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**E-95-1      Communicating with government  
agency represented by counsel**

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**Question**

Is a lawyer for a private person who is involved in a noncriminal matter involving a governmental entity precluded from making direct contact with government officials or employees about the matter, when the lawyer knows that the governmental entity is represented by counsel in the matter?

**Opinion**

Lawyers are generally precluded, under SCR 20:4.2, from communicating “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 the rule states that “a party to a controversy with a government agency [has a right] to speak with government officials about the matter.” Generally, when an organization such as a governmental entity is a party, the prohibition on direct contact extends to “persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.” SCR 20:4.2 comment.

Thus, several principles are at work in this context. First, the person who is involved in the matter with the governmental entity may make direct contact with government officials who are involved, but the person’s lawyer generally may not do so. Second, this prohibition on the lawyer extends only to certain key officials of the governmental entity; it does not, for example, extend to all governmental employees. Third, the prohibition applies only to discussions about the particular matter and not to unrelated issues.

One of the complications that arises under the direct contact rule as it applies to governmental entities is defining the point at which the governmental entity is represented in the matter. In litigation, when an appearance has been entered on behalf of the governmental entity, the fact of the representation usually will

be clear. In various transactional and negotiation settings, the fact of representation may be less clear and may depend upon whether the lawyer for the governmental entity has notified the other lawyer of his or her representation in the matter. When such notice is given, the fact of the representation generally is established. From that point forward, direct contact with relevant government officials is improper, unless consent is given by the entity's lawyer or the law otherwise clearly permits the contact.

One of the purposes of the direct contact rule is to preserve the integrity of the lawyer-client relationship. This goal can be threatened when counsel for a governmental entity is required, under open meeting statutes and other laws, to provide a public airing of counsel's advice. In some cases, counsel for the other party may be afforded an opportunity to speak to the government decisionmakers at the same time and in the same forum as government counsel's advice is offered. While this procedure represents a marked departure from the usual confidential relationship between lawyer and client, it reflects the high value placed upon open government under our democratic system. In such circumstances, the controlling law of the jurisdiction takes precedence over the direct contact prohibition.

In summary, the direct contact rule of SCR 20:4.2 precludes a lawyer, in the course of representation, from making direct contact with covered government officials with respect to a matter when the lawyer knows the governmental entity is represented by counsel in the matter. The exceptions to the rule are direct contact with the consent of the government's lawyer or pursuant to laws and procedures of the controlling jurisdiction clearly allowing such contact.