
E-84-15 Propriety of prosecutor communicating with complainant when complainant is represented by a lawyer

Question

When a lawyer represents a complainant in a criminal matter and requests the prosecutor's office to respond with regard to its handling or review of the matter, may the prosecutor's office when responding to the lawyer, forward a copy of that response to the client/complainant without violating Wisconsin Supreme Court Rule 20.38(1)?

Opinion

SCR 20.38(1) states that during the course of representing a client a lawyer may not communicate "on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing the other party or is authorized by law to do so." *See* Formal Opinion E-82-4, Wis. Bar Bull., June 1984, at 48. The traditional ban against communicating with a person known to be represented by another lawyer without that lawyer's consent is intended to preserve the integrity of the client-lawyer relationship by protecting the represented person from the superior skill and knowledge of the opposing lawyer. *ABA/BNA Lawyer's Manual on Professional Conduct*, at 71:303. The prohibition shields the client not only from a lawyer's intentional and knowing approaches, but also against misguided by well-intended communications. *Id.*

Although the rule against communicating with a person known to be represented by a lawyer is customarily discussed in terms of adversaries (*see generally Lawyer's Manual*, pp. 71:301-28), the policy of protecting the integrity of the client-lawyer relationship is equally applicable in a non-adversary context. Accordingly, if a complainant in a criminal matter is represented by a lawyer in that matter, the prosecutor may not ethically communicate in any way with the complainant on the subject of the representation unless the prosecutor has the prior consent of the complainant's lawyer. *Cf.* ABA Model Rules of Professional Conduct. "Rule 4.2 Communication with Person Represented by Coun-

sel” (comment) (rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question). It should be noted that whether a prosecutor may be authorized by law to pursue such communications is a question beyond the scope of authority of the Committee on Professional Ethics. SCR 20.38(1); *see* Formal Opinion E-74-1, Wis. Bar Bull., June 1984, at 48.