New York State Bar Association

Committee on Professional Ethics

Opinion 768 – 10/8/03

Topic: Definition of "communication" with represented parties; knowledge of adverse party's representation by counsel; statement of client position as legal advice.

Digest: A lawyer representing a government agency in a civil matter may be present and counsel the lawyer's own client at a meeting with a person known to be represented in that matter without opposing counsel's consent, provided that the lawyer gives reasonable advance notice to opposing counsel of the lawyer's intention to attend and does not communicate with the opposing party. If a lawyer has a reasonable basis to believe that a person may be represented by counsel in a matter, the lawyer has a duty to inquire further. If a lawyer does not know that a person is represented by counsel in connection with a matter, and participates in a communication with such an unrepresented party, a lawyer's statement of a client's legal position in the matter does not constitute impermissible legal advice to an unrepresented person.

Code: EC 7-18; DR 1-105(A), (B); DR 7-104(A), (B).

QUESTIONS

1. May a lawyer representing a government agency attend meetings with non-lawyer representatives of a counter-party to a government contract he or she "knows" to be represented by counsel?

2. May the government lawyer who attends such a meeting advise the client representative during the meeting without consent of opposing counsel?

3. Without consent of opposing counsel, must the lawyer who attends the meeting remain silent during the course of the meeting or may the lawyer at least communicate the government's agency's legal position concerning the matter?

4. When a government lawyer attends such a meeting or receives inquiries from counter-parties regarding agency filing requirements, how does the lawyer determine whether he or she "knows" the counter-party is represented for purposes of DR 7-104?

5. If the government lawyer has determined that he or she does not "know" that the counter-party is represented in connection with the subject of a civil matter, does the lawyer's (a) statement to counter-parties of the government's legal position and/or (b) response to inquiries from counter-parties regarding agency filing requirements constitute impermissible legal advice to an unrepresented party?

OPINION

Background

A lawyer is employed by a government agency to advise the agency on, among other things, its dealings with government contractors. This employment gives rise to two common circumstances in which the lawyer is asked to have direct contact with non-lawyer representatives of government contractors that employ lawyers in the ordinary course of conducting their business.

In the first of these circumstances, the government agency asks the lawyer to accompany the agency's contracting officers to meetings with representatives of government contractors. These counter-party representatives have the ability to bind their principal or to make statements that may properly be imputed to the principal. The meetings usually involve the exchange of information, rather than negotiation of the contracts, but the encounters may also concern resolution of contractual issues on which the parties disagree and discussion of contractual disputes in which the potential for litigation inheres. Normally, if counsel represents the government contractor in connection with the contractual issue, the contractor's counsel attends the meeting. On other occasions, however, the government contractor, though known to employ counsel, does not bring counsel to the meeting unless the prospect of litigation is likely. The government agency invites its own counsel to these meetings to facilitate the lawyer's advice to the agency (by enabling the lawyer to fully understand the contractor's issues) and/or to have the lawyer set forth the agency's legal position on the matter to the government contractor.

In the second recurring circumstance, the government lawyer receives questions from non-lawyer representatives of government contractors concerning the government agency's requirements for taking certain actions under the contracts, most typically about the kind of documentation the contractor must file with the agency to provide a legal basis for the agency's decision to approve or disapprove the proposed action. Ordinarily, the answers to these questions are clear – that is, the agency's legal position leaves no room for dispute about whether a document must be filed and what the document must say. A failure to file the documentation is certain to produce an unfavorable decision from the agency and there is no assurance that the agency will reach a favorable decision even if the contractor timely and properly completes and files the required documentation.

