



ISBA Professional Conduct Advisory Opinion

Opinion No. 13-09
October 2013

Subject: Communication with Represented Person

Digest: Direct communication with a government representative regarding a tax assessment dispute in which the representative is represented by counsel are improper without counsel's consent, subject to an exception for direct communications as are authorized by law.

Reference: Illinois Rule of Professional Conduct 4.2;
ISBA Op. Nos. 794, 92-3, and 95-12;
ABA Opinion No. 97-408;
CBA Opinion No. 00-01.

FACTS

An attorney represents a client in a municipal tax case where an assessment of tax is pending. The attorney wants to communicate directly with one of the City's decision makers regarding policy issues underlying application of the tax law to the property involved in the tax case, as well as to discuss a possible resolution or settlement of the case itself. The attorney plans to notify the City attorney handling the matter of his intention to contact the City's representative, but not seek the City attorney's consent to such communications.

QUESTION

Can the attorney in the above circumstances communicate directly with the City's decision maker without first obtaining the City attorney's consent?

OPINION

The present inquiry is governed by Rule 4.2, entitled "Communication with Person Represented by Counsel." Such Rule is referred to as the "no-contact" Rule, and provides as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a 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 purpose of the Rule, as reflected in its Comments, is to prevent overreaching by adverse counsel, to preserve the attorney-client relationship from interference, and to reduce the likelihood of the disclosure of privileged or confidential information.

At the same time, however, it is widely recognized that a constitutional right to petition the government exists which would be undermined by a strict application of the "no-contact" Rule to communications with representatives of governmental bodies. Thus, a relaxation of the Rule has been recognized to exist as to dealings with governmental representatives, premised on the exception stated in the Rule for communications which are authorized by law.

Substantial authority exists on the issue in question. In fact, our Committee has issued three previous Opinions, albeit somewhat aged, on the subject of communications with governmental representatives. In Opinion No. 794, issued in 1982, we strictly applied the "no-contact" Rule in concluding that a lawyer for a landowner in an eminent domain proceeding was prohibited from communicating directly with represented employees of the condemning authority in an attempt to settle the case. Although making reference to the authorized by law exception to the Rule, we did not analyze or apply such exception, concluding only that a lawyer should not communicate directly with municipal representatives known to be represented by counsel absent the prior consent of such counsel.

The same result was reached in our Opinion No. 92-3, where we concluded that an attorney would be in violation of Rule 4.2 by communicating directly with a city's elected officials on the subject of pending litigation when those officials are known to be represented by counsel.

However, in Opinion No. 95-12, we somewhat relaxed our strict application of the "no-contact" Rule as to communications with governmental representatives. The lawyer in that matter represented a client in defending against a municipal zoning ordinance violation proceeding. At the same time, the lawyer had submitted an application to the City on behalf of his client for review of the zoning underlying the ordinance violation proceeding. Moreover, in pursuing such change of zoning, the attorney had cause to communicate directly with City zoning and building code officials concerning the property which was the subject of both the rezoning and the ordinance violation proceedings. We concluded that the lawyer was prohibited by Rule 4.2 from communicating with represented city officials concerning the

pending ordinance violation proceeding, but that the prohibition did not extend to communications regarding the separate rezoning proceeding, such being deemed in the nature of a petition for the redress of a grievance and, as such, protected as being authorized by law under the language of Rule 4.2.

A short time later, analysis of the authorized by law exception to contacts with governmental representatives was taken to a new level in the ABA's widely followed Formal Opinion No. 97-408. Such Opinion, like our previous Opinion No. 95-12, viewed the authorized by law exception as an extension of the constitutional right to petition the government for the redress of grievances and, derivatively, of ensuring a citizen's right of access to government decision makers. Accordingly, it viewed that a balance must be drawn between the competing policy reasons behind permitting or prohibiting direct contact with represented governmental officials. It resolved such competing interests by concluding that while contacts with represented government representatives are not categorically exempt from the no-contact provisions of Rule 4.2, such Rule does permit a lawyer representing a private party in a controversy with the government to communicate directly with government decision makers within the ambit of the right to petition the government subject to three conditions being met: (1) that the government official being contacted has the authority to take or recommend action in the controversy, (2) that the sole purpose of the communication is to address a policy issue, "including settling the controversy," and (3) that the lawyer provides the government's counsel with reasonable notice of his intent to directly contact the government officials so as to afford an opportunity to obtain the advice of counsel before entertaining the communication.

In fact, the Opinion goes so far as to cite a then existing Comment to the Rule to the effect that "[c]ommunications 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." The Opinion goes on to state, however, that in situations where the right to petition governmental representatives for the redress of a grievance has no apparent applicability, either because of the position and authority of the officials to be contacted or because of the purpose of the proposed communications, Rule 4.2 still would serve to prohibit direct communications with government representatives without the prior consent of government counsel.

