NEW YORK STATE BAR ASSOCIATION

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Committee on Professional Ethics

Opinion 607 - 2/15/90 (26-89)

Topic: Communication with Adverse Party.

Digest: Prior to commencement of suit and to being advised the adverse party is represented by counsel, a lawyer may communicate with the party, but must inform the party that, in the event the party is represented by counsel, such communications should be referred to counsel.

Code: Canon 9;
EC 7-18;
DR 7-104(A)(1),(2).

QUESTION

May a lawyer representing a person injured in an automobile accident send a letter and "statement form" to the driver of the automobile that injured his client, where such communication occurs prior to the commencement of any action and prior to the lawyer being advised the driver is represented by counsel?

OPINION

A plaintiff's personal injury lawyer is considering instituting the procedure of sending a letter and "statement form" to the driver of the automobile that injured his client. The letter advises the driver that the lawyer is representing the injured person, and instructs the driver to complete and return, in the self-addressed, stamped envelope, the statement form to the lawyer because "(t)here are sometimes several sides and versions to an accident and, before proceeding further, I would like to know your version of this accident — whether you feel the accident was your fault or the other party's fault, and the reasons for your belief; and the names and addresses

of any witnesses." The statement form asks the driver to describe and sketch how the accident occurred and what caused the accident. The letter also instructs the driver to refer the letter to the driver's insurance carrier if the driver is insured, and to return an enclosed postcard informing the lawyer of the name of the insurance company and the insurance policy limits. The lawyer proposes sending the documents to the driver prior to the commencement of any action in the matter, and prior to the lawyer being advised the driver is represented by counsel. The lawyer inquires whether it is ethically permissible to correspond with the driver in this manner.

The time-honored ethical rule prohibiting a lawyer from communicating with a party known to be represented by counsel is codified in DR 7-104(A)(1), which provides:

> During the course of his representation of a client a lawyer shall not ... (c)ommunicate 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 (emphasis added).

The purpose of this well-established and respected rule is to preserve the proper functioning of the attorney-client relationship and to shield the adverse party from improper approaches. ABA 108 (1934). In *United States* v. *Jamil*, 546 F. Supp. 646, 652 (E.D.N.Y. 1982), *rev'd on other grounds*, 707 F.2d 638 (2d Cir. 1983) the court observed:

> This salutary rule is fundamental to the effective functioning of the legal profession. There could be no reliable attorney-client relationship without an ethical shield against improper approaches to opposing counsel's client. The ethical prohibition protects an adverse party from the imbalance of skill and knowledge between laymen and lawyers (citations omitted).

This Committee has previously stated that " '(i)n the interests of fair play and expeditious resolution of disputes, the legal system functions best when communications between represented adversaries are controlled by their counsel'." N.Y. State 577 (1986), quoting ABA Inf. 1496 (1983). EC 7-18 similarly advises that "(t)he legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel."

Because this standard is so vital to ethical practice, and the intention of the rule is to prevent a person from being deprived of the advice of retained counsel by bypassing such counsel, "an attorney must guard against even an inadvertent or negligent bypass of opposing counsel." *Jamil*, 546 F. Supp. at 652; *In re McCaffrey*, 275 Or. 23, 549 P.2d 666, 668 (1976). Further, "current authorities agree ... that the rule is designed to prevent opposing counsel from impeding an attorney's performance and that the scope of the rule therefore extends even to well-intended approaches." American Bar Foundation, Annotated Code of Professional Responsibility, Comment, 332 (1979); *Abeles* v. *State Bar*, 9 Cal. 3d 603, 609, 510 P.2d 719, 108 Cal. Rptr. 359 (1973). The rule prohibits communication even if the purpose is merely to investigate the facts. *In re Snyder*, 51 Bankr. 432, 438 (Bankr. D. Utah 1985).

The instant inquiry presents two issues this Committee has never directly addressed with regard to the rule prohibiting communication with a party known to be represented by counsel. First is the question whether the driver is a "party" within the meaning of DR 7-104(A)(1) when the communication is made prior to the commencement of an action. We find that the word "party" has an "expansive definition [that] include[s] a person who is a potential litigant," *Jamil*, 546 F. Supp. at 654, and that the absence of a formal commencement of adversarial proceedings does not vitiate DR 7-104(A)(1)'s ethical proscription against unauthorized direct communications with a "party" represented by counsel. In *United States* v. *Hammad*, 858 F.2d 834 (2d Cir. 1988), a prosecutor used an informer to record conversations with the defendant and, significantly, used the artifice and misrepresentation of a sham subpoena to help the informer to elicit admissions. This communication occurred prior to the indictment, but in the absence of the defendant's retained counsel. Such a communication in the absence of counsel did not violate the defendant's Sixth Amendment rights because such rights do not attach before formal adversarial proceedings are commenced against a defendant. The court held, however, that such a communication prior to the commencement of formal adversarial proceedings violated DR 7-104(A)(1), which applies to criminal as well as civil litigations, when aided by the prosecutor's misconduct in issuing the sham subpoena. *Id.* at 836-40. *Cf. United States* v. *Buda*, 718 F. Supp. 1094 (W.D.N.Y. 1989). Similarly, in *Jamil*, *supra*, the Eastern District of New York concluded that for DR 7-104(A)(1) to be applicable in a criminal action "it is sufficient that the client is being investigated as a possible defendant in a potential criminal proceeding" because its "application depends upon the existence of the attorney-client relationship, not upon the existence of a pending law-

