

Should Government Lawyers Talk to My Client?

BY ROY SIMON

Do you represent individual or corporate clients who are being investigated or prosecuted by federal or state government agencies? If so, your control over communications between the government's lawyers and your clients is about to change.

The existing rule in New York, DR 7-104(A), provides that "During the course of the representation of a client a lawyer shall not:

- (1) Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is *authorized by law* to do so..." [Emphasis added.]

Virtually every state has a rule like DR 7-104(A) (though most call it "Rule 4.2," after the comparable ABA Model Rule of Professional Conduct). On its face, the rule applies to all lawyers, public and private, in civil and criminal litigation, and typically in transactions as well.

DOJ Asserts Reno Rules

But the United States Department of Justice ("DOJ") says DR 7-104(A) and Rule 4.2 don't apply to federal government lawyers, and has issued a set of rules commonly known as the "Reno Rules" (codified at 28 CFR Part 77) that purport to authorize federal government lawyers to talk to represented parties in a wide variety of situations without the consent of or even notice to the lawyers representing these people.

The Conference of Chief Justices ("the CCJ"), representing the high courts of all 50 states and the District of Columbia, hotly disputes DOJ's position and argues that state ethics rules, including New York's DR 7-104, apply to federal government lawyers in the same way as they apply to other lawyers. Since 1995; the CCJ has been negotiating with DOJ to develop a compromise version that would change DR 7-104(A) and Rule 4.2 — a rule that would satisfy the government's legitimate need for investigation while respecting the states' right to govern lawyers within their borders.

In December of 1997, the Department of Justice and the Conference of Chief Justices finally reached agreement on a proposal to amend the concepts underlying DR 7-104 and Rule 4.2. The proposal tracks much of the Reno Rules, but would not be promulgated by DOJ. Instead, each state would decide whether to adopt the proposal. In states that adopt the proposal, DOJ will no longer enforce the Reno Rules. The CCJ was supposed to consider the proposal at its January 1998 semi-annual meeting, but instead kicked it over to the July meeting and extended the deadline for public comments to June 1, 1998.

Maybe that's because after the proposal was made public, a federal appeals court in St. Louis held in *O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1998), that DOJ had no authority to promulgate the Reno Rules, and that they are invalid and unenforceable. However, DOJ is seeking review by the United States Supreme Court and will continue to assert the Reno Rules everywhere outside of the Eighth Circuit, including in New York.

Proposal Extends to State Governments

A major difference between the Reno Rules and the joint DOJ/CCJ proposal to amend DR 7-104 and Rule 4.2 is that the joint proposal — unlike the Reno rules — would apply *not only to federal government lawyers but also to state and local government lawyers*. This would be a real change. Existing law construing the phrase “authorized by law” in DR 7-104 does not give state government lawyers nearly the rights they would have under the joint proposal.

Paragraph (a) of the joint proposal largely tracks DR 7-104(A) and Rule 4.2, but elaborates on the phrase “authorized by law” in a manner consistent with existing law. Paragraph (b)(1) allows government lawyers to communicate with represented people before they are arrested or charged with a crime, which is consistent with *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988). Paragraph (b)(1) also allows government lawyers to communicate with represented people before they are “named as a defendant in a civil law enforcement proceeding.

Key Provisions in New Proposal

The heart of the joint proposal is paragraph (b)(2), parts of which go far beyond what is currently allowed under DR 7-104(A). Proposed paragraph (b)(2) provides as follows:

- (b) Rules Relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement. A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction, may communicate with a person known by the government lawyer to be represented by a lawyer in the matter if:...
- (2) the communication occurs after the represented person has been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding brought by the governmental agency that seeks to engage in the communication, and the communication is:
 - (A) made in the course of any investigation of additional, different, or ongoing criminal activity or other unlawful conduct; or
 - (B) made to protect against a risk of death or bodily harm that the government lawyer reasonably believes may occur; or
 - (C) made at the time of the arrest of the represented person and after he or she is advised of his or her rights to remain silent and to counsel and voluntarily and knowingly waives those rights; or
 - (D) initiated by the represented person, either directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel for that communication.

The proposal goes on to define when an individual within an organization is “represented” by the organization's counsel. In a nutshell, the proposal would allow government lawyers to communicate with an organization's employees other than the “control group,” which is expressly defined. The proposal ends with the following two limitations on the government's rights:

- (d) Limitations on Communications. When communicating with a represented person pursuant to this Rule, no lawyer may
- (1) inquire about information regarding litigation strategy or legal arguments of counsel, or seek to induce the person to forego representation or disregard the advice of the person's counsel; or
 - (2) engage in negotiations of a plea agreement, settlement, statutory or no statutory immunity agreement, or other disposition of actual or potential criminal charges or civil enforcement claims, or sentences or penalties with respect to the matter in which the person is represented by counsel unless such negotiations are permitted by paragraph (a) or (b)(2)(D).

Your Comments Are Important

Do you like this proposal? Do you want government lawyers to talk to your clients without your consent under this proposal? Your comments are important. DOJ lawyers had nearly three years to think about the issues and review draft proposals, but the negotiations between DOJ and the CGJ were kept strictly secret. (DOJ responded to my own inquiries about the negotiations with "no comment"), and drafts were never made public until December 22, 1997. Private lawyers have therefore had virtually no input on the proposal.