NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 728 (5/10/00)

Topic: Communicating with represented party; communicating with unrepresented party; advice to non-client concerning risk of self-incrimination

Digest: In civil hearing under General Municipal Law, if pro se civil claimant against municipality faces criminal charges relating to the subject of the claim, attorney for municipality may not communicate directly with the claimant unless attorney is (1) legally authorized to do so, (2) ascertains that the claimant is not receiving legal advice in connection with the civil claim, or (3) receives counsel's permission; if claimant is unrepresented, municipality's attorney has discretion whether to advise claimant of the risk of self-incrimination.

Code: Canons 6,7; DR 7-101, 7-104(A)(1), (2); EC 7-14, 7-18

QUESTION

Under General Municipal Law §50-h, an attorney for a New York municipality may take testimony from a person who has filed a claim against the municipality pursuant to General Municipal Law §50-e. On occasion, a *pro se* claim is filed regarding police matters (typically alleging false arrest or excessive use of force) when criminal charges are still pending against the claimant. A transcript of testimony given by the claimant at the hearing could be obtained by the District Attorney by subpoena or court order and used against the

claimant in the pending criminal proceeding. May the municipality's attorney advise the claimant that his or her testimony might be incriminating and used against the claimant in a subsequent criminal proceeding? Must the attorney do so?

OPINION

Whether the municipality's attorney may advise the claimant about the risk of self-incrimination depends in part on whether the claimant is "represented" for purposes of DR 7-104. DR 7-104(A)(1) governs communications with parties who are known to be represented in the particular matter, while DR 7-104(A)(2) governs communications with those who are unrepresented. Additionally, because the inquiry involves the conduct of an attorney for a municipality, not for a private party, the attorney's professional obligations as an advocate, including the attorney's obligation to serve zealously, competently and loyally on behalf of the client, must be understood in light of the concurrent obligation of a government attorney in a civil case, as in a criminal case, to "seek justice":

> A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and should not use his or her position or the economic power of the government to harass parties or to bring about unjust settlements or results. The responsibilities of government lawyers with respect to the compulsion of testimony and other information are generally the same as those of public prosecutors.

EC 7-14.

1. DR 7-104(A)(1)

If the claimant is represented with respect to the matter on which the municipality's attorney would communicate with the claimant, the permissibility of communicating directly with the claimant would principally be governed by DR 7-104 (A)(1), which provides:

> A. During the course of the representation of a client a lawyer shall not:
>
> 1. 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.

Although the claimant under the stated facts appears generally to be unrepresented with respect to the claim against the municipality, since the written notice of claim

presumably shows no attorney representing the claimant, this does not preclude the possibility that the claimant's criminal defense lawyer is providing advice concerning how the claimant's testimony with respect to the civil claim might affect the criminal case. The municipality's attorney is aware of the likelihood if not certainty that the claimant has a lawyer with respect to the pending criminal charges, but may not be certain whether the criminal defense lawyer is advising the claimant regarding the legal implications of the related civil claim against the municipality. Thus, there is a question whether the municipality's attorney has any duty of inquiry, or whether the municipality's attorney may communicate directly with the claimant on the theory that the claimant is not "known" to be represented in the matter that would be the subject of communications.

This Committee has previously found that, in some circumstances, a lawyer must confirm that an individual is not represented by counsel in the particular matter before communicating directly with that individual. For example, where a party was known at one time to be represented, but it is reasonable to question whether there is continued representation, "a lawyer must undertake a complete and thorough inquiry to determine the ultimate fact of existing or continuing representation" before communicating directly with the opposing party. N.Y. State 663 (1994) (where opposing party claims to be represented by counsel, but the putative lawyer fails to respond, a lawyer may communicate directly with the party only after a complete and thorough inquiry into the question of whether the party is represented); *cf.* N.Y. State 650 (1993) (lawyers staffing corporation's "help line" telephone as part of corporation's "compliance with the law" program are correctly "require[d] to inquire if the caller is represented by counsel in the matter about which the caller is reporting"); N.Y. State 607 (1990) (lawyer representing person injured in an automobile accident who has no information whether the driver is represented may send correspondence to the driver, but must inform that party to refer the documents to counsel if the party is represented).

Under the circumstances presented here, the municipality's attorney would have a similar duty of inquiry before communicating directly with the claimant as proposed. The attorney knows that the claimant faces a criminal charge arising out of the same situation which generated the notice of claim in the civil matter and knows that the claimant is almost certainly represented, or about to be represented, in connection with the criminal charge. Although the criminal defense lawyer apparently is not prosecuting the 50-e claim on behalf of the client, that lawyer may be advising the client about whether there is a risk that testimony in the 50-h hearing may be used against the client in the criminal case - the very subject of the municipal attorney's proposed communication. That being so, the municipal attorney may not communicate with the claimant about the risk of self-incrimination unless the municipal attorney ascertains that the claimant is not represented with respect to this matter. Among other possibilities, this may be determined by asking the claimant whether the claimant's criminal defense lawyer or any other lawyer is advising the claimant concerning the 50-h hearing. If it is determined that the claimant *is* represented in the matter, then direct communications with the claimant are limited by DR 7-104(A)(1) to those

that are "authorized by law" (*e.g.*, questioning in the context of the 50-h hearing itself) or those to which the claimant's attorney has given prior consent.

