NEBRASKA ETHICS ADVISORY OPINION FOR LAWYERS

No. 12-05

In matters where a staff attorney working for a court is not representing a client, the staff attorney may communicate with a person known to be represented by another lawyer without the consent of the other lawyer.

QUESTION PRESENTED:

May staff attorneys employed by a court communicate with a person known to be represented by another lawyer in matters the staff attorney is working on? The communications usually relate to providing general information about cases in the court, and a Nebraska statute encourages the court to respond to inquiries about the operations of the court.

FACTS

The request for this opinion comes from a representative of a Nebraska court. That court employs lawyers that are called staff attorneys. The activity of those staff attorneys communicating with represented litigants has been questioned by a Nebraska lawyer. The staff attorneys' work includes, first, providing information about litigants' rights and obligations in the court. This information is provided by a frequently asked questions (FAQ) posting on the court's web site, by phone conversations, e-mails, or other communication. Second, the staff attorneys also request clarification of information in, and answer questions about, documents that ask for court approval of settlements. Third, staff attorneys arrange and conduct mediation sessions to facilitate settlement of pending cases. Last, staff attorneys also research and perform services typical of law clerk work for judges in any court.

In doing this work, staff attorneys communicate with persons that have cases pending in the court, and sometimes they know those persons are represented by another lawyer. Usually, a communication is initiated by the represented person; but sometimes the staff attorney must initiate a communication to gain required information, give notice of action required, schedule proceedings, or the like.

A staff attorney's work in this connection does not include counseling, advising, or advocating for the court, even though the attorney is hired by and is working for the court. The court is a third party neutral in any litigant's case and is not adverse to a litigant. A staff attorney's work in this connection also does not include providing legal advice to the person with whom the attorney is communicating. Staff attorneys may refer to statutes, rules, and practices; but, when they communicate, they make a point of clarifying that they are not providing legal advice to the person. They also stress that staff attorneys do not take sides about the matter under communication and that any specific issues or disputes are decided by a judge in the case.

APPLICABLE RULES AND COMMENTS

Neb. Ct. R. of Prof. Cond. § 3-504.2. Communication with person represented by counsel.

In representing a client, 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 a court order.

COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

* * * * * * * *

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having

independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

* * * * * * *

DISCUSSION

"No contact" rule—history and purpose:

ABA Model Rules of Professional Conduct § 4.2 has become known as the no contact rule. It has a long history beginning with a reference in Hoffman's Treatise in 1836 stating, "I will never enter into any conversation with my opponent's client, relative to his claim or defence, except with the consent, and in the presence of his counsel." Quoted in John Leubsdorf, *Communicating with Another Lawyer's Client: the Lawyer's Veto and the Client's Interests*, 127 U. Pa. L. Rev. 683, 684 n. 6 (1979). When the ABA began proposing model ethical codes, a predecessor of the rule was Canon 9 of the first ABA Canons of Professional Ethics, adopted in 1908. Later, it was embodied in DR7-104 and EC 7-18 of the ABA Model Code of Professional Conduct before being carried over into its present form. The rule is long-standing and has become well-known in the legal profession.

Since all legal ethics rules are rules of reason, Comment 1 under Rule 4.2 begins by stating reasons for the rule. According to those reasons, the things represented persons are protected from are (a) possible overreaching by other lawyers, (b) interference with the person's client-lawyer relationship, and (c) uncounseled disclosure of information. ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995) says Rule 4.2 "seeks to maintain a real barrier between the opposing lawyer and the represented person. In civil matters it may be the sole barrier between the client and an overreaching opponent." The concurrence in that same opinion begins by stating: "There is nothing more central to what it means to be a client in the

American system of justice than to know that, having hired a lawyer, the client need not worry about being taken advantage of by lawyers, with special skills and training, who represent others." Quoted in *Parker v Pepsi-Cola*, 249 F.Supp.2d 1006, 1007 (N.D.Ill. 2003)

At first blush it may seem like the reasons for the rule do not apply to the situation discussed in this opinion. After all, lawyers working for a court are not usually overreaching. Indeed, they are not even in an adversarial position with any motive to brow-beat or intimidate patrons of the court. Also, lawyers working for a court would have no interest in stealing a client away from a general practitioner; would have no reason to drive a wedge between the client and the lawyer; and, therefore, would not interfere with the client-lawyer relationship. However, as described in the facts portion of this opinion, a staff attorney may well gain uncounseled information from a communication with a represented person. All lawyers know that clients might either say too much or say things the wrong way. Therefore, staff attorneys could violate the spirit of and one reason for the rule by gaining uncounseled information while communicating with represented persons whose lawyer does not know about the communication. That being the case, it is necessary to analyze whether the staff attorneys may in fact violate the rule, not just its spirit.

