

City Bar Reverses Stand On Adverse Client Contact

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Reversing a position taken more than ten years ago (New York City Formal Op. 1991-92), the Ethics Committee of the City Bar has decided that a lawyer may assist a client to communicate directly with an adverse party so long as the client conceives or initiates the contact. Furthermore, the lawyer "may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient."

The Committee cited circumstances in which communication between adversary clients is advisable - "and even crucial." "The need for direct contact often arises to cement a settlement or to break a negotiating logjam, to name just two common situations."

The Committee was prompted to change its position by recent amendments to DR 7-104. As amended in July 1999, DR 7-104(B) provides:

Notwithstanding the prohibitions of DR 7-104(A), and unless prohibited by law, a lawyer may cause a client to communicate with a represented party, if that party is legally competent, and counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented party's counsel that such communication will be taking place.

The Committee was responding also to what it termed "a flood of scholarly criticism" of N.Y. City 1991-92. "We believe that the overly broad criticism of DR 7-104 in N.Y. City 1991-92 is at odds with modern authority." Specifically, the Committee cited the contradiction between its former opinion and the modern view as expressed in the Ethics 2000 Commission's Commentary to ABA Model Rule 4.2 and in Section 99 of the Restatement (Third) of the Law Governing Lawyers. Section 99(2) states, "[the no-contact rule] does not prohibit a lawyer from assisting the client in otherwise proper communication by the lawyer's client with a represented nonclient."

The Committee approved a narrow definition of the word "cause" in DR 7-104(B), *supra*, "akin to the definition found in the dictionary, which would apply where a lawyer prompts or initiates a client's direct contact with an adversary. It does not extend to the endorsement or encouragement of a communication 'first raised by the client' and does not preclude the lawyer from advising the client on the content of communications conceived of or initiated by the client."