

Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 115

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Issue: Under what circumstances may a lawyer who represents a private party contact the employees of a government agency if the private party is involved in litigation against the agency?

Opinion: Because the Utah and United States Constitutions guarantee all private citizens access to government, all communication, whether oral or in writing, with employees or officials of a government agency under any circumstances are permitted. Thus, a lawyer representing a government office or department may not prevent his non-government counterpart from contacting any employee of the government office or department outside the presence of the government attorney, whether or not the communication involves a matter in litigation. However, if counsel for a private party contacts a government employee about pending litigation, counsel must inform the government employee (a) about the pending litigation or that the matter has been referred to agency counsel and (b) about his representation of a private party in that litigation.

Analysis: Access to government agencies must be unrestricted. Rule 4.2 of the Rules of Professional Conduct provides:

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 comment to Rule 4.2 states (emphasis added):

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party . . . does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, . . . a lawyer having independent justification for communicating with the other

party is permitted to do so. *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.*

Rule 4.2 allows unrestricted access to government agencies and employees for communications "authorized by law." The comment to Rule 4.2 provides that a communication authorized by law includes "the right of a party to a controversy with a government agency to speak with government officials about the matter." This part of the comment to Model Rule 4.2 was grounded in the U. S. Constitution, and finds nearly identical support in the Utah Constitution.¹

Thus, private citizens have a constitutional right of access to government, including government officials. Any interest a government agency might have in being protected from statements made by its employees is outweighed by the First Amendment interests of private parties to "petition for redress" and of the agency's own employees.² Further, the government has a "duty to advance the public's interest in achieving justice, an ultimate obligation that outweighs its narrower interest in prevailing in a lawsuit."³

One commentator has noted:

Requiring the consent of an adversary lawyer seems particularly inappropriate when the adversary is a government agency. Constitutional guarantees of access to government and statutory policies encouraging government in the sunshine seems hostile to a rule that prohibits a citizen from access to an adversary governmental party without prior clearance from the party's lawyer. Because of such considerations, the comment to [Model Rule] 4.2 provides that the rule does not impair the right of a party to speak with government officials.⁴

The broad language of the comment to Rule 4.2 does not restrict a private party's right of access, whether personally or through counsel, even in those instances when litigation is pending.⁵ The California Bar Association has gone so far as to clarify this unrestricted access by amending Model Rule 4.2 to provide that the rule "shall not apply to communications with a public officer, board, committee or body."⁶ This Committee interprets Rule 4.2 as written to incorporate this access to public officials by a party's attorney.

Obligations of Contacting Attorney. The authorities cited above give counsel for a private party wide rein in contacting government employees, both generally and with respect to matters in litigation. As an officer of the court, however, counsel has an obligation to deal with those

employees in an open and honest manner. Therefore, if counsel is contacting a government employee about pending litigation, counsel shall inform the government employee (a) about the pending litigation or that the matter has been referred to agency counsel, and (b) about his representation of a private party in that litigation. The government employee is free to refuse to speak to counsel for the private party or to request that the agency's counsel or counsel for the employee be present.⁷

Footnotes

1. "Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const. amend. I. "All men have the inherent and inalienable right . . . to assemble peaceably, protest against wrongs, and petition for redress of grievances." Utah Const. art. I, § 1.

2. *Vega v. Bloomsburgh*, 427 F. Supp. 593, 595 (D. Mass. 1977).

3. *Frey v. Dept. of Health & Human Services*, 106 F.R.D. 32, 37 (E.D.N.Y. 1985).

4. C. Wolfram, *Modern Legal Ethics* 614-15 (footnotes omitted).

5. See Kentucky Bar Op. E-332 (1988), which cites the comment to Rule 4.2 in support of its conclusion to permit broad access to public officials by attorneys for private parties.

6. C. Wolfram, *Model Legal Ethics* at 615 n.59.

7. See *Frey*, 106 F.R.D. at 38.

Rule Cited:

4.2