Consideration of the Prohibition Against Direct Attorney-Opponent Communication

Canon 7 of the American Bar Association Code of Professional Responsibility (hereinafter referred to as the ABA Code) requires an attorney to zealously represent a client “within the bounds of the law.” This comment deals with the boundary of zealous representation established by Disciplinary Rule (hereinafter referred to as DR) 7-104. That rule proscribes communication between an attorney and an opposing party who is represented by counsel without the consent of such counsel.

Disciplinary Rule 7-104 is designed to protect an adverse party from “improper approaches,” and it applies to the conduct of attorneys. It does not reach investigators, parties to litigation, or employees of parties. The proscription of DR 7-104 applies to attorneys handling civil and criminal cases.

Disciplinary Rule 7-104 rests on the premise that if an attorney could communicate at his pleasure with an adverse party, that party could not receive the full benefit of representation by his own

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1. ABA, CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA Code], Canon 7 reads: “A lawyer should represent a client zealously within the bounds of the law.”

2. ABA Code, Disciplinary Rule 7-104 [hereinafter cited as DR plus the appropriate number].

3. DR 7-104 reads, in pertinent part, as follows:

   DR 7-104 Communicating With One of Adverse Interest.
   (A) During the course of his representation of a client a lawyer shall not:
      (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.


5. If an attorney were attempting to use a party to circumvent the rule then he and not the party who acted at his behest would be guilty of unethical conduct. See DR 1-102; ABA COMMITTEE ON PROFESSIONAL ETHICS, OPINIONS, [hereinafter cited as ABA OPINIONS] No. 75 (1932).


Whether an adverse party's best interests are served by the communication is immaterial to whether there is a violation of DR 7-104, for, if the party has an attorney, the breach of ethics occurs when the attorney communicates directly with the opposing party without the consent of his lawyer.

The prohibition against communicating directly with a party represented by a lawyer is straightforward, and the opinions of the American Bar Association Committee on Professional Ethics that address the subject have construed DR 7-104, and its predecessor, literally. One situation, however, appears to justify a deviation from that position of literal interpretation. It is incumbent upon the lawyer desiring communication to determine whether a party is represented by a lawyer. Some limited communication with the party for the narrow purpose of learning whether or not he is represented by a lawyer and the identity of such lawyer would, therefore, not seem to be a violation of the disciplinary rule.

Once a lawyer knows that a party is represented by counsel, all communication must be through the attorneys unless an attorney consents to direct communication with his client. The disciplinary rule applies to the conduct of the attorneys; therefore, a party can-

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8. See Schantz v. Eyman, 418 F.2d 11, 13 (9th Cir. 1969) (state's psychiatrist interview with a criminal defendant without notifying Defendant's attorney constituted a violation of the county prosecutor's ethics).
10. In Annot., Attorney's Dealing Directly With Client of Another Attorney as Ground for Disciplinary Proceeding, 1 A.L.R.3d 1113, 1114 (1965), communicating directly is said to mean to "contact at a time and place where the attorney of the person contacted is not present."
11. ABA CANONS OF PROFESSIONAL ETHICS No. 9.
12. ABA OPINIONS No. 187 (1938).
14. In Mitton v. State Bar of California, 71 Cal. 2d 525, 455 P.2d 753, 758, 78 Cal. Rptr. 649 (1969), the court, in addressing rule 12 of the California Rules of Professional Conduct, which is similar to DR 7-104, noted that: "The rule was designed to permit an attorney to function adequately in his proper role . . . ." It is probable that in some situations an attorney would not be able to function in his proper role without technically violating DR 7-104 in so far as necessary to learn the identity of a party's attorney.
15. ABA COMMITTEE ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, [hereinafter cited as INFORMAL OPINIONS] No. 517 (1962).
not waive the requirement of DR 7-104\textsuperscript{16} and communicate directly with an opposing attorney.\textsuperscript{17}

Communication via an Agent

The prohibition of DR 7-104 extends to communications between a non-lawyer and a represented party when a lawyer causes the communication.\textsuperscript{18} This aspect of the problem arises in the criminal context where the reality of law enforcement officers being agents of the prosecuting attorney has been recognized.\textsuperscript{19} If the police obtain a statement from a defendant who is known to be represented by a lawyer, without obtaining the lawyer's consent to the communication with the defendant, then a prosecuting attorney may not use that statement without violating DR 7-104.\textsuperscript{20} It follows that if a prosecuting attorney knows that law enforcement agents conduct in-custody interrogations of defendants known to be represented by counsel, without obtaining the consent of such counsel, then the prosecuting attorney is not abiding by the spirit of DR 7-104.\textsuperscript{21}

A variation of the above situation is presented in Reilley \textit{v. Keswani}.\textsuperscript{22} There the court found no violation of DR 7-104(A)(1) when Plaintiff's expert witness communicated with Defendant, a doctor being sued for malpractice, without the prior knowledge or consent of Plaintiff's attorney. This result seems inconsistent with the decision in \textit{United States v. Thomas}\textsuperscript{23} where a violation of the rule was found to exist when a defendant, represented by a lawyer, communicated directly with a special agent of the Bureau of Narcotics and Dangerous Drugs and that agent's report of the communication.

