

Nebraska Ethics Advisory Opinion for Lawyers
No. 76-2

IT IS IMPROPER FOR ANY ATTORNEY TO APPEAR ON BEHALF OF A CLIENT BEFORE THE GOVERNING BOARD OF A PUBLIC INSTITUTION OR TO CONTACT THE ADMINISTRATIVE OFFICIALS OF THE INSTITUTION TO PROMOTE COLLECTION OF A JUDGMENT AGAINST THE INSTITUTION WHERE THE INSTITUTION IS REPRESENTED BY LEGAL COUNSEL WITHOUT THE CONSENT OF THE INSTITUTION'S LEGAL COUNSEL.

FACTS

A public institution existing by authority of the laws of the State of Nebraska filed a lawsuit in Federal District Court against several of its employees to determine if the employees were discriminated against as to their wages on the basis of sex. The institution is governed by a board consisting of members elected by the public. Attorney A was hired by the institution to represent it in the lawsuit. Attorney B was hired by the employees to defend them in the suit. The District Court found in favor of the institution. On appeal by the employees the Circuit Court of Appeals reversed ordering that the employees be paid their back wages by the institution. The institution appealed to the United States Supreme Court but the court denied writ of certiorari.

The institution has not paid the employees their back wages as ordered by the court. Attorney B maintains that he has been unable to procure satisfaction of the judgment by making demand on the institution through Attorney A. Attorney B has not pursued collection of the judgment through the courts. Attorney B has forwarded to Attorney A a copy of a letter he proposes to send to the head administrative official of the institution requesting immediate satisfaction of the judgment. Attorney B also proposes to appear before the governing board of the institution to request immediate satisfaction of the judgment. Attorney A has objected to Attorney B directly contacting the administrative official

and to his appearing before the board. Attorney A maintains that such contact is prohibited by DR 7-104 (a)(1) of the Code of Professional Responsibility.

QUESTION PRESENTED

May an attorney who represents an employee of a public institution make direct contact with the administrative officers and/or governing board of the institution where the institution is represented by legal counsel and where the subject matter of the contact is the satisfaction of a judgment in favor of the employee and against the institution.

APPLICABLE CODE PROVISIONS

EC 7-18 The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with the person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person ...

DR 7-104 Communicating with one of adverse interest.

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

DISCUSSION

The question posed here has not been considered by either the Advisory Committee of the Nebraska State

Bar Association or the Committee on Professional Ethics of the American Bar Association. In arriving at a decision it was necessary that this Committee strike a balance between two competing principles one of which is fundamental to our democratic system of government and one of which is fundamental to our system of adversary justice.

It is fundamental to a democratic society that citizens have access to the governing boards of our public institutions and to the officers of those institutions. It is important that each citizen be permitted to confront those persons elected or appointed to govern our public institutions with his problems and grievances. On the other hand the legal profession has recognized throughout its modern history that our adversary system functions best where the attorney for one party to a controversy does not communicate directly with the opposing party where the opposing party is also represented by legal counsel.

The rule regarding contact between an attorney and an opposing party represented by an attorney was first expounded in the early 1800's by David Hoffman, a member of the Baltimore Bar. Hoffman's Resolution XLIII states:

"I will never enter into any conversation with my opponent's client relative to his claim or defense, except with the consent and in the presence of his counsel."

The concept contained in the foregoing Resolution was embodied by the American Bar Association in its Canon 9 in 1908. Canon 9 provided in part that:

"A lawyer should not in any way communicate upon the subject of a controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel..."

This concept has more recently been expressed by the

American Bar Association in DR 7-104 and EC 7-18 of the Code of Professional Responsibility.

Throughout their respective histories Canon 9 and later DR 7-104 have been strictly construed. The following is a compilation of the major opinions of the American Bar Association interpreting these provisions.