2. DR 7-104(A)(2)

Assuming that the claimant is unrepresented in the matter, one must consider whether DR 7-104(A)(2) bars the municipality's attorney from advising the claimant of the risk of self-incrimination. DR 7-104(A)(2) provides:

> A. During the course of the representation of a client a lawyer shall not:
> * * *
> 2. Give advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

Additionally, an Ethical Consideration contained in Canon 7 provides:

> If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance a lawyer should not undertake to give advice to the person who is not represented by a lawyer, except to advise the person to obtain a lawyer.

EC 7-18.

Although the disciplinary rule, by its terms, forbids a lawyer from giving any advice to a party whose interests conflict with those of the lawyer's client, other than the advice to secure counsel, the rule has been understood to allow a lawyer, additionally, to give certain non-controvertible information about the law to enable the other party to understand the need for independent counsel. For example, in N.Y. State 477 (1977), we opined that the inquiring attorney for an executor of a will could ethically advise the surviving spouse that the spouse might have a right of election against the will as to which independent counsel could give advice. We explained:

> A balance must be struck. The executor's lawyer cannot advise the surviving spouse to exercise a right of election, but he can advise him to seek independent counsel. Cf. DR 7-101(A) with DR 7-104 (A) (2). And, to make certain that the surviving spouse understands the need for independent counsel, as a matter of professional privilege the executor's lawyer may inform him of the possible existence of a right to elect a statutory share against the will.

Similarly, an opinion of the New York County Lawyers' Association noted that, in advising an unrepresented plaintiff to retain counsel, the defendant's lawyer could identify legal issues as to which an independent lawyer could advise the plaintiff:

> At the outset of their dealings, pursuant to DR 7-104(A)(2), inquirer should advise plaintiff that there may be legal issues, such as the possible attorney's charging lien, affecting plaintiff's right to recovery under whatever settlement is reached and that plaintiff should consult a lawyer to advise him about such issues because the inquirer is barred from doing so ...

N.Y. County 708 (1995).

These opinions are consistent with the general rationale of DR 7-104(A)(2), which is to "protect unrepresented people "[1] as well as with the understanding that "[t]he legal system in its broadest sense functions best when persons in need of legal assistance or advice are represented by their own counsel." EC 7-18. Accordingly, we believe that DR 7-102(A)(2) does not forbid the municipality's attorney from informing the claimant that testimony in the 50-h hearing might be used against the claimant in the pending criminal prosecution, where the municipal attorney's purpose is to enable the unrepresented claimant to appreciate the possible value of a lawyer's advice.

These opinions interpreting DR 7-104(A)(2), as well as the rule itself, also make clear that a lawyer may advise an unrepresented opposing party to secure counsel, and provide related information, consistent with the duty to represent the client competently and zealously. *See* Canons 6 and 7. Generally speaking, the municipality's attorney's task is to gather evidence in the 50-h hearing that may assist the municipality in determining whether to settle the claim or in defending against it. *Cf.* N.Y. State 463 (1977) ("[I]n litigated matters, traditionally a lawyer serves his client, not only as advocate and advisor, but also as an investigator of the facts relevant to his client's cause. The gathering of information and the marshaling of evidence are an inseparable part of the lawyer's duty to serve his client with zeal and competence.") It may be that the municipality's attorney can carry out this task more effectively if the claimant is unrepresented or is unaware that the risk of self-incrimination suggests the need to be represented. Even so, there is nothing in the Code that compels the municipality's attorney to exploit the claimant's ignorance about the need for legal assistance. This is especially so given that the municipal attorney has a duty to "seek justice." The municipal attorney might reasonably conclude that the municipality's interest in dealing fairly with the public justifies advising the unrepresented claimant to secure a lawyer, even in circumstances where a private party's lawyer would be disinclined to give this advice.

---

[1] Simon's Code of Professional Responsibility, 2000 Ed., p. 454, Commentary.

At the same time, however, there is nothing in the disciplinary rules that explicitly *requires* the municipality's attorney to advise the unrepresented claimant about the need for a lawyer or the risk of self-incrimination. Therefore, the Code permits the municipality's law department to decide, as a matter of sound public policy and professional judgment, whether or not to advise unrepresented claimants about the need for an attorney and the risk of self-incrimination. If the municipality's law department has no policy on the subject and responsibility for conducting of the 50-h hearing is delegated to individual municipal attorneys, the Code affords those individual municipal attorneys the same discretion. The municipal attorneys may make this decision in light of their professional understanding of the municipality's interests and objectives and their understanding of their general obligation, acknowledged in EC 7-14, to "seek justice and to develop a full and fair record, and ... [not] to bring about unjust settlements or results."

CONCLUSION

Except where authorized by law, a municipality's attorney may not communicate with a civil claimant who faces criminal charges relating to the civil claim unless the attorney first ascertains that the claimant is unrepresented concerning the subject matter of the proposed communication or, if the claimant is represented, secures the permission of the claimant's lawyer. If the claimant is not receiving advice of counsel concerning the advisability of testifying in the 50-h hearing, the attorney may advise the unrepresented claimant about the risk of self-incrimination and about the advisability of securing an independent lawyer's advice concerning this risk, but is not required to do so.

(37-99)