2005 Formal Ethics Opinion 5

July 21, 2006

Communications with Government Entity Represented by Counsel

Opinion explores the extent to which a lawyer may communicate with employees or officials of a represented government entity.

Inquiry #1:

Attorney A represents a former employee of County in an employment dispute with County. County Attorney is a full-time employee of County. Attorney A has had no communications with County Attorney on this particular matter. However, County Attorney has defended County in other employment litigation brought by Attorney A in the past. In prior employment litigation cases, County Attorney asked Attorney A that communications with senior county staff, such as the county manager and department heads, concerning litigation or threatened litigation against County, be directed to County Attorney. Attorney A now wants to write a letter to County's human resources director and the county manager on behalf of his current client, threatening litigation if the employment matter is not settled.

May Attorney A address his letter directly to the human resources director and the county manager under these circumstances?

Opinion #1:

No. Under Rule 4.2(a), "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 court order." Rule 4.2(a) prohibits direct communications with represented persons even prior to the commencement of formal proceedings. See Rule 4.2, cmt. [6]. Notwithstanding this general rule, there is some authority that the Rule 4.2(a) prohibition should only apply to communications with a government agency or employee if the communication relates to negotiation or litigation of a specific claim of a client. We agree.

The Restatement of the Law Governing Lawyers §101(2) (2000) "permits direct lawyer contact with a government officer or employee except when the governmental client is represented with respect to negotiation or litigation of a specific claim...." Routine communications on general policy issues or administrative matters would not require prior approval from government counsel. The rationale for this partial exception is that the limitations on communications under Rule 4.2(a) should be confined to those instances where the government stands in a position analogous to a private litigant or any other private organizational party. Under these circumstances, the government agency or official should be protected because the opportunity for abuse is clear. Additionally, if Rule 4.2(a) were applied broadly to cover all communications with government employees, "any matter disputed with the governmental agency could be pursued with safety only through the agency's lawyer[,]" which would "compromise the public interest in facilitating direct communication between representatives of citizens and government officials . . . ." Restatement of the Law Governing Lawyers §101, cmt. b., p. 102 (2000).

Because Attorney A's proposed letter to County's employees concerns a specific claim and threatens litigation, Rule 4.2(a) applies to this communication. The question then becomes, if Rule 4.2(a) applies, to which employees does the anti-contact protection of the rule extend?

Even when a lawyer knows an organization is represented in a particular matter, Rule 4.2(a) does not restrict access to all employees of the represented organization. See e.g., 97 FEO 2 and 99 FEO 10 (delineating which employees of a represented organization are protected under Rule 4.2). Counsel for an organization, be it a corporation or government agency, may not unilaterally claim to represent all of the organization's employees on current or future matters as a strategic maneuver. See "Communications with Person Represented by Counsel," Practice Guide, Lawyers' Manual on Professional Conduct 71:301 (2004)(list of cases and authorities rejecting counsel's right to assert blanket representation of organization's constituents). The rule's protections extend only to those employees who should be considered the lawyer's clients either because of the authority they have within the organization or their degree of involvement or participation in the legal representation of the matter. See 97 FEO 2; 99 FEO 10.

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs, or consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in
connection with the matter may be imputed to the organization for purposes of civil or criminal liability. It also prohibits communications with any constituent of the organization, regardless of position or level of authority, who is participating or participated substantially in the legal representation of the matter.

Rule 4.2, cmt. [9].

The protections under Rule 4.2(a) only extend to County Manager and department heads if, with respect to this employment matter, 1) they supervise, direct, or consult with County Attorney, 2) they can bind or obligate County as to its position in litigation or settlement, 3) their acts or omissions are at issue in the litigation, or 4) they have participated substantially in the legal representation of County. Because it is likely that the human resources director and the county manager fall within one or more of these categories in an employment dispute, and because Attorney A should have known that County Attorney represented County on this matter, Attorney A must obtain consent from County Attorney before communicating a threat of litigation directly to County Manager and Human Resources Director. To the extent this opinion conflicts with RPC 67 and RPC 132, they are hereby overruled.

Inquiry #2:

Even when a government entity is represented under Rule 4.2(a), Rule 4.2(b) permits direct contact with elected officials under certain circumstances. Attorney A gives written notice stating that he intends to contact members of the elected Board of County Commissioners, but does not specify if he will be addressing them in session, or individually. Nor does the letter state when he intends to contact them. When called by County Attorney for clarification on these points, Attorney A acknowledges that these details are absent, but contends the notice is still sufficient.

Is the "adequate notice" requirement of Rule 4.2(b)(2) met under these circumstances?

Opinion #2:

No. Under Rule 4.2(b), in representing a client who has a dispute with a represented government agency or body, a lawyer may communicate orally about the subject of the representation with elected officials who have authority over such government agency or body so long as the lawyer gives "adequate notice to opposing counsel." Adequate notice should be meaningful notice: that is, sufficient information for opposing counsel to act on it to protect the client's interests. The time and place of the intended oral communication with the elected official must be included as well as the identity of the elected official or officials to whom the communication will be directed. Notice must also be reasonable and give opposing counsel enough time to act on it and be present if he so chooses.

Inquiry #3:

Attorney A appears at a public meeting of the elected Board of County Commissioners. Prior to the board meeting, Attorney A approaches a member of the board to tell him that he is there to advise the board of a grave injustice that has been done to his client, and that County Attorney is trying to prevent Attorney A from bringing this matter to the board's attention.

Does this communication with an elected board member violate Rule 4.2(b)?

Opinion #3:

Yes. Pursuant to Rule 4.2(b), a communication with an elected official may only occur under the following circumstances: 1) in writing, if a copy is promptly delivered to opposing counsel, 2) orally, with adequate notice to opposing counsel, or 3) in the course of official proceedings. To the extent RPC 202 differs from this opinion and Rule 4.2(b), it is hereby overruled.