1. Opinions prohibiting the desired contact:

ABA Formal Opinion No. 108 - An attorney representing a plaintiff may not interview the defendant in the absence of his counsel concerning the facts of the case even if the defendant is willing to discuss the matter.

ABA Formal Opinion No. 124 - An attorney may not negotiate a settlement with an adverse party represented by counsel without the knowledge and consent of such counsel.

ABA Formal Opinion No. 187 - It is improper for an attorney to interview an adverse party with respect to the facts of the case without consent of his counsel, despite the fact that such party will be a witness at the trial.

See, also, ABA Informal Opinions 517, 123 and 570.

2. Opinions permitting direct contact:

ABA Formal Opinion No. 66 - Proper for the defendant's attorney to communicate directly with the president of plaintiff corporation concerning the name of a corporate officer most familiar with a subject to be covered by deposition where he had previously requested the information from plaintiff's attorney and had obtained no response. It was required that a copy of any such communication be given to the

attorney.

ABA Formal Opinion No. 117 - An attorney may interview employees of the defendant who were witnesses to incident on which suit is based.

ABA Informal Opinion No. 426 - An attorney may serve a legal notice on an opposing party represented by counsel and may explain general nature of notice but not contents to opposing party in absence of his counsel. In this case the serving of notice on the opposing party was permitted by statute.

ABA Informal Opinion No. 1348 - Improper for an attorney to send copy of settlement offer to opposing party where he believes opposing party's attorney is not relaying offers to his client. The Committee suggests that where applicable statutes or procedural rules permit service directly upon the opposing party such service is permissible provided that opposing counsel is also served. The Committee also suggests that where service through the court is provided for such service should be utilized before direct contact is made.

ABA Informal Opinion No. 827 - The factual situation in this opinion is somewhat analogous to the case at hand. In this opinion the ABA Committee considered a New York County Bar Association opinion in which the plaintiff had obtained a judgment in his favor. Defendant wished to settle the case directly with plaintiff's attorney. Defendant's attorney objected but would not proceed with settlement of judgment until his fees had been paid. In this opinion the ABA Committee concurred with the New York County Bar Association finding that where the legal relationship between the

defendant and his attorney had effectively been terminated the plaintiff's attorney could settle directly with defendant.

The following basic exceptions to Canon 9 are found in the foregoing opinions. An attorney for one party may directly contact an opposing party where the opposing party is represented by counsel:

(1) Where the attorney for the opposing party has given his consent to such contact.

(2) Where the law authorizes such contact.

(3) Where the attorney/client relationship between the opposing party and his counsel has terminated.

The first and second of these exceptions have subsequently been included by the ABA in DR 7-104 of the Code of Professional Responsibility. The third is so basic as to be self-evident.

In order that the question before this Committee be answered in the affirmative it would be necessary for this Committee to create an additional exception to DR 7-104. Should an attorney be permitted to appear on behalf of a client before a public board concerning litigation involving the client and the institution governed by the board without the consent of the board's attorney? It is the opinion of this Committee that such an exception should not be created by interpretation.

As has been stated Canon 9 has been strictly construed throughout its long history. From its inception in 1908 though subsequent revisions the exception proposed here was never adopted. This Committee also takes note of the fact that this exception was not incorporated into the Code of Professional Responsibility which Code was adopted only after extensive review and consideration by the American and State Bar

Associations. It is apparent that the ABA Committee which drafted the Code considered such an exclusion. At note 74 to DR 7-104 the ABA Committee cited the following excerpt from the California Business and Professions Code Section 6076 (West 1962):

"Rule 12 ... a member of the State Bar shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel. This rule shall not apply to communications with a public officer, board, committee or body."

Should this reference to the California exception be construed as a tacit agreement by the ABA Committee with the California position? We believe not. In note 1 to the Preamble and Preliminary Statement of the Code the ABA Committee states:

"The footnotes are intended merely to enable the reader to relate the provisions of this Code to the ABA Canons of Professional Ethics adopted in 1908, as amended, the opinions of the ABA Committee on professional ethics, and a limited number of other sources; they are not intended to be an annotation of the views taken by the ABA Special Committee on Evaluation of Ethical Standards."

