



Ohio Board of Professional Conduct

OPINION 2022-03

Issued April 8, 2022

Withdraws Adv. Op. 1992-7

Lawyer Communication with Government Entity Represented by Counsel

SYLLABUS: A lawyer is prohibited from directly communicating with a current employee or official of the government (a) who supervises, directs, or regularly consults with the government's counsel concerning a matter, (b) who has authority to obligate the government with respect to the matter, or (c) whose act or omission in connection with the matter may be imputed to the government.

A lawyer representing a client may communicate directly with a government official or employee if the purpose of the communication is to address a policy issue rather than the negotiation or litigation of a specific claim, the official or employee has the authority to recommend or act concerning the policy issue, and reasonable advance notice is given to government counsel of the intended communication.

A lawyer may address a government official or employee on behalf of a client at a public meeting without the permission or presence of the government's counsel. Government counsel cannot assert blanket representation of all employees and officials in a matter to prevent direct communication by opposing counsel.

A lawyer should not deliver a formal settlement proposal in a matter to a government officer or employee unless the lawyer has obtained consent of government counsel.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



Ohio Board of Professional Conduct

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APPLICABLE RULES: Prof.Cond.R. 1.0, 4.2, 4.3.

QUESTIONS PRESENTED:

1). Does Prof.Cond.R. 4.2 apply to a lawyer's communications with a government officials or employees?

2). If Prof.Cond.R. 4.2 places restraints on a lawyer's direct communications with a government party, would a lawyer's communications to public officials at public meetings be considered communications authorized by law and excepted from the rule's prohibition? Specifically, would a lawyer representing a client with an interest adverse to the government be permitted to communicate the client's position to officials and employees at a public meeting without the government's counsel being present?

3). Whether government counsel may issue instructions to its employees and officers not to communicate with a lawyer representing an adverse party unless the government's counsel is present or that employees need not consent to communication with adverse counsel without the presence of the government's counsel.

4). May a lawyer send a copy of a settlement offer or other communication directly to a government department or agency even if the original is served on the government's counsel.

OPINION:*Direct Lawyer Communication with Government Officials and Employees*

A lawyer is prohibited from directly communicating about the subject of representation with a person the lawyer knows to be represented by a lawyer in the matter, including officials or persons employed by private and public organizations, unless authorized by law or with the consent of opposing counsel. Prof.Cond.R. 4.2., Restatement (Third) of the Law Governing Lawyers §101 (2000). A lawyer is deemed to know the government entity is represented in a matter when he or she has "actual knowledge of the fact in question." Prof.Cond.R. 1.0(g). In the context of communications with represented government entities in a matter, Prof.Cond.R. 4.2 prohibits a lawyer in a matter from directly communicating with public officials and employees who supervise, direct, or regularly communicate with the government's lawyer concerning a matter, or who have the authority to obligate the organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the

organization, hereinafter “no-contact group.” Prof.Cond.R. 4.2, cmt.[7]. Communications with employees or officers, other than those listed in the no-contact group, are permitted by operation of the rule. The exercise of due diligence by the communicating lawyer is recommended to determine whether an official or employee falls within the no-contact group in a pending or impending matter.

Permissible Communications

A direct communication by a lawyer with the government officials and employees identified in the no-contact group is not prohibited when such a communication is authorized by law. Prof.Cond.R. 4.2. For example, a lawyer representing a client in an underlying matter with a government entity may directly communicate with government officials or employees on behalf of clients premised on the clients’ constitutional right to petition the government for the redress of grievances. U.S. Const. amend I., Prof.Cond.R. 4.2., cmt. [5]. After considering conclusions reached by other jurisdictions, the Board concludes that three conditions must be satisfied before a lawyer directly communicates with government officials under the above example. ABA 97-408, Va. Leg. Eth. Op. 1891 (2020). First, the sole purpose of the lawyer’s direct communication must be to address a policy issue, rather than the negotiation or litigation of a specific claim. Second, the contacted official or employee must have the authority to take or recommend action concerning the policy issue including redress of the client’s grievance. Third, the lawyer must provide government counsel with reasonable notice of an intent to directly contact the government officials to afford them an opportunity to obtain the advice of counsel before entering into the communication. Consent from government counsel to a lawyer’s direct communication is not required when all the conditions described above are satisfied. *Id.* The range of permissible communications may include inquiry with government officials and employees about the government’s policy decisions on issues, or lobbying officials for the passage of a law, statute, or regulation favorable to the lawyer’s clients, even if the lawyer’s communication may be related to an underlying pending or impending matter. Va. Leg. Eth. Op. 1891 (2020).

For example, a lawyer in a matter representing a client defending against a municipal zoning ordinance violation proceeding simultaneously submits an application to the city on behalf of a client to review the underlying zoning determination of the client’s property. While the lawyer is prohibited from communicating directly with

represented city officials regarding the client's zoning violation, the lawyer is not prohibited from direct communications with the same officials regarding the client's application for a review of the zoning of his property. The separate zoning review is viewed an exercise of the client's constitutional right to petition the government through his or her counsel and thus authorized by law under Prof.Cond.R. 4.2. *See* Ill. Ethics. Op. 95-12.

If the purpose of a lawyer's intended communication with a government official or employee is not to address a policy issue, but rather to develop evidence for use in a pending or impending matter, then direct communications by a lawyer are prohibited with public officials and employees who fall within the no-contact group. Consequently, a lawyer must terminate any direct communication initially "authorized by law" with persons in the no-contact group that begins to extend into informal discovery or factfinding, including the gaining of useful admissions against a government party's interest. Va. Leg. Eth. Op. 1891 (2020).

Lawyer Communication With Government Officials or Employees During Public Meetings

A lawyer may be retained by a client to speak on their behalf with government officials or employees during a public meeting to address a client's concerns on policy issues. Because meetings of governmental entities are open to the public under Ohio law, a lawyer's communication with a government official or employee during a formal public meeting and on behalf of a client is a communication authorized by law and permissible under Prof.Cond.R. 4.2. *See* R.C. 121.22. In addition, Prof.Cond.4.2 does not proscribe a lawyer from representing and speaking on behalf of a client at a public meeting when the government's counsel is not present. However, the Board advises lawyers intending to address government officials or employees at public meetings on policy issues to identify themselves as the legal representative of a client, preferably in advance of the public meeting, so that the government officials or employees may consult with or request the attendance of counsel.

Blanket Representation of Government Employees

Not every government employee or official employed by a government entity adverse to a lawyer's client in a matter is off limits to direct communications from a lawyer particularly those not in the no-contact group. Consequently, government

counsel may not unilaterally claim to represent all the government organization's employees in a matter in an effort to prevent direct communication by opposing counsel. *See* Adv. Op. 2016-05, ABA Op. 95-396 (1995). Therefore, government lawyers should not issue instructions to all officials or employees not to communicate with adverse counsel in a matter, with the exception of officials or employees identified in the no-contact group. In addition, a lawyer permissibly communicating with a government official or employee in a matter may not state or imply that he or she is disinterested and should clarify his or her role in the matter. Prof.Cond.R. 4.3.

Communication of Settlement Offers

A lawyer representing a client in a matter with the government should not directly communicate with a government officer or employee to engage in written or oral settlement negotiations about a pending or impending matter with a government official or employee without the consent of government counsel. Prof.Cond.R. 4.2, Restatement (Third) of the Law Governing Lawyers §101 (2000). A recipient of such a communication is more than likely a member of the no-contact group and should not be the recipient of direct lawyer communication. Instead, a lawyer should give an oral or written settlement proposal only to the appropriate government counsel in a matter.