ETHICS OPINION

RO-2003-03

[redacted]

QUESTION:

My law firm has been employed to defend employees and officials of the State Board of Education who have been sued by a County Board of Education. The lawsuit appears to be amenable to settlement and I would like to negotiate settlement possibilities directly with the members of the County Board of Education. My question is whether I may communicate with the members of the County Board without the consent or approval of the Board's attorney.

ANSWER:

You may, as attorney for the State Board of Education, communicate directly with the members of the County Board of Education to discuss settlement of the pending lawsuit without obtaining the consent or approval of the attorney representing the County Board of Education.

DISCUSSION:

Communications with persons represented by counsel are governed by Rule 4.2 of the Rules of Professional Conduct, which provides as follows:

> "Rule 4.2 Communication With Person Represented by Counsel
>
> In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so."

The Comment to Rule 4.2 expands upon the "authorized by law" exception:

> "Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter."

Since members of the County Board of Education conclusively appear to be "government officials" within the meaning of the above-quoted Comment, communications with the members are permitted pursuant to the "authorized by law" exception quoted above.

Most authorities find justification for the exception in the "petition for redress of grievances" clause of the First Amendment to the United States Constitution. In *The Law of Lawyering*, Professors Hazard and Hodes provide the following analysis:

> "... a lawyer for a private party who is in litigation with the government may seek *ex parte* interviews with relevant government officials. If the normal bar of Rule 4.2 were applied stringently, the government agency's lawyer could veto discussions between private parties and government officials, which is questionable policy, and might raise questions under the 'petition for redress of grievances' clause of the First Amendment."

The Law of Lawyering, Hazard & Hodes, Second Edition, Prentice Hall (1990) §4.2:109.

A similar analysis is found in *Modern Legal Ethics* by Charles Wolfram, Charles Frank Reavis Sr. Professor of Law at Cornell Law School:

> "Requiring the consent of an adversary lawyer seems particularly inappropriate when the adversary is a government agency. Constitutional guarantees of access to government[58] and statutory policies encouraging government in the sunshine seem hostile to a rule that prohibits a citizen from access to an adversary governmental party without prior clearance from the governmental party's lawyer.
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> [58] U.S. Const., amend 1 ('Congress shall make no law respecting . . . the right of the people peaceably . . . to petition the Government for a redress of grievances.')."

Modern Legal Ethics, Charles W. Wolfram, West Publishing Co. (1986), §11.6.2, p. 614, fn 58.

The Annotation to Rule 4.2 in the Fourth Edition of the ABA's *Annotated Model Rules of Professional Conduct* also references the First Amendment, viz.:

> "When a governmental agency is the represented party, the Comment to Rule 4.2 recognizes that a party may 'speak with governmental officials about the matter'. The First Amendment right of petition brings such communications within the 'authorized by law' exception to Rule 4.2."

Annotated Model Rules of Professional Conduct, Fourth Edition, American Bar Association (1998) p. 411.

After the *Model Rules* were amended by the Ethics 2000 Committee, the ABA employed slightly different language to reaffirm its interpretation of the

"authorized by law" exception. The Fifth Edition of the *Annotated Model Rules* addresses the issue as follows:

> "When a governmental agency is the represented party, paragraph [3] of the Comment, as amended in 2002, recognizes 'the possibility that a citizen's constitutional right to petition and the public policy of ensuring a citizen's right of access to government decision makers may create an exception to this Rule'."

Annotated Model Rules of Professional Conduct, Fifth Edition, American Bar Association (2002) p. 427.

Both state and federal courts have uniformly recognized the right of an attorney suing a governmental entity to communicate directly with the government officials involved in the lawsuit concerning the disposition or resolution thereof. The United States District Court of Maryland has concluded definitively as follows:

> "Insofar as a party's right to speak with government officials about a controversy is concerned, Rule 4.2 has been uniformly interpreted to be inapplicable. See 2 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 4.2:109 (2d ed. Supps. 1991 & 1994); Charles W. Wolfram, *Modern Legal Ethics* § 11.6.2 (1986)."

Camden v. State of Maryland, 910 F. Supp. 1115, 1118, (D. Md. 1996).

In another representative case, *American Canoe Ass'n, Inc. v. City of St. Albans*, 18 F.Supp.2d 620 (S.D. W.Va. 1998), defense counsel attempted to prohibit plaintiff's attorney from discussing settlement with the members of the city governing body. The Court concluded as follows:

> "... generally, communications with a represented adverse party should proceed through that party's lawyer, pursuant to Model Rule 4.2.
>
> Here, however, both Defendants are government agencies. Government remains the servant of the people, even when citizens are litigating against it. Thus, when citizens deal with government agencies, several sorts of direct contact are 'authorized by law' and permissible. Official comment to Rule 4.2 notes:
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> > 'Communications authorized by law include, for example, the right of a party to a controversy and a government agency to speak with government officials about the matter.'
>
> As interpreted in an American Bar Association Formal Ethics Opinion, this right to speak with government officials about a matter in controversy refers to the constitutionally protected right to petition the government and the derivative public policy of ensuring a citizen's right of access to government decision makers. *ABA Formal Op.* 97-408." 18 F. Supp.2d at 621-622.

See also, *Norfolk S. Ry. Co. v. Thompson*, 430 S.E. 2d 371 (Ga. Ct. App. 1933); *Wilkerson v. Brown*, 995 P.2d 393 (Kan. Ct. App. 1999). See generally, Lidge, *Government Civil Investigations and the Ethical Ban on Communication with Represented Parties*, 67 Ind. L.J. 549 (1992); Baker, *Ethical Limits on Attorney Contact with Represented and Unrepresented Officials*, 31 Suffolk U.L. Rev. 349 (1997).

The American Bar Association and numerous State Bar Associations have authored opinions permitting attorneys to contact employees and officials of a government agency without the consent of the agency's attorney. See, e.g., ABA Formal Ethics Opinion 95-396; ABA Formal Ethics Opinion 97-408 (cited in *American Canoe Association, supra);* North Carolina State Bar Association Ethics Committee Opinion 219 (1995); Association of the Bar of the City of New York, Opinion 1988-8; Kentucky Bar Association Ethics Committee, Opinion E-332 (1988).

Additionally, at least one state, California, has codified the exception and expressly included it in California's version of Rule 4.2, as follows:

> "This rule shall not apply to communications with a public officer, board, committee or body." Calif. R. 7-103.

Based upon the above, it is the opinion of the Disciplinary Commission of the Alabama State Bar that you, as attorney for the State Board of Education, may communicate directly with the members of the County Board of Education to discuss settlement of the pending lawsuit without obtaining the consent or approval of the attorney representing the County Board.

LGK/vf

9/18/03