

Ethics Opinion No. 72-2

Communication Upon Subject in Controversy with Opposing Party when Representation by Counsel in Question.

The Ethics Committee of the Alaska Bar Association has been asked for its opinion on a question dealing with an interpretation of former Canon 9 of the Canons of Professional Ethics and the recently adopted Disciplinary Rule 7-104(A)(1) of the Code of Professional Responsibility.

A stipulated Statement of the Facts is attached hereto as Exhibit A. In two separate actions an Alaska community represented by Alaska Legal Services Corporation sued both the Federal Government and the State of Alaska to restrict the Federal Government from taking certain actions and to restrict the State of Alaska from authorizing the Federal Government from taking the same actions. The Federal Government was enjoined from taking the actions but an injunction had not been issued against the State of Alaska.

The Department of Law of the State of Alaska learned of the possibility that Alaska Legal Services Corporation was not authorized to bring the lawsuits on behalf of the Alaska community and a member of the Alaska State Legislature requested the Department of Law to investigate the matter. Without the knowledge of Alaska Legal Services Corporation, a member of the legal staff of the Department of Law interviewed members of the governing body of the Alaska community and obtained written statements from them to the effect that Alaska Legal Services Corporation did not have authority to bring the lawsuits.

Canon 9 provides as follows:

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; . . .

Disciplinary Rule 7-104 (A)(1) 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 to law to do so.

In an earlier opinion written by Charles P. Flynn, this Committee found as follows:

. . . that a lawyer is ethically permitted to communicate with employees of a government entity concerning a matter in controversy and assuming that full disclosure of the lawyer's representation and the connection of that representation to the communication is made.

From the factual situation it must first be assumed that the only communication that the Department of Law had with the governing group related solely to the lawsuit filed against the Federal Government. The question arises whether Canon 9 or DR 7-104 (A)(1) are applicable since the Department of Law did not represent the Federal Government. We think that this must be answered in the affirmative. The lawsuit filed against the State of Alaska was so closely connected to the controversy with the Federal Government that they could be considered as one. If the lawsuit against the Federal Government failed, likewise would the lawsuit against the State of Alaska. By acting for the Federal Government, the Department of Law was for all intents and purposes acting in regard to the subject matter of the lawsuit against the State of Alaska.

Looking to the earlier ethical opinion of Mr. Flynn, if the Department of Law did not have some justifiable reason for making contact with the governing body, such action would be a violation of both Canon 9 and DR 7-104 (A)(1). In addition, it is somewhat reprehensible pursuant to DR 7-104 (A)(1) that the agent of the Department of Law did not explain the implications of their statements to the governing group.

This Committee cannot find justification for violation of Canon 9 or DR 7-104 (A)(1) in the fact that the Department of Law is the legal branch of the State of Alaska or that a State Legislator requested the action. Neither can the Committee find justification in the fact that the Alaska community involved is an entity of the State of Alaska. It must be treated as any other litigant when it brings a lawsuit against the State of Alaska.

Finally, the ultimate question arises whether there is justification to communicate with the client of another attorney in a lawsuit when the opposing counsel has information that the attorney is not authorized to bring the suit or continue the same. We think not. There are sufficient alternative measures that might be taken to alleviate any reason to create an exception to the rule of non-communication.

In the first instance, the opposing counsel should contact the other attorney and attempt to obtain a clarification from him. This would give the other attorney an opportunity to contact his client and straighten out what might merely be a misunderstanding as to his representation. A request could also be made for permission to communicate with the other attorney's client in regard to the question of representation. It is the opinion of the Committee that in most instances the above action would be sufficient to resolve the question. If, in fact, such action did not lead to a satisfactory resolution of the problem, the opposing attorney could then take the matter to the Board of Governors of the Bar Association or could use discovery and communicate with the other attorney's client by that method. If indeed the client feels that he is not being

properly represented, in most situations one would assume that the client himself would seek aid from the Bar Association or another attorney.

Accordingly, it is the opinion of this Committee that the Department of Law of the State of Alaska acted in an improper manner when, without the knowledge of opposing counsel, it communicated with the client of opposing counsel for the purpose of determining whether or not opposing counsel was properly representing its client.

Adopted by Board of Governors on January 30, 1972.

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