Committee's Scope of Analysis

This Committee's jurisdiction is limited solely to interpretation of the New York Code of Professional Responsibility and does not extend to resolving questions of law. *See, e.g.,* N.Y. State 739 (2001). This inquiry may implicate various questions of state and federal law, including the laws and regulations of the agency in which a government lawyer serves, on which we offer no view. In addition, in the context of a federal government agency in which a lawyer may be rendering services beyond or outside the boundaries of this State, then the choice-of-law provisions of DR 1-105 may apply. In the event that a lawyer is licensed to practice solely in New York, then the New York Code of Professional Responsibility governs the lawyer's actions, DR 1-105(A), except in the context of the lawyer's conduct in proceedings before a court to which the lawyer is admitted, in which event the rules of the jurisdiction in which the court sits apply unless the court's rules otherwise provide, DR 1-105(B)(1). When a lawyer is admitted in more than one jurisdiction, DR 1-105(B) applies the ethical precepts of the jurisdiction in which the lawyer principally practices unless the predominant effect of the particular conduct at issue occurs in another jurisdiction in which the lawyer is licensed. DR 1-105(B)(2)(b). *See* N.Y. State 750 (2001) (when a lawyer is licensed in both New York and Illinois and principally practices in the latter, the ethical rules of Illinois apply, particularly when the conduct in issue occurred in Illinois). For purposes of this opinion, we assume that the New York Code of Professional Responsibility governs the conduct in question.

DR 7-104 of the Code prescribes the government lawyer's obligations in these circumstances. The rule says:

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

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.

B. Notwithstanding the prohibitions of DR 7-104(A), and unless prohibited by law, a lawyer may cause a client to communicate with a represented party, if that party is legally competent, and counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented party's counsel that such communications will be taking place.

We may quickly pass on certain issues that DR 7-104(A)(1) raises in this situation. No question exists that, when a government lawyer is acting for an agency in attending meetings with or responding to inquiries by government contractors, the lawyer is doing so in the "course of the representation of a client." In circumstances involving a purely commercial transaction, DR 7-104(A)(1)'s use of the word "party" means any "person," including a party to a contract or other transaction, whether or not litigation looms. N.Y. State 735 (2001). If the agents of the counter-party at the meeting may speak for and bind their principal, the decision of the New York Court of Appeals in *Niesig* v. *Team I*, 558 N.E.2d 1030, 1035 (N.Y. 1990), instructs that such representatives *are* the principal and hence represented parties within the meaning of DR 7-104(A)(1). N.Y. State 652 (1993). As noted, whether a lawyer is "authorized by law" to communicate with a person the lawyer knows to be represented by counsel is not for us to decide. Subject to any such law, DR 7-104(A)(1) applies to government lawyers in a civil context because "a governmental unit has the same rights and responsibilities in a controversy as any other corporation or individual." N.Y. State 404 (1975) (quoting N.Y. State 160 [1970]); *see* N.Y. State 728 (2000).

<u>Question One</u>: ***May a lawyer representing a government agency attend meetings with non-lawyer representatives of a counter-party to a government contract he or she "knows" to be represented by counsel?***

The question whether a lawyer's silent attendance at a conference between principals constitutes an improper "communication" under DR 7-104(A)(1) is an issue of first impression for this Committee, and our research has been unsuccessful in discovering other opinions, judicial or otherwise, directly addressing the question.

The Code does not define the word "communicate," but the plain and ordinary meanings of the word – to "impart," "convey," "inform," "transmit," or "make known," *Webster's Third New International Dictionary (Unabridged)* 460 (1993); *see Black's Law Dictionary* 253 (5th ed. 1979) – all presuppose some form of transmission of information. Accordingly, we believe that DR 7-04(A)(1) is intended to proscribe only those circumstances in which the lawyer transmits information – whether it be the government's legal

position or negotiation of contractual points – to a person the lawyer knows to be represented by counsel.

Here, the avowed intent of the lawyer's silent attendance at meetings with contractors is to facilitate the lawyer's advice to the government agency about the matter. Such a circumstance falls within the parameters of DR 7-104(B), which regulates a lawyer's conduct in connection with communications between principals in a transaction. The Rule permits a lawyer to cause and counsel a client to engage in such discussions with a represented party, provided the lawyer gives opposing counsel reasonable advance notice. The object of this advance notice provision is to assure the represented party's lawyer the "opportunity to advise his or her own client with respect to the client-to-client communications before they take place." EC 7-18. Because client-to-client communication lacks a key element of DR 7-104(A)(1)'s concern – namely, that lawyers generally are in a better position, by education and training, to overwhelm a non-lawyer and exploit legal knowledge in the course of communicating directly with the non-lawyer – DR 7-104(B)'s requirement of reasonable advance notice is best seen as a guarantee of fairness in the course of dealings between parties represented by counsel. The Rule also prevents opposing counsel from exercising a veto over one party's decision to confer with counsel in connection with a principal-to-principal communication.

