
Coates' Canons Blog: “Stop Calling My Client!” Communication Between Opposing Counsel and Government Officials

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Can a local government attorney use North Carolina legal ethics rules to prevent opposing counsel from contacting government officials in the midst of a legal controversy? Consider this hypothetical situation:

Greta Gunslinger, a renowned litigation attorney, is representing a local developer in a lawsuit against the city over the denial of zoning approval for a major commercial development project. Since filing the complaint, Greta has peppered the city council and the city manager with emails and letters complaining about the city's treatment of her client and not so subtly suggesting that more litigation will follow unless the city becomes more friendly to developers.

As city attorney, you are more than a little annoyed with Greta's litigation tactics. Although she's copied you on all of her correspondence with city officials, Greta has ignored your request that she route all communications with city officials through you. Yesterday Greta threatened to start bombarding council members with telephone calls to voice her concerns, which puts you over the edge. After seeing an email announcing an upcoming legal ethics CLE seminar, you remember the ethical prohibition on direct communication with an opposing party represented by counsel. Is Greta violating State Bar rules by communicating directly with city officials, all of whom are your clients?

Probably not. It's true that Rule 4.2 of both the North Carolina Revised Rules of Professional Conduct (RPC) and the American Bar Association's Model Rules of Professional Conduct (Model Rules) prohibit an attorney from “communicat[ing] about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter.” But clients don't waive their First Amendment rights to petition the government for redress of grievances simply by retaining attorneys. Both the RPC and the Model Rules permit communications “authorized by law,” which according to the official comment to the rule may include communications made while “exercising a constitutional right to communicate with the government.”

In a 1997 ethics opinion, the ABA concluded that this exception permits direct communication with government officials who have authority to take or recommend action in the matter provided that the “sole purpose of the communication is to address a policy issue, *including settling the controversy.*” The ABA suggests that the only communications with government officials that violate Rule 4.2 are those intended to gather evidence for the client's case. In contrast, the Restatement of the Law Governing Lawyers takes a more narrow view of the “authorized by law” exception, concluding that it does not protect communications concerning the negotiation or litigation of a specific claim against a government agency or official. A 2005 ethics opinion from the N.C. State Bar adopts this narrow view of the First Amendment exception to Rule 4.2.

Adding to the confusion, the North Carolina version of Rule 4.2 contains an additional provision that explicitly protects *all* communications with *elected* officials, assuming the communicating attorney provides the government attorney with copies of written communications and with prior notice of oral communications. The ABA's version of 4.2 contains no exception for communications with elected officials, one of the rare instances when the RPC materially diverge from the Model Rules.

What does all of this mean for Greta? Under North Carolina ethics rules, Greta is free to communicate directly with *elected* officials on her client's behalf even if those communications focus solely on the dispute between her client and the city. Assuming she provides the required notice to the city attorney, Greta may email, write or call council members to discuss her client's case as much as she likes.

Greta's communications with *non-elected* officials such as the city manager are potentially more problematic. Depending on the interpretation of the "authorized by law" exception that North Carolina courts choose to apply, Greta's emails and telephone calls may be viewed as First Amendment-protected conduct or inappropriate contact with represented parties. The more Greta focuses on larger policy issues involved in her client's claim, the more likely the First Amendment exception applies. The more Greta focuses on the factual issues and specific merits of her client's claim, the more likely that Rule 4.2 bars the communications.

Remember that the RPC constrain only the actions of attorneys, not their clients. Absent a court order, a litigant is always free to contact the opposing party to discuss settlement. In fact, Rule 4.2 explicitly condones attorneys' efforts to encourage client-to-client settlement discussions.

For an excellent analysis of the 1997 amendments to RPC Rule 4.2 concerning contact with government officials, see this article by Alice Neese Mine, ethics counsel and assistant executive director of the N.C. State Bar.

Links

- www.abanet.org/cpr/mrpc/rule_4_2.html
- www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5611100408
- www.ncbar.com/ethics/eth_articles_contact.asp