

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-332
Issued: September 1988

This opinion was decided under the Code of Professional Responsibility, which was in effect from 1971 to 1990. Lawyers should consult the current version of the Rules of Professional Conduct and Comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question: May a lawyer representing a government office or department in a litigated matter prevent his non-government opponent from contacting all employees of the government office or department outside the presence of the government attorney.

Answer: No.

References: DR 7-104; KBA E-213(1979); C. Wolfram, Modern Legal Ethics 614-15; Note: DR 1-104 of the Code of Professional Responsibility Applied to the Government "Party"; Vega v. Bloomsburgh, 427 F. Supp. 593 (D. Mass. 1977).

OPINION

This question was presented by two different lawyers in two different contexts. In the first request, a lawyer complained that counsel for a government department had insisted that counsel had no right to contact any employee of the department regarding a litigated matter, counsel's "blanket veto" extending down to field employees and inspectors. In another request, a lawyer complained that he had been charged with an ethical violation as a result of his discussions with a minority member of an elected local board regarding a decision that had been made by the board as an entity. In this opinion we only address the subject of such "blanket vetoes". The application of the familiar rule against bypassing the lawyer of a represented party is necessarily fact sensitive, and will call for the application of counsel's sound judgment in close cases. Furthermore, we only address the "lawyer's veto" in this context. The particular individual who is contacted informally is free to discuss a matter or not, as he or she chooses.

Disciplinary Rule 7-104(A)(1) provides that during the course of the lawyer's representation of a client the lawyer shall not "communicate or cause another to communicate on the subject of the representation with a party (the lawyer) knows to be represented by a lawyer in that matter unless (the lawyer) has the prior consent of the lawyer representing such other party or is authorized by law to do so". The rule "was designed to permit an attorney to function adequately in (the lawyer's) proper role and to prevent the opposing attorney from impeding (the lawyer's) performance in such role".

Mitton v. State Bar, 78 Cal.Rptr. 649 (Cal. 1969). The rule also provides a safeguard against the risk that a party whose counsel is by-passed might unwittingly make statements to opposing counsel (perhaps prompted by overreaching or deception) that could prejudice the party's interest at trial. Abeles v. State Bar, 108 Cal.Rptr. 359 (Cal. 1973). The rule reflects concepts of fair play inherent in the adversary system. Generally, it seems only fair and reasonable that government counsel and government parties receive protection under the rule.

On the other hand, "when the party is a multi-person entity, such as a corporation or a government body ... DR 7-104's protection of parties (if interpreted too broadly) may be at odds with the goal of permitting access to witnesses in order to uncover and present all relevant evidence to the trier of facts". Note: DR 7-104 of the Code of Professional Responsibility Applied to the Government "Party", 61 Minn.L. Rev. 1007, 1013 (1976-77).

In the past the Committee has observed that DR 7-104 does not preclude "unconsented" contacts with corporate employees who lack the power to bind the corporate opponent, or who do not possess "confidential" information belonging to the employer entity. Clearly, the same exceptions would logically apply in the context of the "government" as a party. Moreover, Professor Wolfram and other influential commentators have observed that the rule should be narrowly construed in this context because of constitutional guarantees of access to government and statutory policies encouraging government in the sunshine". C. Wolfram, *Modern Legal Ethics* 614-15. Indeed, his interpretation of the rule is supported by the Comments to Proposed Model Rule 4.2 (the analog to DR 7-104), which suggests that the expression "authorized by law" (also found in DR 7-104) includes the right of a party to a controversy with a government agency to speak with government officials about the matter.

In fact, the Code has been narrowly interpreted by courts and state bar committees. For example, in Vega v. Bloomsburgh, 47 F.Supp. 593 (D. Mass. 1977) a case brought against a department and certain high-level officials, the court rejected the state's contention that all employees of a department were "represented parties" that could not be interviewed by plaintiff's counsel outside the presence of the Assistant Attorney General representing the department. In reaching this conclusion the court employed the reasoning ordinarily applied in the context of contacts with corporate employees, and also cited first amendment considerations. Both the North Carolina and Alaska Bar Committees have issued similar opinions. See N.C. Op. 184(1965) and Alaska Op. 71 1 (1971).

The New York State Bar went even further in a case involving communications with certain elected officials. In New York Op. 404 (1975) the Bar Committee stated that an attorney could communicate with individual minority members of a board of education about a contested board decision.

The Committee observed that:

The overriding public interest compels that an opportunity be afforded to the public and their authorized representatives to obtain the views of, and pertinent facts from, public officials representing them. ... Minority members of a public body should not ... be considered adverse parties their constituents whom they were selected to represent.

While we cannot address every situation that may arise with a single opinion, we offer these observations in the hope that they will provide useful guidance to government counsel as well as lawyers involved in disputes with government agencies and offices.

This opinion addresses only contacts regarding government employees and officers serving in such capacity. Lawyer's concerned with the propriety of contacting employees and agents of non-governmental entities should consult our earlier opinions.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.