1977

DR 7-104 of the Code of Professional Responsibility Applied to the Government Party

Minn. L. Rev. Editorial Board

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Minnesota Law Review. 3096.
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Note: DR 7-104 of the Code of Professional Responsibility
Applied to the Government “Party”

A welfare recipient who has been notified that her benefits are being terminated asks an attorney to represent her at a welfare board termination hearing. The attorney knows that the information in a welfare recipient’s file is generally available to the recipient. In preparation for the hearing, therefore, the attorney, as the recipient’s legal representative, contacts an eligibility technician at the welfare department to obtain information on the agency’s reasons for terminating assistance. While the attorney’s conduct is not particularly unusual, it may violate Disciplinary Rule (DR) 7-104 of the American Bar Association (ABA) Code of Professional Responsibility.

DR 7-104 prohibits a lawyer “during the course of his representation of a client” from communicating “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.”

1. The Code of Professional Responsibility of the American Bar Association (ABA) was promulgated in 1969 after an extensive effort by the Bar to revise and reorganize the Canons of Professional Ethics enacted in 1908. It has been formally adopted in whole or in part by statute or by the state’s highest court in all 50 states and the District of Columbia. See A. Kaufman, Problems in Professional Responsibility 29 (1976). The Code consists of three interrelated parts: Canons, Ethical Considerations (EC’s), and Disciplinary Rules (DR’s). The Canons are broad “axiomatic norms” that express the standards that attorneys should follow in their dealings with the public, the legal system, and other members of the bar. Each of the nine Canons is followed by specific Ethical Considerations and Disciplinary Rules. While the Ethical Considerations are “aspirational” in character, the Disciplinary Rules are “mandatory,” stating precepts intended to bind all attorneys. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preamble and Preliminary Statement. The extent to which the rules are considered binding or merely advisory may vary among jurisdictions. Compare People v. McCallum, 341 Ill. 578, 173 N.E. 827 (1930) with In re Annunziato’s Estate, 201 Misc. 971, 108 N.Y.S.2d 101 (1951).

2. The rule, entitled “Communicating with One of Adverse Interest,” in its entirety provides:

   (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.

   (2) Give advice to a person who is not represented by a lawyer,
Although the rule has been uniformly followed when the party contacted is a private individual, its application to contact with a government entity is somewhat unclear. Two aspects of the rule pose particular problems. First, the Code does not indicate which employees of a government body are to be considered the government “party” for purposes of DR 7-104. Second, it does not specify at what point in a dispute the government’s interests will be considered sufficiently adverse to those of a member of the public to trigger the rule’s application. This uncertainty is heightened by the fact that neither the American Bar Association’s Committee on Professional Ethics nor many state bar asso-
ciations have yet interpreted the rule in a situation involving a government “party.”

In order to determine whether, or to what extent, DR 7-104 should govern contact by an attorney with a government “party,” this Note will first examine the rationale underlying the rule. It will next identify which employees of a multi-person entity should be considered “parties” under DR 7-104. Based on this analysis, it will then suggest why and how the rule’s application should be modified when the multi-person entity is a government body. Finally, the Note will suggest a method to determine at what point before or during a controversy the government should be able to invoke the rule’s protection.

I. THE RULE’S RATIONALE

In an early opinion the ABA Committee on Professional Ethics identified as two objectives underlying Canon 9, the predeces-

6. The texts of state and local ethics opinions are only published, if at all, in the official publications of each bar association. The formal opinions issued by state and local organizations through 1970, however, are summarized in the two volume Digest of Bar Association Ethics Opinions, see O. Maru & R. Clough supra note 5; O. Maru, 1970 SUPPLEMENT TO THE DIGEST OF BAR ASSOCIATION ETHICS OPINIONS (1972), published by the American Bar Foundation.

To research this Note, letters were sent to the state bar associations of 48 states and to the bar associations of the District of Columbia, Chicago, and New York City, asking each bar if it had considered whether DR 7-104 applied when an attorney representing a private party communicated concerning a matter in dispute with a government official or employee. Of the 51 bar associations contacted, 46 responded. Seven indicated that they had issued formal opinions interpreting DR 7-104, or its predecessor, original Canon 9, in this context. Some of these opinions are discussed in notes 39, 66, 70, & 78, and text accompanying notes 62-66 infra. Three other states had issued informal opinions on this subject, and one state had touched upon DR 7-104 tangentially in an opinion concerning another provision of the Code. California’s statutory version of the rule expressly excludes government entities from its coverage. See notes 60-61 and accompanying text infra. The remaining 34 bar associations had never considered the rule in a government context.