The ABA's Formal Opinion has been viewed as the seminal authority on a lawyer's right to communicate directly with government officials, and although subject to some criticism, has been widely followed. To this effect, the Chicago Bar Association, in its Opinion No. 00-01 (2000), followed the ABA Opinion, stating that it sets forth appropriate guidelines in recognizing that while communications with represented government representatives are not exempt from the "no-contact" Rule, communications which are inherent in a citizen's constitutional right to petition the government and have access to government decision makers are permitted even if the governmental body is represented by a lawyer in the matter. Thus, consistent with the ABA Opinion, the CBA concluded that even without consent by the governmental attorney, a private attorney may approach a governmental official who has authority to take or recommend action in a controversy to discuss policy matters, including settling the controversy, so long as counsel for the party gives the

government lawyer prior notice of such intended contact.

The Restatement of the Law Governing Lawyers arrives at a similar conclusion, but by means of a different route. As stated, the ABA Opinion starts with the proposition that contacts with represented government representatives are subject to the prohibition of the "no-contact" Rule, but with an exception for direct contacts with government decision makers, provided that the sole purpose of the contact is to address a policy issue. Section 110 of the Restatement comes at such issue from the opposite direction, starting with the proposition that the no-contact rule does not apply to communications with governmental representatives; stating that the rule does apply, however, to prohibit direct contact with respect to the negotiation or litigation of a specific claim; but excepting from such prohibition direct communications on an issue of general policy. Thus, under either the ABA rationale or the Restatement, we arrive at the same place; i.e., that direct contacts with a governmental decision maker in a controversy with a government entity are permissible, but only if the purpose of the contact is to address, in the language of the ABA Opinion, a policy issue, or, as stated in the Restatement, an issue of general policy.

In light of the aforesaid authority, as well as the fact that the ABA Rule 4.2 interpreted in ABA Formal Opinion No. 97-408 is essentially identical to Illinois Rule 4.2, our inclination is to interpret our Rule consistent with the ABA and the CBA findings. We cannot do so, however, for the following reasons.

First, the ABA Opinion, the CBA Opinion and the Restatement all conclude that direct communications with a governmental decision maker are permissible without the consent of the government attorney are those which address a policy issue. In fact, the ABA Opinion states that the sole purpose of the communication must be to address a policy issue. What constitutes a policy issue, however, is at best problematic, especially in light of the ABA's and CBA's recitations that policy issues such as are appropriate for direct communication with a governmental representative include "settling the controversy." The Restatement, however, does not go as far. It instead reflects only that while communications on an issue of general policy are not prohibited, communications with respect to the negotiation or litigation of a specific claim are prohibited. We are in accord with this view. Thus, while we can accept the rationale of the ABA and CBA Opinions that communications regarding the underlying application of the tax law may be viewed as constituting a policy issue, we cannot agree that discussions or negotiations as to settling and resolving a specific tax assessment controversy similarly involve solely a policy issue. To this effect, we believe that our prior Opinion 95-12 was correct in concluding that a lawyer is prohibited by Rule 4.2 from communicating with represented city officials concerning a pending ordinance violation proceeding, although not prohibited from communicating with City officials regarding a separate re-zoning proceeding as to the same property. Such communications are deemed in the nature of a petition for the redress of a grievance, and are thus protected as being authorized by law under the language of Rule 4.2.

We additionally disagree with the ABA's and CBA's Opinions to the extent that they require an attorney whose communications are deemed protected by law, and thus excepted from the "no-contact" Rule, to nonetheless give notice to governmental counsel of his

intent to communicate directly with the governmental official. Nowhere does Rule 4.2 contain any such provision. To the contrary, the Rule on its face mandates the consent of governmental counsel to a communication which is subject to the Rule's "no-contact" provision, but neither consent from nor notice to governmental counsel as to communications which are authorized by law or otherwise exempt from the coverage of the Rule. The notice requirement as to otherwise protected communications, while possibly prudent, is nonetheless strictly a creation of the ABA's Opinion and is not mandated by Rule 4.2.

CONCLUSION

We are of the opinion that an attorney is not precluded from direct communications with a City decision maker as to underlying tax law policy issues, even when there is a pending tax case between the City and the attorney's client. Moreover, in such instance, prior notice to the City's attorney is not required by Rule 4.2. To the contrary, however, direct communications with the City decision maker as to the settlement or resolution of the pending matter cannot fairly be said to relate to policy issues, and are prohibited without first obtaining the consent of the City's lawyer. In such instance, the providing of prior notice to the City's attorney without obtaining the attorney's consent is insufficient to allow such direct communication with the City's representative.

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