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Re: Request for Ethics Opinion 92-15

Dear

You have requested an opinion from this Committee concerning the following factual scenario.

FACTS

You are a states attorney and the county in which you are states attorney is in the process of taking disciplinary action against one of its employees. This employee has hired a lawyer to represent her. Pursuant to the County Personnel Manual, the employee and her lawyer met with the County Commissioners and yourself as part of the grievance procedure. Subsequent to that meeting, the employee's lawyer wrote a letter addressed to both yourself and the County Commissioners.

Based on these facts, you have asked this Committee whether or not the letter written and sent directly to your client constitutes a violation of Rule 4.2.

OPINION

It is the opinion of this Committee that Rule 4.2 has been violated unless the direct communication with the County Commissioners is authorized by law. A lawyer may not send a letter to a party known to be represented by another attorney even where the letter is delivered to the attorney as well as his client unless there has been consent to do so or the direct communication is authorized by law. As pointed out by Committee member Larry Von Wald:

> The reason for Rule 4.2 is two-fold. One of the purposes is to preserve the proper functioning of the legal system. The other is to shield the adverse party from

"improper approaches". Wright v. Group Health Hospital, 691 P.2d 564, 467 (1984). It has been pointed out that there is more to the ethical problem addressed in Rule 4.2 than just the prevention of over-reaching. It has been stated that the rights and interests of the adverse party's attorney and the proper functioning of the legal system are involved as well. People v. Green, 275 N.W.2d 448, 453 (Mich. 1979).

Rule 4.2 makes no exception for communicating with a client represented by an attorney so long as the attorney is aware of the communication. The rule simply states that such a communication shall not take place unless the lawyer has the consent of the other lawyer or is authorized by law to do so. In other words, the language of the rule leads to the conclusion that it does not permit the type of conduct about which [you] have complained.

It seems the written communications, as are involved here, which are delivered to persons represented by attorneys, have significant potential for interfering with the proper functioning of the legal system and the interests of the adverse party's attorney. For example, in the instance presented here, the unauthorized communication may cause a reaction in the individual commissioners which might not otherwise occur were the communication directed to [you] and [you] be given the opportunity to proceed [your] disclosure of the contents of the communication with discussion concerning its nature, advice and counsel concerning the extent to which the Commissioners' should become concerned with the statements made in the letter, etc.

Should a lawyer not be immediately available upon his client's receipt of communications from a lawyer representing an adverse party, such communications may serve to induce the attorney's client to react adversely and damage his own interests. This . . . is but one way in which communications directed to adverse parties, as well as their lawyers, may interfere with the proper functioning of the legal system and affect the rights and interests of the adverse party's attorney. Of course, an attorney has the right to communicate with his client without interference by the attorney for an adverse party.

In Ethics Opinion 90-7, this Committee addressed the issue of personal ex parte contacts with city commissioners. In that

opinion, this Committee ruled that such personal contacts were not allowed under Rule 4.2 and stated in dicta as follows:

> Therefore, it appears that the appropriate course of conduct is that written contacts with government officials in this instance, municipal officials and specifically those municipal officials who have discretionary authority over the matter in controversy, may be made in writing so long as the attorney for the municipalities are provided with notice of the contact as well as copies of the submissions.

The above-quoted language was not necessary to the resolution of the issue presented in Ethics Opinion 90-7 and to the extent that the above-quoted language of Ethics Opinion 90-7 is inconsistent with the opinion of this Committee on this request, Ethics Opinion 90-7 is hereby modified. It is the opinion of this Committee that there should be no direct communication with a party known to be represented by counsel unless there has been consent or unless the direct communication is authorized by law.

It is reasonable to believe that the lawyer involved in this instance had read and relied upon the above-quoted language in Ethics Opinion 90-7. Therefore, it is the opinion of this Committee that although Rule 4.2 has been violated by that lawyer in this instance, this violation should not result in disciplinary action against that lawyer nor is it something that this Committee believes would necessitate reporting by you to the Disciplinary Board under Rule 8.3.

Sincerely,

BOYCE, MURPHY, MCDOWELL & GREENFIELD

Michael S. McKnight, Chairman
Ethics Committee