7. “Multi-person entity” is used in this Note to designate those judicial entities, such as corporations and government agencies, in which the authority to act for the entity is typically dispersed among a number of individuals. Partnerships might also fall within this class, although in the case of partnerships it is considerably easier to identify the source of authority because, by definition, partners have authority to act for and bind the partnership. See UNIFORM PARTNERSHIP ACT § 9(1).

8. Original Canon 9 provided:
A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent
sor to DR 7-104, "preserv[ing] the proper functioning of the legal profession," and "shield[ing] the adverse party from improper approaches." With respect to the first of these objectives, the Committee noted:

Compensation for his services is an attorney's professional right and, in matters affecting a professional right, candor and fairness require that other attorneys grant him more than the mere compliance with rules of court or with his statutory rights. They require that he be given a reasonable opportunity to assert and protect any such right which he may claim and possess, whether it be based on a lien or not.

This somewhat obscure language suggests that lurking behind the rule was the belief that if an attorney were present during an opposing attorney's communication with his client, opposing counsel could not negotiate an unfavorable settlement that would jeopardize the attorney's right to recover a contingent fee. Another concern underlying the rule may have been the fear that a lawyer could seize upon the absence of an opposing party's attorney to advise that party to retain new counsel, thus depriving the attorney not only of his fee but of his client as well.

The self-serving aspect of DR 7-104 has not been emphasized in recent years. The rule's second objective, however, has received continuing attention. In disciplinary proceedings against attorneys, several courts noted the protection original Canon 9 afforded a party during communications with opposing counsel. In In re Atwell,2 a Missouri court stated that the Canon existed "to prohibit lawyers from taking advantage of litigants who are represented by Counsel."3 In Mitton v. State Bar,4 the Cali-
fornia Supreme Court offered a more explicit description of the dangers against which the rule was directed:

The rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role. If a party's counsel is present when an opposing attorney communicates with a party, counsel can easily correct any element of error in the communication or correct the effect of the communication by calling attention to counteracting elements which may exist.15

Another aspect of the rule, subsequently recognized by the California Supreme Court in Abeles v. State Bar,16 was the safeguard it provided against the risk that a party without benefit of counsel would unwittingly make statements to opposing counsel that could prejudice the party's interests at trial.17

That benefits are to be derived from the retention of counsel and his active involvement in all phases of litigation is an assumption that pervades the entire legal system, both criminal and civil. In the context of criminal proceedings, it is reflected in the development of a constitutional right to counsel.18 This right derives from a conviction that the adversary system of justice successfully promotes due process only when both sides have

cerning both the party's opposition to a motion for a new trial and the possibility of judgment in excess of the policy limits of the party's automobile liability insurance. Since both of these matters might have affected the resolution of the dispute, it was held that the party contacted needed the benefit of counsel to evaluate the accuracy of the communications.

15. Id. at 534, 455 P.2d at 758, 78 Cal. Rptr. at 654.
17. The basis of the disciplinary action in Abeles was unauthorized contact by an attorney with one of several business partners who were joint parties to a lawsuit against the attorney's client. The attorney had persuaded one of the opposing parties, out of the presence of counsel, to sign an affidavit denying that he authorized the filing of the action and repudiating various allegations in the complaint. Even though there was counsel of record for the business enterprise, the accused attorney asserted that the party with whom he had communicated was not represented by that counsel. The California Supreme Court rejected this argument, ruling that when there was counsel of record, communication should be through him, whether or not he was, in fact, authorized to act for the party. Id. at 609-10, 510 P.2d at 723, 108 Cal. Rptr. at 363.
18. The scope of the right to counsel in a criminal proceeding has been delineated in a long series of cases. See, e.g., United States v. Ash, 413 U.S. 300 (1973) (right to counsel exists at any stage in which the accused is subject to confrontation by the prosecution); Coleman v. Alabama, 399 U.S. 1 (1970) (right to counsel exists at time of arraignment or preliminary hearing); United States v. Wade, 388 U.S. 218 (1967) (right to counsel extends to post-indictment line-up). But see Kirby v. Illinois, 406 U.S. 682 (1972) (no right to counsel at pre-indictment identifications). See also Miranda v. Arizona, 384 U.S. 436 (1966) (right to counsel exists during custodial interrogation).
equal ability to develop and argue the merits of a case. 19 The Supreme Court, in Powell v. Alabama, 20 recognized that a private individual, not trained in the intricacies of the law, is simply no match for a skilled attorney, making it imperative that a defendant generally have the same access to counsel as the state. 21 Miranda v. Arizona 22 recognized the importance of counsel at these pretrial confrontations when counsel's presence would not only reduce the likelihood that the state would apply undue pressure but would also guarantee that the party being interrogated gave a "fully accurate statement" that would be "rightly reported by the prosecution at trial." 23 Similar concerns apply to parties involved in civil litigation. In Goldberg v. Kelly, 24 for example, the Supreme Court acknowledged the potential importance of counsel to safeguard a welfare recipient's due process rights during a pre-termination hearing. 25

