NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 663 – 4/21/94 (66-93)

Topic: Communication with adverse party; knowledge of adverse representation

Digest: A lawyer may communicate directly with an opposing party when the putative lawyer for that party fails to respond only after undertaking a complete and thorough inquiry to determine the ultimate fact of continuing representation.

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

QUESTION

May a lawyer ethically contact an opposing party directly when the putative lawyer for that party fails to respond?

OPINION

An attorney for a creditor inquires whether she may contact a debtor who previously has indicated that attorney X represents the debtor, in the following circumstances: After some preliminary communications from the creditor itself to the debtor, the creditor's lawyer contacted the debtor by letter or telephone, and the debtor responded that X represents him. When the inquirer contacted X concerning the matter, X failed to reply to any inquiries, either by telephone or letter. The creditor's attorney sent a series of certified letters to X requesting acknowledgment from X as to whether X represented the debtor. The third certified letter requesting confirmation of the representation was a "final letter," which indicated that if no response was received within 15 days of receipt, the lawyer would assume that X did not represent the debtor or no longer represented the debtor, and that the lawyer would contact the debtor directly. In similar cases, X has contacted the lawyer wondering why the lawyer sent documents to him, because, as X explained, he only had an initial consultation with the debtor without a subsequent retainer.

DR 7-104(A)(1) of the Lawyers' Code of Professional Responsibility provides:

> During the course of the representation of a client a lawyer shall not:
>
> (1) [c]ommunicate or cause another to communicate on the subject of the representation with a party *the lawyer knows to be represented* by the lawyer in that matter unless that lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so. (Emphasis added.)

We have stated that "[t]he 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." N.Y. State 607 (1990). We stated further that "even a well-intended or inadvertent bypass of opposing counsel violates DR 7-104(A)(1)." *Id.* We determined that the opposing client, which in this case would be the debtor, is a "party" within the meaning of DR 7-104(A)(1) even in the absence of a formal commencement of adversarial proceedings." *Id.* This "expansive definition … include[s] a person who is a potential litigant. *Id.* (*quoting United States v. Jamil*, 546 F. Supp. 646, 654 [E.D.N.Y. 1982], *rev'd on other grounds*, 707 F. 2d 638 [2d Cir. 1983]). Under our opinion in N.Y. State 607, the result under DR 7-104(A)(1) would be the same both in the pre-litigation stage and after the commencement of formal adversarial proceedings against the debtor.

At the same time, "DR 7-104(A)(1) only bars communication with a party the lawyer '*knows*' is represented by counsel." N.Y. State 607 (emphasis added). We determined in N.Y. State 607 that, if the lawyer "has not been advised whether the … [opposing party] is represented by counsel, the lawyer does not 'know' whether [that party] is represented by counsel," and that therefore communication directly with the client is permitted. But such direct communication must otherwise comply with the Code (especially DR 7-104[A][2]), and must include a cautionary statement "that, in the event the … [party] is represented by counsel, the documents should be referred to counsel." N.Y. State 607. Where a lawyer does not know that the opposing client is represented by counsel, he or she "is free to communicate with that person on any and all subjects," but may not offer legal advice to such party other than urging the party "to secure other counsel." N.Y. State 463 (1977). See also, N.Y. State 358 (1974)(any effort to give legal advice to an unrepresented person with differing interests is prohibited by DR 7-104[A][2] and EC 7-18).

These opinions do not address a spurious claim of representation by a party or a recalcitrant attorney who will not confirm or deny the claimed relationship. A similar scenario, however, was considered in N.Y. City 79-13 (1979). The inquirer, who was counsel to a prevailing plaintiff, attempted to collect on the judgment after the time for appeal had expired. On the day that costs were imposed on the defendant, the inquirer wrote the opposing attorney

on behalf of the plaintiff, enclosing the bill of costs and asking that the opposing attorney contact him for the purpose of arranging payment. In the absence of a response from opposing counsel, the inquirer write again, calling attention to the previous correspondence and indicating that attempts at telephone contact also had been unsuccessful. The second letter advised that the inquirer would take all necessary and appropriate action to make collection unless the opposing attorney made contact with the inquirer. Thereafter, still faced with silence from the attorney, the inquirer wrote another letter warning that he would contact the client directly to execute upon the judgment unless opposing counsel returned his correspondence.

The City Bar held that the proposed contact with the opposing client was prohibited. Distinguishing ABA Inf. 827 (1965), which sanctioned dealing directly with the opposing party to collect a final judgment after the opposing party's representation was terminated, the City Bar committee observed that, despite the unanswered correspondence, there had been no affirmative indication of termination.

N.Y. County 625 (1974) is to the same effect. In that inquiry, the inquirer believed that the opposing lawyer had not contacted the client, and probably no longer represented the client. The inquirer proposed to notify the lawyer that he planned to communicate directly with the opposing party to discuss settlement. The County bar committee observed that the inquirer had no affirmative indication of withdrawal or termination of the representation, and thus the lawyer continued to represent the opposing party. N.Y. County 625. The County Bar committee noted that the inquirer could submit a settlement offer by his client to the opposing party's attorney, who then would be under a duty to inform his client f the receipt of such offer. *Id.*

Our Committee believes that the County Bar and City Bar opinions, while correctly interpreting DR 7-104(A)(1), are distinguishable from the instant inquiry. The series of letters sent by the City Bar inquirer did not address the subject of representation and, most importantly, did not contain the last warning that a failure to communicate on the part of opposing counsel would lead the inquirer justifiably to believe that the opposing party was no longer represented or indeed never was represented by this attorney. The City Bar inquirer simply warned that execution on the judgment would follow a failure to communicate. Similarly, the County Bar inquirer had confirmation from the opposing party that she was represented by a lawyer, albeit she did not follow her lawyer's directions with any regularity. There was no effort in the County Bar inquiry to communicate with the opposing lawyer in the manner proposed here, which involves a series of letters addressing the subject of representation, and a warning that a failure to communicate would justify the belief that representation either never existed or no longer exists.

In most cases, the simple word of the opposing client will suffice to trigger the obligations of DR 7-104(A), and to create a presumption that he or she, in fact, is represented by counsel. In some circumstances, however, it is reasonable to question whether there is continued representation. We caution that mere doubt, without more, cannot overcome the presumption created by the opposing client's statement that he or she is represented by counsel. A finding to the contrary cannot be based on studied ignorance, or facts which would lead reasonable observers to conclude indicate simple neglect of the attorney to the opposing client's case. A lawyer must undertake a complete and thorough inquiry to determine the ultimate fact of existing or continuing representation. In order to overcome the word of the opposing client as to representation, there must be clear evidence that the opposing party is not represented by counsel.

The procedure described here is a reasonable, although not the only satisfactory, method to determine whether an opposing party is represented by counsel. After sending a series of letters, including the last one that warns of the consequences of a failure to respond, the interests protected by DR 7-104(A)(1) will have been satisfied and the lawyer justifiably can conclude that she does not "know" that the debtor is represented by counsel. Any effort to communicate with the debtor after these procedures have been followed, however, cannot violate any other provision of the Code, particularly DR 7-104(A)(2), and must contain a directive to the debtor that, if indeed he or she is represented by a lawyer, the communication and nay paper work attached thereto should be referred to counsel. N.Y. State 607.

CONCLUSION

Subject to the qualifications stated above, the inquiry is answered in the affirmative.