Staff attorneys must know the person they are communicating with is represented by another lawyer:

The no contact rule prohibits lawyers from communicating on a matter that is subject to that lawyer's representation with "a person the lawyer *knows* to be represented by another lawyer in the matter." (emphasis added). Thus, the rule is not violated if the staff attorney is communicating with a person he or she believes to be unrepresented but who actually does have counsel, unbeknownst to the staff attorney. The word "know" is defined as denoting actual knowledge of the fact in question. However, a person's knowledge may be inferred from circumstances. Neb. Ct. R. of Prof. Cond. § 3-501.0 (f). In all instances where a lawyer is dealing with unrepresented persons on behalf of a client, the lawyer is subject to another rule, Neb. Ct. R. of Prof. Cond. § 3-504.3, Dealing with unrepresented person.

There does not have to be adversity, and the lawyer need not initiate the communication:

The rule is not limited to situations where the communicating lawyer is working adversely to the represented person. It applies to a lawyer for a co-defendant in a criminal case trying to get help or favorable testimony from another defendant on the same side of the same case. 11 ABA/BNA Law. Man. Prof. Conduct 192, cited in ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995). It also applies to a prosecutor communicating with the victim of a crime when the victim has employed another lawyer to represent the victim in civil issues involving the same matter, and having similar interests, as the criminal prosecution. Nebraska Ethics Advisory Opinion for Lawyers No. 09-03.

The plain text does not limit the rule to situations where the lawyer initiates the communication; the text simply says the lawyer "shall not communicate." Comment 3 of the rule expressly states that, as soon as the attorney knows he or she is communicating with a represented person in the same matter, the lawyer must "immediately terminate" the communication. That same comment, added in 2002, states the rule "applies even though the represented person initiates or consents to the communication." This feature gives the decision to permit or prohibit communication to the lawyer, not the client. The new Comment 3 was added in 2002 to make it clear that the protections given may not be waived by the client. ABA Report to the House of Delegates, No. 401 (February 2002).

There does not need to be a case or a proceeding:

Up until 1995, the rule used the word "parties" instead of "persons." This led some to believe there had to be a case or some proceeding for the rule to apply. If this belief were accurate, the rule would not apply before a suit, prosecution, claim or the like, was filed. Likewise, it would not apply to two parties that were negotiating a contract—each with his or her own lawyer. However, ABA Formal Op. 95-396 repudiated that notion and noted that even the title of the rule had used the word "person" instead of "party" (although the rule used the word "party"). A comment to the rule when it had that form indicated the prohibition was meant to apply to all represented persons, whether those persons were parties in a proceeding or not.

Shortly after publication of the 1995 formal opinion, the matter was put to rest when the ABA changed the rule by replacing the word "party" with the word "person." Now there is no doubt that the rule applies whether the one communicated with is a party to any proceeding or

not. As long as the communication is with a represented person and the topic involves the same matter, the rule applies.

The "authorized by law" exception does not apply:

The facts of this inquiry note that there is a Nebraska statute that encourages the court employing these staff attorneys to respond to inquiries about the operations of the court. That statute authorizes the administrator of the court to staff and maintain a call center that responds to inquiries by persons the court serves about the rights, benefits, and obligations handled by the court.

The no contact rule has an exception and will allow a communication if it is "allowed by law." 71 ABA/BNA Lawyers' Manual on Professional Conduct 306. See, e.g., *Smith v. Johnson*, 711 N.E.2d 1259 (Ind. 1999) (court rule providing for service of complaint); *Lewis v. Bayer AG*, 2002 WL 1472339 (Pa. Ct. Com. Pl. 2002) (FDA regulations authorizing drug company's mailings to putative members of plaintiff class of patients who experienced adverse drug reactions); Arizona Ethics Op. 03-02 (2003) (bankruptcy rules requiring that certain notices be sent directly to parties). Comment 5 of Model Rule 4.2 also expressly says the "authorized by law" exception may include (1) communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government; or (2) investigative activities of lawyers representing government entities before criminal or civil enforcement proceedings are filed.

The committee believes an argument can be made that the "authorized by law" exception would apply to some of the activities of the staff attorneys. After all, there is a "law" that authorizes the court to answer inquiries, and it is a "law" that empowers the court administrator to staff the call center. However, the committee believes it is an argument with limited strength that should not be relied upon to justify the staff attorneys' communications. It is the opinion of the committee that staff attorneys are not "authorized by law" to communicate with persons known by the attorney to be represented by another lawyer for the following reasons:

First of all, working in connection with the call center is not the only instance of staff attorneys communicating with persons they know to be represented by another lawyer. There are also instances of communicating in connection with paperwork used to get court approval for

settlements. Further, there are instances of staff attorneys communicating with represented persons in connection with a staff attorney handling mediation sessions.

Second, the law does not require or expressly authorize the court administrator to have staff attorneys be among the persons communicating in connection with the call/information center. Although it may be good business to have the staff attorneys work in this regard because the statute does state that the court may provide information to users of the court about the users' rights, benefits, and obligations, the court administrator could have someone other than licensed attorneys respond to those inquiries.