The importance of the protective function served by counsel is also reflected in the Code of Professional Responsibility. Although the Code does not purport to require that all parties be afforded counsel, the same considerations of fairness that underlie the concept of due process suggest that if a party does have a lawyer, that lawyer should be present during questioning of his client by an opposing attorney. DR 7-104 reflects an apparent conviction that, in the interests of legal sportsmanship, a party should not be allowed to further his case by taking advantage of his opponent's naiveté to elicit devastating statements or to conclude an ill-advised settlement. The legal system, accordingly, protects a party against himself by ensuring that contacts with opposing attorneys will take place only through the party's own counsel or in his presence.

The attorney can protect his client in dealing with an opposing attorney in a number of ways. For example, a party is under no legal obligation to disclose information unless the opponent

20. Id.
21. Id. at 69. In a dissent to Massiah v. United States, 377 U.S. 201, 211 (1963), Justice White described original Canon 9 as forbidding lawyers "to interview the opposing party because of the supposed imbalance of legal skill and acumen between the lawyer and the party litigant," language similar to that used in Powell.
23. Id. at 470.
25. Id. at 270-71 ("Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of [his client].").
formally requests discovery. Acting without benefit of counsel, however, he might be unaware of his right to withhold information and make prejudicial disclosures under pressure from an aggressive attorney.\textsuperscript{26} In cases where a party decides to expedite the resolution of a dispute by voluntarily responding to opposing counsel’s questions, counsel also has an important function to perform. He can object, on behalf of his client, to questions requesting information subject to a claim of privilege,\textsuperscript{27} or he can stress the need for strict accuracy and encourage his client to refresh his memory by checking past records if a key fact or date is at issue. When damaging or prejudicial statements are made during the course of an interview, the attorney can minimize the harm done to his client’s case by ensuring that such statements are, to the extent possible, explained or clarified, either during the interview itself or at trial.\textsuperscript{28} Finally, counsel can ensure that the opposing attorney does not give inaccurate advice and that the client does not unwisely settle or compromise his case.

II. THE GOVERNMENT PARTY

A. DEFINING THE PARTY IN MULTI-PERSON ENTITIES

The protective function served by counsel’s presence reflects the concept of fair play that lies at the heart of the adversary system. When the party is a multi-person entity, such as a corporation or a government body, however, DR 7-104’s protection of parties may be at odds with the goal of permitting access to witnesses in order to uncover and present all relevant evidence to the trier of facts.

That our legal system affords attorneys relative freedom to interview witnesses—as opposed to parties—was recognized by former Canon 39 which provided that “[a] lawyer may properly

\textsuperscript{26} The adversary process itself provides a partial check against the likelihood that an attorney will harass an opposing party into making inaccurate or careless statements, for the attorney gains little if the statements he elicits can be easily discredited at trial. Accordingly, the attorney has some incentive to take care to impress upon the party being interviewed the need for accuracy in his remarks. Since the interests of the attorney and the interviewee conflict, however, the interviewing attorney could hardly undertake to advise the party fully; DR 7-104 thus provides the additional protection of the party’s own counsel.

\textsuperscript{27} For a discussion of privileges, see generally C. McCormack, Evidence §§72-183 (2d ed. 1972). See also note 50 \textit{infra}.

\textsuperscript{28} Cf. Miranda v. Arizona, 384 U.S. 436, 470 (1966) (“The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecutor at trial.”).
interview any witness or prospective witness for the opposing side in any civil suit or criminal action without the consent of opposing counsel or party.”

The only restriction placed on the contacting attorney was that he “scrupulously avoid any suggestion calculated to induce the witness to suppress or deviate from the truth, or in any degree to affect his free and untrammeled conduct when appearing at the trial or on the witness stand.” Although the new Code of Professional Responsibility did not retain Canon 39 as a separate provision, it does distinguish between party and witness, placing greater restrictions on contact with the former. This distinction is important in determining the scope of DR 7-104's application to the multi-person entity, for a fair interpretation of the rule should accommodate both the attorney's need for relative freedom in interviewing witnesses and the need for restraints on communicating with a party.

Both government and corporate entities will probably have exclusive possession of much of the information necessary for trial preparation, and the statements of employees are likely to be essential to the opposing party's case. Thus, if the adversarial process is to function effectively, it is imperative that DR 7-104 not significantly impair opposing counsel's ability to gather evidence. When the party sought to be contacted is a private individual, DR 7-104 prevents an attorney from interviewing only that individual; but where the party is a multi-person entity, the rule could be broadly read to encompass virtually any employee, thus shielding a potentially large number of important witnesses.

