

Contacting Represented Government Officials

by

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Reprinted from *Minnesota Lawyer* (May 1, 2000)

Generally, lawyers cannot directly contact a represented person without the consent of that individual's counsel. See *Rule 4.2, Minnesota Rules of Professional Conduct*. The purposes of this prohibition are to protect persons against overreaching by adverse counsel, safeguard the attorney-client relationship from interference by adverse counsel and to reduce the likelihood that clients will unwittingly disclose privileged or other information that they would not otherwise be required to disclose.

The anti-contact rule also applies to organizations represented by counsel, although the prohibition is limited in scope to those individuals within the organization who have managerial responsibility or whose act or omission could be imputed to the organization for the purposes of civil or criminal liability (e.g., directors, officers, managers and supervisors). See *Comment to Rule 4.2*.

The most recognized exception to the no-contact prohibition of Rule 4.2 is a direct communication or contact with a represented person that is "authorized by law." This exception applies where a statute, regulation or court rule either authorizes or requires direct contact with a represented party (e.g., personal service of notices or orders). Tucked away in the Comment to Rule 4.2 is another "authorized by law" exception.

This exception consists of "the right of a party to a controversy to speak with government officials about the matter." This isolated and unexplained statement has for a number of years raised the question of whether a different standard applies in contacting represented government officials or agencies and, if so, to what extent.

Until recently, many state ethics authorities held that governmental officials and agencies fell within the protected class of "represented" persons under Rule 4.2. Other states permitted direct contact with represented government officials, but only where the communication was in writing and a copy was given to the government lawyer.

In 1997 the ABA Standing Committee on Professional Responsibility and Ethics issued Formal Opinion 97-408 (August 2, 1997) entitled *Communication with Government Agency Represented by Counsel*. The opinion analyzes the competing policy reasons for prohibiting and permitting direct contact with represented government officials. It resolves these competing interests by concluding that direct communication with a represented government official is permissible if (1) "the sole purpose of the lawyer's communication is to address a policy issue, including settling the controversy" and (2) the lawyer gives government counsel reasonable advance notice of her intention to directly contact the official(s). At a glance, it might appear that government officials are "fair game" and may be contacted directly despite being represented by counsel. Not so, Formal Opinion 97-408 contains various qualifications that ultimately limit the opportunities for unfettered ex parte communication with represented officials.

The first qualification restricts direct contact with represented governmental officials to those officials who possess authority to "take or recommend action in the matter." Another limitation opines that direct contact with represented government officials is improper where the purpose is to "develop evidence as well as address a policy issue." This limitation is consistent with the Comment to Rule 4.2, which prohibits contact with persons whose statement may constitute an admission on the part of the organization. Consequently, ex parte contacts to conduct a factual inquiry or gather evidence are improper, even if the official possesses authority to take or recommend action in the matter.

A final qualification prohibits ex parte contacts with any represented government official who may be personally liable in the matter. This prohibition applies regardless of whether counsel for the official was privately retained or provided by the government. Where the same lawyer represents both the government and the official, consent of counsel is necessary before making any direct contact with the official.

For the past two years, the Director's Office has used ABA Formal Opinion 97-408 in analyzing and responding to advisory opinion inquiries concerning ex parte contacts with represented government officials.

The Opinion has also been referenced in the resolution of at least two disciplinary complaints alleging improper contact with government parties.

Lawyers representing governmental entities need to be mindful of the "governmental exception" enunciated in Formal Opinion 97-408. As a precaution, government lawyers may wish to alert clients (i.e., government officials with authority to take or recommend action in legal controversies) to the potential for direct contact by opposing counsel. Educating these officials about the attorney-client privilege and the effects of waiver might also be advisable.

Similarly, lawyers representing private parties in controversies with the government need to be familiar with the unique circumstances that must exist, before ex parte contact with a governmental official is authorized. Lawyers intending to make an ex parte contact with a represented government official should first review the following:

1. Does the official who is going to be contacted have the authority to take or recommend action in the matter?
2. Is the sole purpose of the ex parte contact to address a policy issue, including settling the controversy?
3. Is any part of the reason for contacting the official to conduct a factual inquiry or obtain evidence?
4. Could the government official be personally liable in the matter?
5. Was notice provided to the government lawyer of the intention to contact the government official directly?