

Ethical Considerations in Dealing with Administrative Agencies

By

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Dealing With Administrative Agencies

Since the time of the New Deal, there has been an ever growing aspect of government on the federal, state, and local level: the administrative agency. Lawyers dealing with such agencies, particularly those who work in other areas, do not often step back to consider whether their ethical responsibilities are different because they are dealing with a government agency. They should because the Rules of Professional Conduct, the RPCs, do have some particular provisions unique to agency practice, particularly since Washington adopted amendments to the RPCs in 2006.

On July 10, 2006, the Washington Supreme Court adopted *en banc* (by a 7-2 vote) a series of amendments to the Washington Rules of Professional Responsibility. The adoption of these amendments, and some new rules, is the culmination of nine years of public process which resulted in the new rules.

The Expanded Notion of a Tribunal

When initially written, the RPCs were drafted primarily with courts in mind. However, the new version of the RPCs uses an expanded notion of a tribunal which includes an administrative agency. RPC 1.0 (m) has this definition:

“Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

Under this definition, if the administrative agency is acting in an adjudicatory manner, a lawyer has all the ethical duties as if the lawyer were appearing in court. The most significant duties involve those under RPC 3.3 Candor Toward the Tribunal. This rule has several subparts which impose duties upon the lawyer. Under RPC 3.3, a lawyer shall not knowingly:

1. Make a false statement of fact or law, or fail to correct one previously made.
2. Fail to disclose a material fact when disclosure is necessary to avoid assisting a client in a criminal or fraudulent act, unless such disclosure is *prohibited* under the confidentiality provisions of RPC 1.6.
3. Fail to disclose controlling legal authority directly adverse to the position of the client if the other side has not done so.
4. Offer evidence the lawyer knows is false.

5. If the lawyer has offered material evidence and comes to know it is false, this must be disclosed unless disclosure is *prohibited* under RPC 1.6.

6. A lawyer may refuse to offer evidence the lawyer reasonably believes is false.

7. In an ex parte proceeding, the lawyer shall inform the tribunal of all material facts known to the lawyer to allow the tribunal to make an informed decision, even if the facts are adverse.

Under RPC 3.3, it is unclear when the lawyer has the duty to disclose that evidence offered was false. Under the new version of RPC 1.6, the lawyer has the discretionary ability to disclose information relating to the representation to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in which the client has used the lawyer's services. This discretionary ability to disclose means that disclosure of such information is no longer *prohibited* under RPC 1.6.

Nonadjudicative Proceedings

RPC 3.9 provides that a lawyer representing a client before a legislative body or administrative agency in a nonadjudicatory proceeding shall disclose that the appearance is in a representative capacity. The rule goes on to provide that the requirements of RPC 3.3 "Candor Toward the Tribunal," are also applicable, except the ex parte proceeding provision in RPC 3.3(f). In addition, the lawyer is required to comply with the provisions of RPC 3.4 "Fairness to Opposing Party and Counsel," and RPC 3.5, "Impartiality and Decorum of the Tribunal."

Communicating with Government Officials Who Are Represented by Counsel

The most problematical area in regard to dealing with administrative agencies relates to communication when the agency or official is represented by counsel. The standard rule, memorialized in RPC 4.2, is that a lawyer shall not communicate about the subject of the representation with a person the lawyer knows is represented by another lawyer unless the other lawyer has consented to the communication. The revised Rule 4.2 adopted in 2006 is broader than the old RPC 4.2. The prior rule prohibited contact with a "party" who was represented. The new rule prohibits contact with a "person" who is represented.

RPC 4.2 has another provision which allows such a communication to occur if it is authorized "by law" or a court order. The "authorized by law" exception to RPC 4.2 opens the door for a lawyer representing an adverse party directly to contact a government official about the case, even if that person, the agency, or the governmental entity is represented by counsel, private or public. The reason is that people have a First Amendment right to petition the government. The Washington Constitution has a similar

provision. Article I, Section 4 provides: “The right of petition . . . shall never be abridged.”

Although not unanimous, the weight of authority is that these constitutional rights are authorized by law to communicate directly with a government official whether or not that person or agency is represented by counsel. The commentary to RPC 4.2 is rather vague about the subject but does provide: “[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.” The WSBA issued an Informal Ethics Opinion, No. 1363 in 1992, which dealt with whether counsel for a corporation subject to a consent decree by the EPA may properly communicate with the acting regional administrator during pendency of a possible enforcement proceeding or whether that contact should be through counsel for the administrator. The WSBA stated: “The Committee is of the opinion that RPC 4.2 provides authority to contact the government official even when represented by counsel when such contact is authorized by law. This is consistent with the Supreme Court opinion in *Wright v. Group Health Hospital*, 103 Wn. 2d 192 (1984).” The Committee then punted the issue and stated: “However, the Committee, which is charged with interpreting the Rules of Professional Conduct only, cannot render an opinion on whether such contact is authorized by law.” That concludes the WSBA’s written guidance on the issue. However, Barrie Althoff, when he was Chief Disciplinary Counsel for the WSBA, wrote an article in the *Bar News* in 2001 saying the no-contact provisions of 4.2 probably did not apply in the governmental situation since the “elevation of an ethics rule over a constitutional right seems questionable.” However, the article states those were his opinions, and “not official or unofficial WSBA positions.”