29. ABA Canons of Professional Ethics No. 39 (as amended 1937). Prior to 1937, Canon 39 read as follows:

Compensation demanded or received by any witness in excess of statutory allowances should be disclosed to the court and adverse counsel.

If the ascertainment of truth requires that a lawyer should seek information from one connected with or reputed to be biased in favor of an adverse party, he is not thereby deterred from seeking to ascertain the truth from such person in the interest of his client.


30. ABA Canons of Professional Ethics No. 39.

31. For the Code's current restrictions on dealing with witnesses, see ABA Code of Professional Responsibility EC 7-28, DR 7-102(A) (3)-(7), DR 7-109 (c).

32. The ABA Committee on Professional Ethics has ruled that when an individual is both a party and a potential witness, he should be treated as a party. See ABA Comm. on Professional Ethics, Opinions, No. 187 (1938). Thus if employees were considered parties, as well as witnesses, the restrictions of DR 7-104 would apply.
If the rule were broadly applied, gathering evidence could be made particularly difficult: an entity could simply refuse requests by opposing counsel to communicate directly with employees. Although counsel could engage in discovery, using depositions, for example, as a "substitute" for informal interviews, discovery tends to be costly. When the "party" is a multi-person entity, the cost is potentially much greater than in the case of an individual since opposing counsel might be forced to question many employees to determine whether their testimony would be helpful to his case. If the entity permitted interviews with its employees, but insisted that its attorney be present during questioning, costly delays would undoubtedly result, if only from the difficulty of arranging mutually convenient times for both parties' attorneys to be present. Whether such a policy would significantly impede trial preparation would depend largely upon how many employees fell within the proscription of DR 7-104 and on the entity's degree of cooperation with its opponent.

Even if the entity were relatively cooperative and permitted interviews with its attorney present, opposing counsel's opportunity to gather information freely could be impaired. The presence of the entity's attorney might tend to stifle the employee's willingness to disclose information. Although government or corporate employees may have less commitment to the entity's practices and policies than their superiors and may often be more willing to speak candidly about internal operations,34

33. The general discovery provisions of the Federal Rules of Civil Procedure are broad, providing that

[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.


34. John Kenneth Galbraith suggests that lower level corporate employees in general identify less with the corporation than do top management officials. J. GALBRAITH, THE NEW INDUSTRIAL STATE 149-53 (1967). The degree to which employees identify with the corporation may vary, however, depending on factors such as: (a) the prestige of the group of the organization attracting identification, (b) the extent to which individuals who comprise the organization interact, (c) the level of satisfaction of the needs of individuals within the organization, and (d) the degree to which inner competition is minimized. Id. at 153. Although developed in a corporate context, these generalizations appear applicable to government employees as well.
the presence of the entity's attorney during questioning could discourage an employee from such disclosures for fear that if his statements were reported to his superior, it would jeopardize his job or the possibility of advancement.\textsuperscript{35}

Although the suggested problems in information gathering are not insurmountable—the use of discovery or skillful questioning by an attorney with the entity's attorney present could eventually produce information helpful to the client's case—trial preparation would be facilitated if DR 7-104 were read narrowly enough to exclude some employees from the category of "party."\textsuperscript{36} At the same time, however, it is important to preserve...

\textsuperscript{35} That counsel for a multi-person entity would want to be present precisely because his presence might inhibit unfavorable remarks is consistent with expectations about the operation of an adversary system. By adopting DR 7-104, the legal profession has suggested that parties deserve protection against the risk of volunteering adverse information despite the problems created for the opposing party in his search for information valuable to his case. But the adversary system is also designed to achieve a fair result; that goal is more seriously impeded by extending the rule to a large group of employees of a multi-person entity than by applying the rule to private individuals.

\textsuperscript{36} The ABA Committee on Professional Ethics has narrowed the rule to exclude some employees. ABA Comm. on Professional Ethics, Opinions, No. 117 (1934). But cf. New York County Bar Ass'n, Opinions, No. 528 (1965) (improper for plaintiff's attorney to communicate directly with any employee of defendant corporation).

The Committee held in Opinion 117 that the attorney for a person injured by falling on the slippery floor of a store could properly interview the clerks employed by the store who had witnessed the accident. Although it is not entirely clear from the opinion whether the defendant party was a sole proprietor or a corporation, the opinion has been interpreted by other bar associations as establishing a standard for corporate situations. See, e.g., Los Angeles Bar Ass'n, Opinions, No. 234 (1956). See also Michigan Bar Ass'n, Opinions, No. 41 (1951), reprinted in 38 Mich. St. B.J. 181 (1959) (permissible to interview defendant corporation's clerks who had witnessed or were involved in accident causing injury without obtaining consent of opposing counsel).