\textsuperscript{17} The term "opposing attorney" is used to refer to any counsel other than the party's own retained attorney.
\textsuperscript{18} See note 5 \textit{supra}.
\textsuperscript{20} United States \textit{v. Thomas}, 474 F.2d 110, 112 (10th Cir. 1973). ABA OPINIONS No. 95 (1933). A related problem in criminal matters is the notion that communication which amounts to a violation of DR 7-104 also denies a criminal defendant of the assistance of counsel. See Schantz \textit{v. Eyman}, 418 F.2d 11, 13 (9th Cir. 1969).
\textsuperscript{21} See Broeder, \textit{supra} note 7, at 602.
\textsuperscript{22} 137 N.J. Super. 553, 350 A.2d 74, 75 (1975).
\textsuperscript{23} 474 F.2d 110 (10th Cir. 1973).
cation was used as evidence at trial in violation of DR 7-104. A distinction, however, can and probably should be drawn between a witness acting independently (as in Reilley) and a subordinate or employee (as in Thomas); for an attorney is not responsible for the conduct of an independent witness, but he is responsible for the conduct of a subordinate or employee.

Direct Communication Problems

A number of fact situations seem to invite violation of DR 7-104, but three appear to be recurring traps for both the hapless zealot and the disregarding recalcitrant. These are divorce or separation proceedings, efforts to effectuate settlements, and entanglement of attorneys in non-legal business activities.

When a couple is separated and possibly contemplating divorce, tension is usually high, and reasoned response may not be present when the husband and wife are forced to communicate. So it was with the Clem family. Husband and Wife had separate counsel. Husband wanted the car that his estranged wife had; when she refused to trade, he took the car he wanted. Wife's lawyer gave chase in his own car, and when Husband finally stopped, the lawyer confronted him and threatened criminal action if the car was not returned. Husband did return the car and the lawyer was suspended from practice for thirty days for communicating directly with a party represented by counsel.

The attorney in the above situation became too involved in the conflict between the parties. Rather than acting as a zealous advocate for his client the attorney actually became a participant in the dispute. Having become involved on a personal level it is not surprising that he communicated directly with the opposing party in disregard of the proscription of DR 7-104.

The problem of the divorce proceeding settlement seems to arise when one attorney feels that he can adequately represent the interests of two parties whose interests are adverse and who have secured individual counsel. Once Husband and Wife who are seek-


25. Problems in the divorce area sometimes include settlement communication difficulties.

26. Montgomery County Bar Ass'n, Inc. v. Haupt, 277 Md. 326, 353 A.2d 629, 633 (1976). Ironically, at the time of Haupt's disciplinary hearing the Clems had resolved their dispute and were again living together.
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ing a divorce reach an understanding on which a settlement can be based it is natural for them to go to the lawyer of one or the other to have the agreement reduced to writing. Both Husband and Wife probably feel that time and money can be saved by this consolidation procedure, and since they agree on the substance of the agreement, they see no apparent need to involve both lawyers. The attorney, however, is bound by the ABA Code and must reject any temptation to accommodate the two parties. In In re Mussman’s Case the offending attorney represented Husband in a divorce proceeding. The attorney knew that Wife was also represented by a lawyer; yet when Husband brought Wife to his office to draw up the settlement agreement, he talked with her and went so far as to draw up a letter for her signature that dismissed her attorney. The lawyer then drew up a stipulation “pertaining to custody, support and distribution” of property. That breach of ethics contributed to Mussman’s indefinite suspension from practice.

A similar offer of service to adverse parties occurs when one lawyer attempts to draft a settlement agreement based on the desires of the parties to litigation. If both parties to a dispute are represented by counsel then it is impossible for one attorney to consummate unilaterally a settlement without violating DR 7-104 unless the other attorney consents. An exception to the settlement dilemma exists when one party has made a settlement offer and the attorney for the opposing party has refused to communicate to his client information that is vital to the settlement. In that situation the attorney for the party offering to settle is justified in communicating directly with the opposing party.

