New York State Bar Association

Committee on Professional Ethics

Opinion 812 – 5/3/07

Topic: Communication with a represented party.

Digest: Unless prohibited by state or local law, DR 7-104(A)(1) permits a lawyer representing a private party before a town planning board to communicate with individual planning board members about pending determinations provided: (a) the proposed communications solely concern policy issues; and (b) the lawyer gives planning board counsel reasonable advance notice of the proposed communications.

Code: DR 7-104(A)(1); EC 7-15, 7-18.

QUESTION

1. Over the objection of counsel representing a town planning board, may in-house counsel for a real estate development company communicate privately, separately, and informally about the developer's pending applications with individual members of the board who support the developer's proposed project?

OPINION

2. The inquirer is in-house counsel to a limited liability company engaged in the business of shopping center development. In that capacity, the inquirer is the "public face" of the developer and represents the developer before various government bodies to secure required land use permits and approvals.

3. The inquiry concerns a development project for which a State Environmental Quality Review Act ("SEQRA") review and site plan and subdivision approvals are pending before a seven-member town planning board. The project is controversial and has engendered substantial public opposition. The town board, which has no jurisdiction over the determinations to be issued by the planning board, is said to support the shopping center project. However, a majority of the members of the planning board, including the planning board chair, are said to oppose the project.

4. The planning board is represented with respect to the shopping center project by outside counsel. The developer has also secured outside counsel to "formally" represent the developer before the planning board, limiting in-house counsel's role to communicating "separately and informally" on behalf of the developer with the "more receptive" minority of planning board members who support the project. The inquirer states that these communications are "not in the nature of legal advice or assistance" and are "not designed to supplant guidance provided to the board by their own legal counsel." Rather, the separate communications "are confined to the provision and receipt of factual information and the discussion of state and local environmental and land use issues and polices" and are intended "to ensur[e] that supportive members of the planning board have the information they need to counter the opposition's efforts to derail the project, and are able to share facts and strategies with the developer." The developer thus seeks to create an even playing field with "[m]embers of the public who oppose the project [and who] communicate and strategize freely with like-minded members of the planning board, without going through the board's legal counsel."

5. Counsel for the planning board has objected to the separate, private communications regarding the project with individual members of the planning board, and has directed that the inquirer limit his communications to written submissions addressed to the planning board secretary for distribution to the entire board and for inclusion in the administrative record.

6. Against this background, the inquirer asks whether he may ethically persist in the "informal communications" with individual members of the planning board.

7. The inquiry is governed by DR 7-104(A)(1), known as the "no-contact" rule, which provides:

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

See also EC 7-18.

8. Because consent has clearly not been given, and because the planning board is represented with respect to the matter, the proposed communications are prohibited under the "no-contact" rule unless within the meaning of DR 7-104(A)(1): (a) planning board members are not "parties"; or (b) the communications are otherwise "authorized by law." We address each question in turn.

1. Are Planning Board Members "Parties"?

9. The answer to this question is controlled by application of the standard set forth by the New York Court of Appeals for determining the "party" status of employees of corporations and other entities for DR 7-104(A) purposes in *Niesig v. Team I*:

> The test that best balances the competing interests, and incorporates the most desirable elements of the [various] approaches, is one that defines "party" to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel.[1]

10. We have held the *Niesig* test to be applicable to governmental units.[2] Thus, DR 7-104(A)(1), as interpreted by *Niesig*, prohibits "only communications with government officials who have authority, individually or as part of a larger body, to bind the government or to settle a litigable matter, or whose act or omission gave rise to the matter in controversy."[3] Here, as the planning board is invested with the power to issue binding SEQRA, site plan and subdivision determinations with respect to the matter before it, the *Niesig* "party" test is satisfied.

2. Are the Proposed Communications with the Planning Board "Authorized by Law"?

11. In N.Y. State 404 (1975) we recognized an "implicit exception" to the broad no-contact prohibition of DR 7-104(A)(1) where a "public body is involved," based on the "overriding public interest [which] 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." Accordingly, we opined that private counsel could, without the consent of school district counsel, properly communicate about a controversy with an individual member of a school board who disagreed with the school board decision being contested by the lawyer's client. This sentiment – that the literal application of the "no-contact" rule must be tempered by constitutional considerations where the First Amendment right to petition government is implicated – is shared by most authorities.[4]

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1 76 N.Y.2d 363, 374; 558 N.E.2d 1030, 1035; 559 N.Y.S.2d 493, 498 (1990).