In Opinion 117, the ABA Committee permitted communication with employees when the primary purpose of the contact was to gather information for trial preparation. While the Committee did not indicate specifically that the purpose for the contact was important to its decisions, a purpose test might be used to determine whether the rule applied. Under this test, contact with an employee to establish facts needed for litigation would be permitted, but contact to negotiate settlement of a claim would not. Given the difficulties of predicting the exact direction a conversation with an officer of a corporation or government agency might take, however, it would be awkward to impose such a restriction on attorneys. Furthermore, in another context the ABA later rejected this distinction between permitted and unpermitted contacts. "[I]t is clear from the earlier opinions of this committee that Canon 9 . . . does not allow a communication with an opposing party, without the consent of his counsel, though the purpose merely be to investigate the facts. Opin-
the general purpose of DR 7-104 to protect a party from unwittingly saying or doing anything that might prejudice his interests. To ensure that both parties to a dispute are optimally protected, only those employees of the multi-person entity whose interests are so closely bound up with the entity's interests that they can be equated with one another should be considered potential "parties"; all other employees should be merely witnesses.

Those who are ultimately responsible for managing the entity's operations have the strongest interest in the outcome of any dispute involving the entity. Because they set policy, they will be held accountable if the entity is found to have been in the wrong. These officials are the multi-person entity's alter ego—they can speak and act for the entity and can settle controversies on its behalf. This Note will suggest that, for reasons peculiar to the government, the "party" label be restricted to a subclass of those individuals within a government entity who have executive management responsibilities. For the moment, however, it is enough to note that the "party" designation for multi-person entities in general should extend no further than executive officers. Bar associations that have interpreted DR 7-104 in the context of a multi-person entity have generally adopted this approach.

ions 117, 95, 66." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 187 (1938). The local bar associations have agreed with the ABA that the purpose for which contact is sought should not determine whether the rule applies. See, e.g., ALASKA BAR ASS'N, OPINIONS, No. 71-1 (1971). See also DRINKER, supra note 11, at 201-03.

37. See text accompanying notes 44-72 infra.

38. When an employee's actions subject him to the possibility of personal liability, of course, he should be treated like any other party or prospective party.

39. See ARIZONA BAR ASS'N, OPINIONS, No. 203 (1966) (counsel representing a claimant against a municipality could, if he informed the employees of his role in the case, contact nonadministrative municipal employees without permission from the municipality's counsel but not employees who held positions that allowed them to "speak for and to bind" the municipality); IDAHO BAR ASS'N, OPINIONS, No. 21 (1960) (counsel for plaintiff could interview employees of defendant corporation without the presence of counsel but not its officers or directors who were the corporation's "alter ego").

In 1971, the New Mexico Bar Association held, in a case involving litigation against the state highway department, that DR 7-104 prevented direct communication with the highway commissioner, state highway engineer, and other executive nonlegal personnel. While the language of DR 7-104 stipulates that the contacting attorney must obtain the consent of counsel before engaging in communication with an opposing party, the New Mexico Bar held it sufficient if the attorney merely notified opposing counsel of the intended contact. NEW MEXICO BAR ASS'N, OPINIONS,
The Texas Bar, however, has read the rule more broadly, stating that, in a corporate context, an attorney is precluded from communicating with either officers or directors of the corporation or any employee whose acts or omissions are the subject of controversy and for which the corporation may be liable.\textsuperscript{40} In certain respects, this opinion is consistent with the general goals of DR 7-104. Precluding direct communication with corporate officers and directors protects the class of individuals who may be able to bind the corporation to the terms of a settlement; preventing direct contact with employees whose actions are the subject of litigation insulates individuals whose statements are likely to be crucial to the corporation's case.

An early ABA ethics opinion, however, suggests that whether an employee is a "party" should not turn on the fact that he could damage an entity's interests. In Opinion 117,\textsuperscript{41} the Ethics Committee approved direct communication by an attorney with employees who had witnessed an accident and whose statements were potentially harmful to their employer's case.\textsuperscript{42} This position seems sound, for unless the employee is subject to personal liability, his interest in the dispute is not closely identified with that of the entity, and he will not be accountable to persons outside the entity for his actions. Executive officers, on the other hand, must account for the entity's actions. Consequently, construing DR 7-104 to include only these officials would achieve fair results.\textsuperscript{43}

That this narrow definition is preferable to that of the Texas Bar opinion can be illustrated by comparing the applicability of

\textit{reprinted in 9 St. B. N.M. Bull. 391 (1971), summarized in O. Maru, supra note 6, at 244.}