Thus, in our view, a lawyer may silently attend a meeting between principals provided the lawyer gives reasonable advance notice to opposing counsel of the lawyer's intention to attend the meeting.

Question Two: ***May the government lawyer who attends a meeting of principals advise the client representative during the meeting without consent of opposing counsel?***

Having given reasonable advance notice of the lawyer's intention to attend the meeting, the government lawyer may provide advice to the government contracting officers before and during the meeting. We caution, however, that the government lawyer may not directly address or otherwise communicate with the opposing party during the meeting, and thus, in giving advice to the lawyer's own client during the meeting, the lawyer must do so at times and places and in a manner that does not amount to a communication by the lawyer to the opposing party. Whether avoidance of such improper communications requires that the lawyer's advice to the government clients during the meeting be given during breaks or otherwise outside the view and hearing of the opposing party will depend on the circumstances, the possibilities of which are too numerous to permit any meaningful fixed rule.

Question Three: ***Must the lawyer who attends a meeting of principals without opposing counsel's consent remain silent during the course of the meeting or may the lawyer at least communicate the government's agency's legal position concerning the matter?***

We have no doubt that a statement of a client's legal position, without more, is

within the common and ordinary meaning of the word "communicate" used in DR 7-104(A)(1). "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." N.Y. State 607 (1990) (citing ABA 108 ([934]). 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-intentioned approaches." American Bar Foundation, *Annotated Code of Professional Responsibility*, Comment, 332 (1979). Although the Rule may have its greatest impact in protecting against intrusive inquiries into the facts underlying a particular matter, its purpose is not confined to such protection. Even were the Rule limited to a discourse on facts, an interpretation we do not accept, a statement of legal position inescapably entails assumptions of fact. Hence, a lawyer's statement of a client's legal position in a matter, no matter how qualified, is a "communication" that DR 7-104(A)(1) proscribes if the other elements of the Rule are present.

Question Four: ***When a government lawyer attends a meeting of principals or receives inquiries from counter-parties regarding agency filing requirements, how does the lawyer determine whether he or she "knows" the counter-party is represented for purposes of DR 7-104?***

DR 7-104(A)(1) applies only if the lawyer "knows" that the party is "represented by a lawyer in that matter." *See* N.Y. State 607 (1990). If a government lawyer knows that a party is represented by counsel in a civil matter, then the lawyer may not communicate with the party on the subject of that matter without such counsel's consent. Wisconsin Opinion 91-6. *See* N.Y. State 728 (2000). The mere fact that a lawyer knows that a corporation has an in-house legal staff, however, does not necessarily mean that a lawyer "knows" that a member of that staff is representing the corporation in that particular matter. *Cf.* N.Y. State 652 (1993) (that a government lawyer may represent an agency in connection with an enforcement proceeding or a permit application does not necessarily mean that the lawyer represents the agency in connection with the promulgation of rules that could potentially affect the outcome of the enforcement proceeding or permit process); *Schmidt* v. *State*, 722 N.Y.S.2d 623, 625 (N.Y. App. Div. 2000) ("[T]he State of New York is always represented by counsel," but this fact does not end the inquiry on whether counsel represents the State on the particular matter in issue).

We have previously opined that when a lawyer has a reasonable basis to believe that a party may be represented by counsel, then the lawyer has a duty of inquiry to ascertain whether that party is in fact represented by counsel in connection with a particular matter. N.Y. State 735 (2001); N.Y. State 728 (2000); N.Y. State 663 (1994). The necessary extent of such an inquiry will depend on the circumstances of a particular matter.

Owing to the diversity of facts in which the issue may arise, it is sufficient to say that DR 7-104(A)(1) requires, at a minimum, that, when a government lawyer has a reasonable basis to believe that a government contractor may be represented by counsel

in connection with the subject of the meeting, then the government lawyer must make inquiry of the government contractor about whether a lawyer represents the contractor in the matter. Likewise, in the case of counter-party inquiries regarding agency filing requirements, prudence suggests that if the government lawyer has a reasonable basis to believe that counsel represents the government contractor in connection with the matter, then the lawyer must make inquiry about whether the contractor is indeed represented in such matter.