2 N.Y. State 652 (1993); *see also* N.Y. State 768 (2003).

3 N.Y. State 652 (*citing* N.Y. City 1991-4 and Ohio Opinion 92-7).

4 *See*, *e.g.*, *American Canoe Ass'n Inc. v. St. Albans*, 18 F. Supp. 2d 620 (S.D. W. Va. 1998) (the right to contact and communicate with government officials is a right of citizenship); ABA Formal Op. 97-408 (1997) (Model Rule 4.2 "does not prohibit a lawyer representing a private party in a controversy with the government from communicating directly with government officials who have authority to take or recommend action in the matter, provided the communication is solely for the

12. This concern for protecting the First Amendment interests of citizens to contact governmental decision makers has also led to specific no-contact rule exceptions in California and the District of Columbia.[5]

13. The issue of whether a lawyer who is representing a private party in a controversy may communicate about the matter with responsible government officials without the prior consent of government counsel has been comprehensively addressed by the American Bar Association Standing Committee on Ethics and Professional Responsibility in ABA 97-408. Noting the "tension between a citizen's right of access and the government's right to be protected from uncounselled communications by an opposing party's lawyer,"[6] the ABA Committee interpreted Model Rule 4.2, the functional equivalent of DR 7-104(A)(1),[7] to allow unconsented contacts with government officials that would otherwise have been prohibited by the no-contact rule, but subject to three conditions. First, the official to be contacted must have authority to take or recommend action in the controversy. Second, the sole purpose of the communication must be to address a policy issue. Third, advance notice of the proposed communications must be given to the lawyer representing the government official in the matter so as to afford government counsel the opportunity to advise his or her client with respect to the communication, including whether even to entertain it.[8]

14. Insofar as set forth in this opinion, we adopt the approach taken in ABA Formal Op. 97-408 and here conclude, on the facts presented, that the proposed communica-

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purpose of addressing a policy issue, including settling the controversy."); Alabama Opinion 2003-03 (lawyer defending employees and officials of state board of education in suit by county board of education may communicate directly with county board of education members to discuss settlement); Kansas Opinion 00-06 (lawyer for zoning applicant may contact city officials about client's application despite city attorney's contrary directive because "a citizen must always have access to his or her government"); Utah Opinion 115 (1993) (lawyer may contact any employee of a represented government agency after advising the employee of the matter in question and of the lawyer's representation therein); *see also* RESTATEMENT OF LAW GOVERNING LAWYERS (THIRD) § 101(1), at 102 (2000**)** ("Unless otherwise provided by law . . . the prohibition . . . against contact with a represented non-client does not apply to communications with employees of a represented government agency or with a governmental officer being represented in the officer's official capacity.").

5 California Rule of Professional Conduct 2-100(C)(1) (providing that the general no-contact rule "does not apply to communications with a public officer, board, committee or body"); District of Columbia Rule of Professional Conduct 4.2(d) (providing that the District's no-contact rule does not prohibit "communications by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client").

6 ABA Formal Op. 97-408, at 7.

7 Model Rule 4.2 (Communication with Person Represented by Counsel) provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

8 ABA Formal Op. 97-408, at 7-8.

tions fall within the protection of the First Amendment right to petition. They are, therefore, not prohibited by DR 7-104(A)(1), provided that counsel for the planning board is given reasonable advance notice that such communications will occur.[9] Although the precise parameters of the constitutional right to petition are beyond our jurisdiction, we note that communications directed to government officials who do not have the authority to take or recommend action in the matter, or communications that are intended to secure factual information relevant to a claim (for example, mere witnesses to government misconduct), should both be fully subject to the no-contact rule as, in each of these situations, there are no First Amendment considerations at play.[10]

15. Our resolution of this inquiry comes with several important caveats. First, we do not opine on whether additional "private," "separate" or "informal" communications with board members may violate a state statute or local ordinance that governs planning board procedures, or whether such communications may implicate a locally adopted ethics code. Second, we do not here address ex parte communications with an adjudicatory government body, such as a zoning board of appeals, which present different considerations.[11] Third, the inquirer may not deliberately elicit information that is protected by attorney-client privilege or as attorney work product.[12] Fourth, the inquirer should cease contact with a planning board member if the member so requests.[13]

CONCLUSION

16. Absent the application of state or local ordinances that prohibit or regulate the practice, and subject to the qualifications set forth in this opinion, DR 7-104(A)(1) permits a lawyer representing a private party before a town planning board to communicate with individual planning board members about pending SEQRA, site plan and subdivision determinations *provided*: (a) the proposed communications solely concern municipal development policy issues; and (b) the lawyer gives planning board counsel reasonable advance notice of the proposed communications.

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[9] *Cf.* N.Y. State 768 (2003) (lawyer representing government agency 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 lawyer gives reasonable advance notice to opposing counsel of lawyer's intention to attend and does not communicate with opposing party).

[10] *See* ABA Formal Op. 97-408, at 8-9.

[11] *See* EC 7-15 ("The nature and purpose of proceedings before administrative agencies vary widely. The proceedings may be legislative or quasi-judicial, or a combination of both.").

[12] *See* N.Y. State 785 (2005).

[13] C*f.* EC 7-18 ("A lawyer who advises a client with respect to communications with a represented person should also advise the client against engaging in abusive, harassing or unfair conduct.").