\textsuperscript{40} Texas Bar Ass'n, Opinions, No. 342 (1968).
\textsuperscript{41} ABA Comm. on Professional Ethics, Opinions, No. 117 (1934).
\textsuperscript{42} Id. A number of state and local bar associations also permit an attorney to interview employees of the opposing party, even when the actions of the employees are the subject of dispute. See Los Angeles Bar Ass'n, Opinions, No. 234, reprinted in 31 L.A. B. Bull. 267 (1956) (an attorney could interview, without consent of defendant's counsel, both the agent who wrote the insurance policy in issue and an underwriter employed by defendant insurance corporation); New York City Bar Ass'n, Opinions, No. 331 (1935) (plaintiff's lawyer could interview an employee of a prospective defendant without consent of defendant's counsel despite the fact that the suit was a negligence action and the employee interviewed was allegedly negligent); North Carolina Bar Ass'n, Opinions, No. 97 (1952) (plaintiff's attorney could interview, without consent of defendant's counsel, a corporate employee whose actions were the basis of a lawsuit against the corporation but who was not himself a party).
\textsuperscript{43} To suggest that the corporate or government "party" should be
the rule to a multi-person entity and to a sole proprietorship. In litigation involving a sole proprietor, the "party" label would extend only to the individual owner of the business and not to his employees. Although defining "party" as "executive officers" necessarily means that more individuals in a multi-person entity will be protected than in a sole proprietorship, the "executive" definition minimizes disparities in the rule's application by ensuring that only those who hold positions functionally similar to that of a sole proprietor will be shielded. The Texas position, in contrast, shields employees who may have no responsibility for the entity's actions. This extends far more protection to the multi-person entity than to the sole proprietorship, an unfair result that seems based only on the entity's legal form, rather than on an analysis of the interests that DR 7-104 should be designed to accommodate.

B. Defining The Government Party

Although the considerations generally applicable to any multi-person entity are helpful in determining the extent to which DR 7-104 should protect access to mere witnesses and shield those who should be considered parties, where the multi-person entity is the government, other considerations may also affect how the rule should be interpreted and applied. In many respects, the government entity has interests identical to those of the corporate party; it has an interest in presenting its case defined to include executive level officials rather than all employees implies that a sharp distinction can be made between those individuals with executive responsibilities and all other individuals within an organization. In reality, the distinction is often blurred. Officers and directors of a corporation, for example, are obviously within the executive category, but it is far less clear how middle management personnel should be classified. If the executive label is to encompass all those responsible for corporate policy, middle management employees would seem to qualify. Yet, many of the bar associations that have considered DR 7-104 in the context of a multi-person entity seem to regard the executive classification as synonymous with officers and directors. See, e.g., Idaho Bar Ass'n, Opinions, No. 21 (1960), discussed at note 39 supra. Perhaps that position results from the certainty it affords both bar disciplinary committees and attorneys in deciding whether specific conduct complies with DR 7-104. To include within the rule those middle management employees responsible in some part for a specific policy would require attorneys to know the intricacies of each entity's decisionmaking process since the responsibility entrusted to middle management personnel is apt to vary greatly from one organization to another. Therefore, it is convenient to limit the rule's application to top executive officials on the assumption that officers and directors are responsible for the entity's policy.
effectively and persuasively and in ensuring that the terms of any settlement are favorable. Unlike the corporate party, however, the government also has an obligation to advance the public's interest in achieving justice, an obligation that outweighs its narrower interest in winning a lawsuit. This ultimate obligation to serve the public distinguishes the government from the corporate party and, as will be demonstrated, is the reason that, for purposes of DR 7-104, the “party” label should be more narrowly construed when applied to contact with government employees.

The Code of Professional Responsibility recognizes that the promotion of justice is a paramount responsibility of the government: “a government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position . . . to bring about unjust settlements or results.” Similarly, in the interest of justice, the Code and the courts require public prosecutors to disclose information within their knowledge that might be favorable to the defendant.

Although a private party’s interest in winning a lawsuit is permitted to conflict with society’s interests in promoting justice, a government party’s stake in winning is superseded by its re-

44. Indeed, for most litigation purposes, the law treats a government party just like any other party. The government, for example, has the right to assert the attorney-client privilege to protect certain types of information from disclosure, see Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975), and is subject to the same rules of discovery as other parties, see United States v. Procter & Gamble Co., 356 U.S. 677 (1958); Mitchell v. Roma, 265 F.2d 633 (3d Cir. 1959); 4 MOORE’S FEDERAL PRACTICE ¶ 26.61 (2), at 263 (2d ed. 1976).