The appropriate course of action when an opponent party indicates a desire to negotiate a settlement is to contact that party’s

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28. Id., 286 A.2d at 617.
29. I assume, without accepting as true, that the breach of ethics that results from communication with a represented opponent is the result of overzealousness or some other altruistic motivation. But see Mitton v. State Bar of Cal., 71 Cal. 2d 525, 455 P.2d 753, 78 Cal. Rptr. 649 (1969).
31. INFORMAL OPINIONS No. 517 (1962). The exception seems proper, for if an attorney refuses to communicate full information to his client he is not adequately representing the client. To prevent another attorney from communicating directly with the party in that situation would be to convert a rule designed to protect parties from improper conduct by lawyers into a rule that protected lawyers who were not adequately representing their clients.
lawyer before discussing the proposed settlement with the party. If a party and the opposing attorney have contacted the party’s attorney and given him adequate notice of a pending settlement conference and have given him an opportunity to attend the conference, then his failure to attend would appear to be a waiver of his right to attend, and DR 7-104 would not be violated if the conference proceeded without him.32

An area in which an attorney’s communication with a represented party appears natural centers around the lawyer who is engaged in non-legal business activities. In that situation the dual status of attorney and businessman does not relieve an attorney of his obligation to abide by the ethical requirements of the Bar.33 Respondent in In re O’Neil34 was a lawyer serving as general counsel for and eventually as president of the Royal Indemnity Company. While serving as counsel and as president, Respondent knew of and approved negotiations between the company agents and allegedly injured persons who were represented by lawyers but whose lawyers did not consent to the negotiations. After observing that Respondent was bound by the legal canons of ethics after becoming president of the company just as he had been before that time, the court stated: “There seems to be no good reason why a lawyer should be allowed to be honest as a lawyer and dishonest as a businessman.”35 Even if a lawyer-businessman could effectively split his manner of conduct in such a way, the dishonest conduct in his business activities would blend with his overall reputation, and the reputation of the legal profession would be damaged by his presence in the Bar.

In a business relationship such as debtor-creditor it might be normal for the creditor to deal directly with the debtor. Indeed, if the creditor brought suit to recover the debt it would not be uncommon for the creditor and debtor to discuss settlement possibilities without the consent or presence of their lawyers. If, however, one of the parties is an attorney then the attorney may not communicate directly with the other party once that party is represented by a lawyer. In dealing with this situation, the court in Complaint as to the Professional Conduct of Otto Heider36 stated: “If accused

35. Id., 239 N.Y.S. at 299.
chooses so to intermingle his professional and his personal financial and business interests, he cannot escape the responsibility attaching thereto.” The court went further, in that case, to describe the attorney’s conduct: “[The attorney] has subordinated the concept of his profession as one of service to its consideration and employment as an aid in the promotion and furtherance of his business and financial interests.”

A more complicated entanglement of an attorney engaging in business activities was considered in In re Wright. There the attorney was disbarred for numerous breaches of ethics, one of which dealt with direct communication with an opponent party. Wright represented his father-in-law who held a mortgage on real property. After learning that the mortgagor had retained an attorney, Wright wrote to the mortgagor, without sending a copy of the letter to the other attorney, and threatened legal action to remove him from the property; he further requested that the mortgagor communicate directly with him instead of through the mortgagor’s attorney.

The ABA Code does not preclude a lawyer from engaging in business activities in addition to the practice of law; however, when a lawyer does engage in non-legal business activity he is not relieved of the ethical restrictions placed on him by his position as a member of the legal profession. An attorney is expected to conduct himself in accord with the ABA Code in all of his endeavors.

**Trial Tainted by a Violation of DR 7-104**

A different problem is presented when improper communication produces material of evidentiary value and the obtaining lawyer attempts to place the information in evidence at trial. When a trial court judge encounters an apparent breach of ethics by a lawyer he can ignore the breach, suppress the evidence that is tainted

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37. Id., 341 P.2d at 1118.
39. The other breaches of ethics which contributed to Wright’s disbarment included undue influence, breach of fiduciary duty, and conflict of interest in a proceeding in which he served as attorney, director and clerk of a corporation involved in a land transaction.
40. See DR 5-104 concerning limitations on business dealings with clients.
by the breach of ethics,42 exclude the offending lawyer from further participation in the trial, not allow the party represented by the offending lawyer to present further evidence, dismiss the suit, or proceed with the trial as if the offense had not occurred and report the offending lawyer to the appropriate disciplinary authority.43 The decision concerning which of those possible remedies to utilize would seem to be another of the innumerable decisions that must be left to the discretion of the trial judge.

If the trial court judge ignores an apparent breach of ethics brought out in trial, the better view seems to be that an appellate court can reverse the decision on the appeal in the exercise of the appellate court's general supervisory power over the lower court.44 In State v. Yatman,45 however, the court stated that ethical considerations do not require reversal on appeal.

Conclusion

The requirement of DR 7-104 is simply stated and literally applied. The rule is one designed to perpetuate not only the concept of civility in the practice of law but also to prevent overreaching by one lawyer over another. If the rule is followed, each client will receive the maximum benefit from his lawyer, and each lawyer will have the opportunity to represent his client without fear of improper contact from other lawyers.

W.M. Moore

44. Moore v. Wolfe, 495 F.2d 35, 37 (8th Cir. 1974).