The American Bar Association (the “ABA”) issued Formal Ethics Opinion 95-396 (1995) which states that the authorized by law provision of RPC 4.2 is satisfied by “a constitutional provision, statute or court rule, having the force and effect of law, that expressly allows a particular communication to occur in the absence of counsel.” In accord is *Camden v. Maryland*, 910 F. Supp. 1115 (D. Md. 1996) stating “Insofar as a party’s right to speak with government officials about a controversy is concerned, Rule 4.2 has been uniformly interpreted to be inapplicable.” *But see*, Alaska Bar Association Opinion 94-1 (1994) stating that for purposes of 4.2, a citizen may petition government on a represented matter, but may not do so through a lawyer.

Although the ABA recognized the constitutional right to petition government in its 1995 opinion, two years later it tried to narrow the scope of this right. A divided Ethics Committee issued Formal Opinion 97-408 (1997) where the majority opined there were two conditions on allowing direct contact: (1) requiring the communication be only about a policy issue, which may include settlement of the dispute; and (2) and requiring notice to the government lawyer before the communication takes place. The ABA opinion concluded that if these two conditions were not met, there would be a violation of RPC 4.2.

To this author, a former member of the ABA Standing Committee on Ethics, the conclusion reached in the opinion is very dubious. It ignores the supremacy of, and potential chilling effect on, important First Amendment rights. More importantly, the

opinion's conditions are not found in either the language of the rule or its commentary. Without this underpinning, the opinion lacks a foundation. However, the opinion does provide some sound advice for counsel. Obviously, if you desire to have a good working relationship with governmental counsel, going over the lawyer's head to the client without any notice will not contribute to a harmonious working relationship. Government lawyers can certainly talk to their clients or others about potentially being contacted by counsel for the other side in a dispute. A word of caution is necessary in doing so. Comment [5] to RPC 3.4 cites to *Wright v. Group Health, supra*, and states: "Advising or requesting that a person other than a client refrain from voluntarily giving information to another party may violate other Rules. See, e.g. Rule 8.4(d)."

Inadvertent Disclosure of a Document

Administrative agencies often produce many documents relating to a matter, either through discovery or public records act requests. Often privileged or other protected material gets produced. RPC 4.4(b) provides that "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall notify the sender." The Rule only requires notification. It does not require return of the document and does not prohibit its subsequent use, although a protective order relating to such matters might be entered.

Production of Documents Attorney Client Privilege

In Washington, a lawyer often has two options for obtaining documents from an administrative agency. If allowed in the type of proceeding, discovery requests, including requests to produce documents, can be utilized. The other option is to obtain documents under the public records act. What is exempt from production can vary between the two. However, production of documents under the PRA has an advantage over discovery. The failure to produce a document carries a penalty, as well as the ability to obtain attorney's fees in a case to compel production. This gives a party seeking documents an advantage in dealing with an agency which is inappropriately withholding documents.

Attorney client privilege is a legitimate exemption for production, both under discovery and PRA requests. In reviewing documents for privilege, or seeking production of what an agency claims is privileged, there is an evolving concept in the law about what is privileged because of changing technology. Today we see large number of recipients of emails, and counsel is often listed on the email as one of many recipients. Is the communication then blanketed in privilege? Federal decisions have begun to question the viability of the privilege, particularly when there is widespread circulation within a company or entity. The view is then this is business advice, rather than legal advice. *SmithKlineBeecham Corp. v. Apotex Corp.*, 232 FRD 467, 478 (E.D. Pa. 2005). This was the result in the Vioxx litigation with a finding that Merck had basically forfeited its claim to attorney client privilege by having too many persons on the email, more than were just necessary to receive legal advice. *In re Vioxx Prods. Liability Litig.*, 510 S. Supp. 2d 789 (E.D. La. 2007). Government agencies have a habit of widespread

dissemination of information on emails. Probing who actually received something can be helpful in challenging an assertion it is a privileged communication. House counsel should be mindful of this emerging trend in the law and start educating clients about only dispensing legal advice to those who actually need to receive it.

Conclusion

Dealing with administrative agencies poses particular challenges for lawyers. Care must be taken by those representing the agency and its employees and those representing adverse parties to fulfill the ethical responsibilities of counsel.