



Committee on Professional Ethics

Opinion #404 - 8/13/75 (23-75)

Topic: Communication with adverse party.

Digest: Not improper for attorney to communicate with individual members of board of education under limited circumstances.

Code: DR 7-104(A)(1)

QUESTION

Where a board of education is split on a decision, may an attorney representing a petitioner reviewing that decision contact the minority members of the board in connection with such proceedings without the consent of the board's attorney?

OPINION

The question is answered in the affirmative. DR 7-104(A)(1) provides that an attorney shall not "Communicate...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". See Drinker, Legal Ethics 201 (1953).

A board of education is a governmental unit which acts through the members of its board. DR 7-104(A)(1) was applied to governmental entities in N.Y. State 160 (1970), based on the premise that "a governmental unit has the same rights and responsibilities in a controversy as any other corporation or individual".

DR 7-104(A)(1) does not prohibit an attorney from interviewing employees, ABA 117 (1934) or witnesses of an adverse party, ABA 14 (1929), ABA 127 (1935), as long as such witness is not, in fact, an adverse party in the action ABA 108 (1934); ABA 187 (1938). In regard to corporate entities prior decisions have differed as to whether employees of an adverse corporate party may be interviewed, such interviews being permitted in N.Y. City 613 (1942) and prohibited in N.Y. County 528 (1964).

The specific issue raised herein is whether, in the absence of consent from the board's designated attorney, counsel may discuss a matter in controversy with a member of the board who voted against the decision being contested. A crucial question is whether an individual member of a public body must be considered an adverse party in regard to a decision he opposed.

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, for purposes of DR 7-104(A)(1), be considered adverse parties to

their constituents whom they were selected to represent.

Thus DR 7-104(A)(1) is read as implicitly creating a limited exception to its otherwise broad prohibitions because a public body is involved and is not intended to extend beyond such public entities.

A similar result prevails in California where by statute the prohibition against communications with adverse parties "does not apply to communications with a public officer, board, committee or body". Cal. Business and Professional Code Sec. 6076 (West 1962); see footnote 74 to Canon 7.

In the absence of consent communications with members of a public body in an adversary proceeding should be made only in instances where the public official has indicated his or her desire to speak with opposing counsel.