suit." *Jamil*, 546 F. Supp. at 653. *See also* N.Y. City 101 (1928) (attorney may not interview for fact finding purposes opposing party represented by counsel although suit has not been commenced); N.Y. City 302 (1934) (attorney for defendant may not negotiate a matter with the opposite injured party represented by counsel but should deal only with the party's counsel, although no suit has been commenced).

The second issue raised by the instant inquiry is the implication of the plaintiff lawyer's lack of knowledge as to whether the driver is represented by counsel. DR 7-104(A)(1) only bars communication with a party the lawyer "knows" is represented by counsel. Since the lawyer in the instant inquiry has not been advised whether the driver is represented by counsel, the lawyer does not "know" whether the driver is represented by counsel. The act of communicating with the driver by sending the documents is therefore not prohibited by DR 7-104(A)(1). Nevertheless, the substance and content of those documents must accord with the purposes and spirit of DR 7-104(A)(1). With them as our guide, we conclude that the lawyer, when sending the documents to the driver, must inform the driver that, in the event the driver is represented by counsel, the documents should be referred to counsel.

A client is generally told by his or her lawyer to refer to the lawyer any communications received from any parties in the matter. A sophisticated client will understand and follow this instruction, but a less experienced person may naively view such a letter from a lawyer as part of the normal procedures of the lawyer's "game" with which he is not acquainted. The client may be enticed by hearing from a lawyer that there are "several sides and versions to an accident" and "I would like to know your version." Such contact threatens the opposing party's attorney-client relationship, impedes opposing counsel's performance, and fails to protect the "adverse party from the imbalance of skill and knowledge between laymen and lawyers," *Jamil*, 546 F. Supp. at 652, thereby undermining the very purposes of the rule of DR 7-104(A)(1). Absent a duty to inform the party to refer the documents to counsel if the party is represented, such contact allows the party to be taken advantage of, be influenced or coerced by opposing counsel, and "be deprived of the advice of retained counsel." *Id.*

Though we do not impute such negative motives to the instant inquirer, we note again that even a well-intended or inadvertent bypass of opposing counsel violates DR 7-104(A)(1). *Jamil, supra*; *McCaffrey, supra*; *Snyder, supra*. Implying a duty to instruct the party to refer documents to the party's

attorney in the event the party has one helps to insure that opposing counsel is not inadvertently bypassed, and that Canon 9's teaching that a lawyer should avoid even the appearance of impropriety is observed. Further, the duty accords well with DR 7-104(A)(2), which mandates that the only advice a lawyer can give an unrepresented adverse person is to secure counsel. N.Y. State 358 (1974). Moreover, the duty acts as a prophylactic curtailing the willful ignorance or purposeful avoidance of the knowledge that the opposing party is represented by counsel, while an opposite rule would tend to encourage such conduct.

Along these lines, in *United States* v. *Hammad*, 678 F. Supp. 397 (E.D.N.Y. 1987), *rev'd on other grounds*, 858 F.2d 834 (2d Cir. 1988), discussed above, the government argued that the prosecutor did not "know" the defendant was represented by counsel. The District Court, finding a violation of DR 7-104(A)(1), explained that the government should have "pursued its inquiry into the nature of .... representation before sending its agent to discuss the subject matter of the case with Mr. Hammad." *Id.*, 678 F. Supp. at 399. This finding of a violation of DR 7-104(A)(1) was affirmed by the Second Circuit. *Id.*, 858 F.2d at 840. *See also In re Snyder*, 51 Bankr. 432, 437 (Bankr. D. Utah 1985) (violation of DR 7-104(A)(1) where "the debtor's attorney knew or *should have known* (the creditors) were represented by counsel") (emphasis added); Ga. 86-4 (1986) ("If the plaintiff's lawyer needs information as to the name of the insured's insurer, he or she may properly write the insured for this information. But the contents of the letter shall be limited to no more than a demand, a request for the necessary information and a suggestion to seek counsel").

CONCLUSION

Prior to the commencement of suit and to being advised the adverse party is represented by counsel, a lawyer may communicate with the party, but must inform the party that, in the event the party is represented by counsel, such communications should be referred to counsel.