

Final

**Rhode Island Supreme Court
Ethics Advisory Panel Opinion No. 2000-09, Request No. 810
Issued November 9, 2000**

FACTS

The inquiring attorney represents individuals in a lawsuit in which they allege that they were injured by a state employee. Defendants are the State of Rhode Island and the employee. The State is represented by outside counsel. The inquiring attorney would like to obtain records and information from various state agencies and employees. Specifically, the inquiring attorney wants to directly contact the State Police to obtain accident reports and details of the investigation; the Department of Transportation to obtain highway construction, maintenance, and repair records; the Department of Administration to obtain information about the number of persons employed in similar positions as that of the defendant-state employee; and the agency that employs the defendant to obtain descriptions of the employee's job duties, assignments, and hours worked.

ISSUE PRESENTED

The inquiring attorney asks whether the Rules of Professional Conduct restrict or prevent him/her from directly contacting the various state agencies and employees.

OPINION

Pursuant to Rule 4.2 the inquiring attorney may directly communicate with employees of the State Police, the Department of Transportation, and the Department of Administration for the purpose of obtaining the information described. However, direct communication with managerial employees and officials of the state agency that employs the defendant, about the defendant's job duties, assignments, and hours worked, is prohibited unless he/she has the consent of the lawyer or lawyers representing the opposing parties.

REASONING

Rule 4.2 prohibits a lawyer from communicating with a party that is represented by counsel about the subject of the representation. The rule states 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 prohibition of Rule 4.2 applies to all represented parties, including both private and public organizational entities. See ABA Standing Committee on Ethics and Professional Responsibility, Formal Op. 97-408 (1997). Where the represented party is an organization, the Rule prohibits a lawyer from communicating

". . . with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." Comment to Rule 4.2.

In the case of a government entity, an additional consideration is the right to petition government for redress of grievances guaranteed by the First Amendment to the United States Constitution and article 1, section 21 of the Rhode Island Constitution, and the derivative public policy of ensuring a citizen's right to access to government decision-makers. "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." Comment to Rule 4.2.

The ABA Standing Committee on Ethics and Professional Responsibility addressed Rule 4.2 as it applies to government entities in ABA Formal Op. 97-408 (1997). In balancing the interests served by the no-contact rule against the constitutional right of petition and the related public policy favoring access to government decision-makers, the Committee concluded that a lawyer representing a private party in a controversy with the government may communicate directly with government officials provided that (a) the sole purpose of the communication is to address a policy issue, including settlement of the controversy; (b) the government official has authority to take or recommend action in the controversy; and (c) the lawyer notifies government counsel in advance or if the communication is written, mails government counsel a copy of the written communication, thereby affording government counsel a meaningful opportunity to advise the officials. See ABA Standing Committee on Ethics and Professional Responsibility, Formal Op. 97-408 (1997).

In the instant inquiry, the right to petition has no apparent applicability to the direct contacts described by the inquiring attorney. Therefore, Rule 4.2 applies to the inquiring attorney's communications with officials and employees of the State in the same way it applies to a lawyer's communications with officials and employees of a private organization. That is to say, the inquiring attorney is prohibited from communicating with persons who have managerial authority to speak on behalf of or bind the State, whose acts or omissions in connection with the matter can be imputed to the State, and whose statements can constitute an admission on the part of the State. See Comment to Rule 4.2. Thus, subject to these restrictions, the inquiring

attorney may directly communicate with employees of the State Police to obtain accident reports and details of the investigation, the Department of Transportation to obtain highway records, and the Department of Administration to obtain information on the numbers of persons employed in positions similar to that of the defendant-state employee.

With respect to managerial employees and officials of the state agency that employs the defendant, the Panel is of the opinion that there exists a greater likelihood that the acts or omissions of such persons could be imputed to the State, and that the statements of such persons could constitute an admission on the part of the State. Therefore, the inquiring attorney is prohibited from directly communicating with managerial employees and officials of the state agency that employs the defendant, about descriptions of the defendant's job duties, the defendant's assignments, and the hours that defendant worked, unless he/she has the consent of the lawyer or lawyers representing the defendants.

Nothing in this opinion precludes a lawyer from obtaining information under Rhode Island General Laws §38-2-1 et seq., entitled "Access to Public Records."