Staff attorneys are not "representing a client" when communicating:

It is the committee's opinion that the staff attorneys are not "representing a client" in situations described by the facts of this inquiry. Staff attorneys are communicating with persons in situations where the court (the entity employing the staff attorneys) is a third-party neutral. The court is not getting any legal advice, advocacy, or counsel from the staff attorneys during the communications described. The matters subject to the communications involve some matter where the represented person is using the services of the court, either as a litigant, a potential litigant, or an interested citizen.

The no contact rule is one of the rules of legal ethics that does not regulate attorneys in everything they do. The first words of the present rule condition application of the rule by stating, "In representing a client, . . ." When the rule was previously embodied in the Model Code of Professional Conduct (as DR 7-104), the first words were, "During the course of representing a client, . . ." Comment 4 of the present rule (in expressly allowing lawyers to give second opinions to represented persons) states: "Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter." This principle is discussed in ABA Comm. On Ethics and Prof'l Responsibility, ABA Formal Op. 95-396 (1995) in the following words:

> [I]nvestigators themselves are not directly subject to Rule 4.2, even if they happen to be admitted to the Bar (as many FBI agents are), because they are not, in their investigative activities, acting as lawyers: they are not "representing a client." (Then continuing in the opinion's footnote 54) Although there appears to be no decisional authority on the point,

> it seems clear, and widely understood, that the fact that an investigator is also a member of the bar does not render him, in his activities as an investigator, subject to those ethical rules—the overwhelming majority of the provisions of the Model Rules—that apply only to a lawyer "representing a client."

An Ethics Advisory Opinion, 11-04, given by the South Carolina Ethics Advisory Committee also rules that a South Carolina attorney working to conduct administrative investigations of businesses as an investigator for a U. S. federal agency is not "representing a client." Therefore, the attorney may communicate with operators of those businesses even though the operators have employed counsel to represent them in connection with the investigations. This is true even though the attorney/investigator knows the attorney representing the target of the investigation is being purposely unresponsive and does not want the target to speak to the investigator. Obviously the attorney/investigator is making an end run around a balky lawyer. That opinion states: "Certain rules, however, by their terms apply only when a lawyer is acting in a representative capacity. Rule 4.2 is one such rule; the prohibition against communications with a represented person does not apply to an attorney who is not 'representing a client.'"

Some of the Model Rules of Professional Responsibility apply to lawyers even when they are not representing a client. One example is Rule 8.4 (b) which makes it unprofessional conduct to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." Another example is rule 3-501.11 (d) (2) (i) which applies to a lawyer's activities serving as a public official whether the lawyer is also representing the public entity as its lawyer or not. There are other examples of ethics rules applying to lawyers whether they are representing a client or not. According to ABA Formal Op. 95-396, previously cited, the "overwhelming majority" of the Model Rules of Professional Responsibility only apply to a lawyer in connection with work done while being a lawyer for a client. In Nebraska, there is no question that the plain language of the no contact rule restricts its application to situations where the communicating lawyer is communicating about something for which he/she is representing a client.

There are a couple of situations where the rule applies even when the attorney does not have a client. One involves cases where a lawyer appears *pro se* and thus does not have a

separate client. *In re Schaefer,* 117 Nev. 496, 25 P.3d 191 (2001), documents that there is a split of authority on the point, but most authority holds that the policies served by the rule apply to *pro se* attorneys even though they are not communicating "in representing a client." *Id.* 117 Nev. at 508, 25 P.3d at 199. A similar result is reached where a lawyer is working as a Chapter 7 bankruptcy trustee. *See* Virginia State Bar Standing Comm. on Legal Ethics, Op. 1861, 2/21/12. Both situations of a *pro se* attorney and a bankruptcy trustee are noted as situations where the communicating lawyer can gain unfair advantage over a represented litigant by making *ex parte* contacts. However, these two situations are the only exceptions from the general rule that an attorney must be working in representing a client in order to be subject to the no contact rule.

In the facts given with this request for an advisory opinion, it is clear that these staff attorneys are not working "in representing a client" when they knowingly communicate with represented persons. Therefore, it is the committee's advisory opinion that there is no violation of Neb. Ct. R. of Prof. Cond. § 3-504.2 in those circumstances. In situations where a staff attorney is representing the court—in giving an opinion on the legality of an employment practice, helping negotiate and draft a contract the court is to enter into, or advocating for the court in the event of litigation or other proceedings—then the result would be just the opposite.

CONCLUSION

In summary, after considering the Nebraska Rules of Professional Responsibility, the committee concludes that, in matters where a staff attorney working for a court is not representing a client, the staff attorney may communicate with a person known to be represented by another lawyer without the consent of the other lawyer. The committee did not consider, nor does it offer any opinion about, responsibilities under the Nebraska Revised Code of Judicial Conduct.