45. The Committee on Professional Ethics of the Federal Bar Association expressed the government’s obligation to the public in discussing a government attorney’s responsibilities:

This lawyer assumes a public trust, for the government, over-all and in each of its parts, is responsible to the people in our democracy with its representative form of government. Each part of the government has the obligation of carrying out, in the public interest, its assigned responsibility in a manner consistent with the Constitution, and the applicable laws and regulations. In contrast, the private practitioner represents the client’s personal or private interest.


46. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-14.

47. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13.

sponsibility to seek a fair result. Thus, when a member of the public has been wronged by some action or inaction of a government agent, the government's proper goal coincides with that of the injured citizen in uncovering and correcting the wrong. To the extent that statements made by government employees reveal information that helps the trier of fact to ascertain "the truth," the government is not prejudiced and, therefore, has no reason to invoke DR 7-104 as a check against what its employees may tell an opposing attorney. Indeed, since the presence of counsel may discourage employees from candidly expressing their views,

49. Cf. Board of Regents v. Roth, 408 U.S. 564, 588 (1972) (Marshall, J., dissenting) ("[I]t is now firmly established that whether or not a private employer is free to act capriciously or unreasonably in respect to employment practices, . . . a government employer is different. The government may only act fairly and reasonably.") (emphasis added).

50. The disclosure of government information could be damaging for reasons other than its potential to undermine the government's position in litigation. Disclosure of privileged information, for example, may have a detrimental effect on the government's ability to execute its administrative responsibilities. Common law evidentiary privileges enshroud both military and state secrets and the identity of government informers. 8 J. WIGMORE, EVIDENCE, §§ 2374, 2378 (McNaughton rev. ed. 1961). Congress has also enacted statutes to protect certain government communications and reports from public scrutiny. Id. If a private attorney is allowed to communicate directly with government employees, however, he might persuade them to release confidential information helpful to his client's case. If the government's attorney were contacted instead, he could discourage any unauthorized release of privileged information. But if this is the rationale which justifies requiring a government attorney to be present during an interview with a government employee, then individuals other than attorneys—for example, news reporters—should also be barred from contacting government employees directly since the dangers of unauthorized disclosures would be equally great. In any event, since the government is capable of policing its own employees, there is no apparent reason for the ethical code of the legal profession to address this issue.

If a government employee's release of information to a private attorney were to waive the government's right to claim a privilege at trial, the legal profession might properly be concerned with disciplining the attorney. It is unlikely, however, that disclosure of information by anyone other than the head of an agency would be a valid waiver of the government's right subsequently to assert a claim of privilege. In the context of state and military secrets, the courts have held that only an agency or department head can claim the privilege on behalf of the government at trial. See, e.g., United States v. Reynolds, 345 U.S. 1, 7-8 (1953) ("There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer.") (footnotes omitted). Conversely, it is logical to infer that only a department or agency head can waive the privilege. Since such an official probably could not be pressured into disclosing privileged information during a conversation with opposing counsel, the danger that privileges would be forfeited by permitting attorney contact with government employees seems slight.
application of the rule could actually undermine the government's interest in achieving justice.

At the same time, however, the absence of government counsel during the opposing attorney's interrogation of its employees may impede the pursuit of truth. An aggressive attorney may elicit from the employee information damaging to the government's case without making him aware of the need to ensure its accuracy. The likelihood that a government employee will be careless in his remarks could be minimized somewhat by requiring, as did former Canon 39, that the contacting attorney disclose both his identity and that he represents a party opponent before questioning any government employee. Although the language of Canon 39 has been dropped from the new Code of Professional Responsibility, the disclosure requirement seems consistent with a lawyer's general obligation as an officer of the court not to mislead or deceive parties or witnesses.

This safeguard, however, will not completely eliminate the risk that an overreaching attorney may pressure a government employee into making a distorted or misleading statement that can be used against the government at trial. Thus, a narrow construction of "party" for purposes of DR 7-104 may increase the likelihood that the government will be forced to rebut damaging assertions obtained from its employees under pressure, making the government attorney's task at trial more difficult.

Despite this possibility, a narrow construction of the rule remains desirable. In addition to the government's responsi-

51. In interpreting Canon 39, the ABA Committee on Professional Ethics held: "An attorney for the plaintiff may properly interview employees of the defendant who were witnesses to the incident upon which the suit is based so long as no deception is practiced and the employees are informed that the person interviewing them is the attorney for the plaintiff." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 117 (1934). For partial text of Canon 39, see the text accompanying notes 29-30 supra.

