E-91-6 Unauthorized communication with opposing party who is represented by counsel

Facts

In a memorandum dated June 8, 1989, U.S. Attorney General Richard Thornburgh established an official Justice Department policy that U.S. attorneys, their assistants and investigative agents are exempt from ABA, state and local rules of professional conduct that regulate or forbid attorneys and their agents from communicating with parties represented by counsel, in both criminal and civil matters, where the government attorney knows that the party has retained counsel for the matter under investigation. Subsequent to issuing the June 1989 memorandum, the Justice Department has taken a formal position before the House Government Operations Committee and at least one district court considering the 1989 memorandum, that state supreme courts and federal district courts do not have authority to regulate or limit Justice Department lawyers licensed to practice in a particular state in relation to communications with represented parties.

Questions

1) May a lawyer licensed to practice in Wisconsin, who is employed by a federal, state or local government entity, ethically communicate about the subject of the representation with a party, in a civil or criminal matter, that the government lawyer knows to be represented by another lawyer in that matter, without the consent or knowledge of the other lawyer?

2) May a government lawyer licensed to practice in Wisconsin ethically rely on a directive from his or her superior that unilaterally exempts him or her from the provisions of SCR 20:4.2?

Opinion

The answer to both questions is ''no.'' SCR 20:4.2 states that ''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.'' Rule 4.2 of the ABA Model Rules of Professional Conduct, and its predecessor DR 7-104(A)(1), or substantially similar rules have been adopted by courts of all 50 states and the District of Columbia, as well as numerous federal district courts, which have adopted state rules of professional conduct by local rule. SCR 20:4.2 applies to all lawyers practicing in Wisconsin, whether they are in private practice or in government service.

Congress and the Supreme Court specifically have recognized the power of states to license lawyers to practice in their courts and to regulate their communications. *See, e.g.,* Fed. R. App. p. 46. A license to practice in federal court is dependent on a lawyer's prior admission to the bar of at least one state. *Theard v. United States*, 354 U.S. 278, 281 (1957); *Galahad v. Weinshienk*, 555 F. Supp. 1201, 1211 (D. Col. 1983). States have a substantial interest in regulating the conduct of lawyers who practice in their courts and who represent or prosecute their citizens. *Sperry v. Florida*, 373 U.S. 379, 383 (1963); *Nix v. Whiteside*, 475 U.S. 157, 165 (1986); *Gentile v. State Bar of Nevada*, ___ U.S. ___, 115 L. Ed. 2d 888, 921-24 (1991).

Lawyers who work for the federal government or any other government agency in the United States do not, by virtue of that fact, shed their dual obligations as officers of the court. *Berger v. United States*, 295 U.S. 78 (1935). As such, they are required to conduct themselves in accordance with the rules of professional conduct established by all the courts in which they are admitted to practice.

Courts consistently have recognized that federal government lawyers are subject to state rules of professional conduct, and specifically those rules relating to unauthorized contact with represented parties. *United States v. Hammad*, 858 F.2d 834, 837-38 (2d Cir. 1988), *cert. denied*, ___ U.S. ___, 112 L. Ed. 2d 154 (1990); *United States v. Lemonakis*, 485 F.2d 941, 955 (2d Cir. 1973); and *United States v. Lopez*, 765 F. Supp. 1433, 1445-50 (N.D. Cal. 1991).

In *United States v. Lopez*, District Judge Patel ruled that since there is no federal statute that authorizes government lawyers to question represented parties in the absence of counsel, Justice Department lawyers were bound by the proscriptions of California's ethics code which adopted DR 7-104, regardless of the position taken in the 1989 Thornburgh Memorandum. *Id.* at 1448. Without

an ethical restraint like DR 7-104, ''a prosecutor's authority to communicate with represented individuals would be virtually limitless.'' *Id.* Judge Patel went on to state that ''as the 'nation's litigator,' the (Justice) Department and its attorneys must be held accountable to the same court-adopted ethical rules that govern all other lawyers.'' *Id.* at 1450.

All government lawyers licensed to practice law in Wisconsin (federal, state or local) are bound by SCR 20:4.2. A directive or policy statement from a government lawyer's superior unilaterally exempting him or her from the provisions of SCR 20:4.2 does not in any way diminish the lawyer's duty to comply with SCR 20:4.2.