Question Five: ***Once a government lawyer has determined that he or she does not "know" the counter-party is represented in connection with the subject of a civil matter, does the lawyer's (a) statement of the government's legal position and/or (b) response to inquiries from counter-parties regarding agency filing requirements constitute impermissible legal advice to an unrepresented party?***

The question whether a lawyer may state his or her agency's legal position in a meeting with unrepresented contractors or respond to their questions concerning the agency's filing requirements is governed by DR 7-104(A)(2)'s proscription against rendering legal advice (other than the advice to secure counsel) to parties not represented by counsel. That rule is intended to protect parties lacking counsel from receiving legal advice from a lawyer whose client's interests are or may be adverse to those of the unrepresented party. *See* N.Y. State 728 (2000); N.Y. State 650 (1993); N.Y. State 358 (1974); *W.T. Grant Co.* v. *Haines*, 531 F.2d 671, 676 (2d Cir. 1976); *Croce* v. *Kurnit*, 565 F. Supp. 884, 889-91 (S.D.N.Y. 1982).

Although the interests of the contractor are or have a reasonable possibility of being in conflict with the interests of the government agency within the meaning of DR 7-104(A)(2), we do not think the government lawyer's statements constitute impermissible legal advice to an unrepresented third party. Rather, the government attorney is stating the *client agency*'s legal position to a third party. Such is especially apparent in the context of the meetings[1] with contractors, in which the lawyer's position as agency counsel is obvious.

This reasoning also applies to communications with government contractors concerning filing requirements in connection with applications for an agency's approval to take actions under the contracts. We are sensitive to the fact that such filings are often the responsibility of a contractor's non-legal personnel, and that DR 7-104(A)(1) need not be an impediment to the smooth operation of government in its dealings with contractors. If the government agency has appointed a lawyer as the person to describe its filing requirements (which presumably are non-negotiable) to government contractors,

[1] We note in passing that a government lawyer's mere attendance at public speeches, continuing legal education programs and other public events at which a counter-party may be present without counsel does not give rise to the type of "communication" contemplated by DR 7-104.

we do not think that the Rule requires contractors to use a lawyer in order to learn the government's requirements.[2]

[2] Obviously the extent of permissible communications may be limited by considerations other than DR 7-104, *e.g.,* "if it is known or learned that [the contractor's representatives] possess[] information that is protected by the corporation's attorney-client privilege or as attorney work product," N.Y. State 735 (2001), which a lawyer may not knowingly elicit, N.Y. State 700 (1998).

CONCLUSION

If a lawyer for a government agency knows that another lawyer represents the counter-party to a government contract in connection with that contract, then the government lawyer may attend meetings with non-lawyer representatives of the counter-party, provided reasonable advance notice is given to opposing counsel. Without consent of opposing counsel, the government lawyer may advise the lawyer's own client during the meeting, but may not communicate the government's position on the matter or otherwise negotiate with the counter-party.

When a government lawyer attends a meeting among principals or receives inquiries from counter-parties regarding agency filing requirements, in order to determine whether he or she "knows" that the counter-party is represented for purposes of DR 7-104 he or she must take account of all the relevant circumstances, including the parties' prior course of dealing. If a reasonable basis exists for believing that counsel represents a party on that matter, then the lawyer should make inquiry about whether the counter-party is indeed represented.

Once a lawyer has determined that he or she "knows" that a person is not represented by counsel in connection with a civil matter, and participates in a communication with such an unrepresented party, neither a lawyer's (a) statement to a counter-party of a client's legal position in the matter, nor (b) response to inquiries from such party regarding agency filing requirements, constitutes impermissible legal advice to an unrepresented person. However, should either type of communication involve something beyond ministerial matters, prudence suggests that the lawyer should remind the inquirer that the lawyer represents the government and that the contractor may wish to to retain its own counsel in order to be advised on the issue.

(3-03)