We can only construe the inclusion of the citation to the California Code and the failure to include the exclusion in the Code to mean that the ABA Committee, while recognizing the problem, did not see fit to adopt the additional exclusion. In view of the ABA Committee's failure to adopt the exclusion it is the opinion of this Committee that the exclusion should not be adopted by interpretation. If such an exclusion is desired by members of the Nebraska Bar it is our belief that such a change should be made only through the formal procedures adopted by the Nebraska Bar Association and the Nebraska Supreme Court.

Although it is the opinion of this Committee that an attorney should not, under DR 7-104, represent his client before the governing board of a public institution without the consent of the board's attorney where litigation is involved, this Committee does not believe that the prohibition should extend to such an appearance where litigation has not yet resulted from a controversy or where the litigation has been completely terminated.

As previously stated, free access to public boards and institutions is fundamental to our society. In many instances the interests of the parties appearing before the boards will be adverse to or conflicting with positions or policies adopted by the boards. In addition, most, if not all, public boards are represented to some extent by an attorney. If DR 7-104 were to be strictly interpreted no person taking a stand opposed to that of a public board could appear by his attorney before that board without the consent of the board's attorney. A person desiring to make his position known would be forced to choose between appearing individually without benefit of counsel or not appearing at all. This interpretation would prohibit appearances of persons by their attorneys before city councils, county boards, state administrative boards and commissions and even the state legislature itself if a controversy were involved. It is obvious that such a result was not intended by the ABA Committee who drafted EC 7-18 and DR 7-104. Therefore, it is the opinion of this Committee that an attorney may represent his client before the governing board of a public institution without authorization from the board's attorney prior to the time that litigation is commenced or after any litigation has been completely terminated.

SUMMARY

It is the opinion of this Committee that the following general rules should be applied by an attorney to determine if his proposed contact with a public institution or its governing board is ethical:

1. It is improper for an attorney during the course of his representation of a client in a controversy with a public institution to appear before the governing board of the institution or to contact an administrative official of the institution for the purpose of discussing the controversy without the consent of the attorney for the board or institution where the controversy has resulted in litigation and the litigation is pending.

2. It is proper for an attorney during the course of his representation of a client in a controversy with a public institution to appear before the governing board or to contact an administrative official of the institution for the purpose of discussing the controversy without the consent of the attorney for the board or institution where the controversy has not resulted in litigation or where resulting litigation has been completely terminated.

3. If litigation is pending an attorney may represent his client before the governing board or contact an administrative official as set forth in Rule 1 above if:

(a) He has been authorized to do so by the attorney for the board or institution.

(b) He is authorized by law to do so.

(c) The matter in litigation has been reduced to final judgment and the legal relationship between the board and its attorney has been terminated.

4. If an attorney has been authorized or is permitted under the rules set forth in Rule 3 above to appear before the governing board or to contact an administrative official of the institution the attorney should always act within the bounds of professional courtesy to the opposing attorney by forwarding to the opposing attorney copies of all direct correspondence with the board and by giving the opposing attorney notice of all planned appearances before the board or meetings with the administrative official.

In the present case it appears that although the controversy has been litigated to a final judgment, Attorney A is still actively representing the public institution. Under the above rules any direct contact between Attorney B and the board or an administrative official of the institution for the purpose of promoting payment of the judgment would be improper without the consent of the institution's attorney.

It is also the opinion of this Committee that where legal remedies exist they should be first exhausted by an attorney prior to his making any authorized direct contact with the opposing party. In the present case if Attorney B is unable, in his estimation, to make satisfactory progress toward satisfaction of the judgment by making demands on Attorney A he should pursue all legal remedies for the satisfaction of the judgment notwithstanding the additional costs to his client.

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