses. The Code of Professional Responsibility has no equivalent provision to Canon 39. The Committee does not infer from this, however, any greater restriction upon the right of counsel to interview opposing witnesses. Because of the structure of the new Code of Professional Responsibility, the Committee is of the opinion that no inference should be drawn from this omission.

In determining the extent to which an employee of the party should be treated in the same fashion as the party itself, there are a series of distinctions which could potentially be made. The first of these is to distinguish between employees of various units of the governmental entity. For example, merely because one is engaged in litigation against the United States of America involving a tort claim due to activities of the United States Army, counsel certainly should not be precluded from talking with employees of the Weather Bureau without the consent of opposing counsel. Although questions may arise concerning the unit of government which is actually involved, in the litigation, these questions must necessarily be resolved by examining the intent with which a particular contact was made, as well as all the other factors in the situation.

Other potential distinctions in the treatment of the various employees of the governmental entity would be to distinguish between management personnel, or personnel representing the entity concerning the matter in controversy, and non-management personnel. Another distinction might be drawn in terms of the purpose behind the contact. For example, contact with an employee by counsel for the purpose of interviewing him to establish factual matters in the controversy might be permitted, but direct contact by counsel which is intended to resolve or propose compromise of the controversy would not be permitted. Again, close questions of intent would arise. Other

distinctions, of course, would be available at the opposite ends of the spectrum, wherein either all employees would be identified with the party by whom they were employed, or the distinction between parties and employees of parties would be literally observed and in no case would an attorney be ethically prohibited from consulting an employee of an opposing party.

These latter two positions, which would always identify employees with the party or never so identify them are both easily rejected. In the one case, since a governmental entity can only function through its employees or agents, the attorney for the governmental entity would be placed in a totally untenable position and the functioning of the adversary system of justice would be significantly impaired. Likewise, if all employees were to be identified with their employer for this purpose, the investigation of matters in controversy with an eye to determining the actual facts would be needlessly encumbered.

Attempting to draw a distinction between the type of contact made is unsupported by either Canon 9 or DR 7-104(A)(1), although it does draw some support from Canon 39, and should therefore be rejected. This is the position taken by Drinker. Drinker, *supra* at 202.

Thus, it is the Committee's opinion, consistent with the developing trend in the opinions of the American Bar Association, that attorneys 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. This position protects the policy behind Canon 9 and DR 7-104 (A)(1), by protecting the adverse party from overreaching and allowing the widest possible range to the policy behind Canon 39, which is to promote full investigation into the facts in controversy.

In the Committee's opinion, the subsidiary problem created by litigation with a governmental entity, which is that it is always, in a sense, represented by counsel, is sufficiently disposed of by the language of DR 7-104(A)(1). In some sense, it can be said that a governmental entity is always represented by counsel concerning matters in controversy, because specific attorneys are charged with that representation. Thus, for example, the United States is always represented by the United States Attorney, as the state of Alaska is represented by its Attorney General. However, the terms of DR 7-104 (A)(1) that make it applicable only when a lawyer is representing a party "in that matter", appears to the Committee to mean that until the government's attorney has begun active participation in the matter, opposing counsel may proceed as if the government were unrepresented. The Committee also believes that this is a fair interpretation of Canon 9, although the point is not covered explicitly.

This, the Committee's answer to the question posed is that 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 to the communication is made.

Adopted by Board of Governors on April 14, 1971.

Endnotes:

Endnote #1:

Canons of Professional Ethics

9. Negotiations With Opposite Party.

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him to the law.

39. Witnesses.

A lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party. In doing so, however, he should scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammelled conduct when appearing at the trial or on the witness stand.

Endnote #2 Code of Professional Responsibility

DR 7-104 Communicating With One of Adverse Interest.

(A) During the course of his representation of a client a lawyer shall not:

(1) 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.