52. DR 1-102(A)(4) provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102(A)(4).

53. The federal government has urged on occasion that DR 7-104 not be allowed to frustrate investigations designed to expose government wrongdoing. In Jenkins v. Cowley, C.A. No. 3-74-394-C (N.D. Tex. 1974), the defendants alleged that the government had violated the rule by communicating directly with certain employees during an investigation of possible criminal violations of the Civil Rights Acts. The government subsequently submitted information gathered during that investigation to the court in a civil action brought against the defendants. The Justice Department defended its conduct, arguing that the exception in
bility to promote public justice rather than its narrow self-interest, the government is further distinguished from a private party by its responsibility—wholly apart from its role in litigation—to supply information concerning government operations to the public and to be responsive to the public's views on how the government should operate. DR 7-104's tendency to inhibit access and restrict disclosure runs counter to these other government obligations.

The benefits of maintaining open lines of communication between the public and the government are considerable. Public input into the government's decisionmaking is essential to ensure, for example, that government policies reflect the public's will. Yet, if a citizen attempts to communicate through his attorney about a dispute, a broad reading of DR 7-104 might subject the attorney to discipline for contacting directly a represented party.

DR 7-104 for direct communication with a party when "authorized by law" covers contacts made by the Justice Department with state employees in the course of civil rights investigations, since such investigations are authorized by law under 18 U.S.C. §§ 241, 242 (1970) and 42 U.S.C. § 1983 (1970). Response Brief of the United States to a Motion to Dismiss the United States as Amicus Curiae at 4, Jenkins v. Cowley, C.A. No. 3-74-394-C (N.D. Tex. 1974). The government also argued that as amicus curiae it was not adverse to the defendants or any other party, nor was it representing a "client" within the terms of the disciplinary rule. Id. at 5. The court in Jenkins found no unethical behavior and denied the defendant's motion to dismiss. See letter from Marie Klimesz, Attorney, Civil Rights Division, U.S. Dep't of Justice, to author (Apr. 28, 1977) (on file with MINNESOTA LAW REVIEW).

It is not at all clear that the drafters of the Code intended to exclude from DR 7-104 investigations authorized by statutes such as the Civil Rights Acts. Rather, the drafters probably inserted the exception for contacts "authorized by law" to exclude contacts connected with discovery proceedings, such as the taking of depositions. See J.M. CLARK & C. WOLFRAM, PROFESSIONAL RESPONSIBILITY: ISSUES FOR MINNESOTA ATTORNEYS 726 (1976). Since the federal government has indicated its belief that the rule should not apply to its own investigations, however, it would be anomalous for it to contend that the rule should be broadly construed when a private party seeks to discover information concerning the government's wrongdoing by contacting its employees.

54. The recent impetus toward greater openness in government is reflected in passage of legislation such as the Freedom of Information Act, 5 U.S.C. § 552 (1970). During Senate debate on the Act, Senator Moss, one of its sponsors, expressed the philosophy underlying the Act as the need to "remove every barrier to information about—and understanding of—Government activities consistent with our security so the American public is . . . adequately equipped to fulfill the ever more demanding role of responsible citizenship." 112 CONG. REC. 13641 (1966).

The government's attorney would have to be consulted instead, and although this would not cut off the citizen's access to his government, the use of an extra intermediary would make communication considerably more difficult and less effective.\textsuperscript{56}

The public must also have extensive access to government information. One commentator has termed an informed public "the best 'inspector general' any central government ever had,"\textsuperscript{57} who, if given enough information about government transactions to detect improper conduct, will protect the government against "the misfeasance or malfeasance of its own administrators."\textsuperscript{58} The government's knowledge that the public has access to information encourages responsible decisionmaking since the government will want to avoid situations that could prove embarrassing if revealed. Moreover, government errors, once discovered, can be remedied by resort to the courts.\textsuperscript{59} Because a broad reading of DR 7-104 would restrict a citizen's access to the very information that would expose government error, the rule's scope in a government setting should be severely limited.

Concern with curbing DR 7-104's restraints in a government context is reflected in the positions taken by two of the bar associations that have addressed the issue in any detail. The California equivalent of DR 7-104 simply states that the rule's prohibition of direct communication with parties represented by counsel is inapplicable to "communications with a public officer, board, committee or body."\textsuperscript{60} Thus, the California Bar seems to have

\textsuperscript{56} The possibility that something may be lost in translation when communication is routed through intermediaries appears to have been the concern underlying a recent opinion by the New York State Bar allowing direct communication with members of a board of education who had voted in the minority on a contested matter. NEW YORK STATE BAR ASS'N, OPINIONS, No. 404 (1975). See text accompanying notes 62-66 infra.

\textsuperscript{57} J.R. WIGGINS, FREEDOM OR SECRECY 73 (1964).

\textsuperscript{58} Id.


\textsuperscript{60} Rule 7-103 of the Rules of Professional Conduct of the State Bar of California, CAL. BUS. & PROF. CODE foll. § 6076 (West Supp. 1977). The California rule in its entirety reads:

A member of the State Bar shall not communicate directly or indirectly with a party whom he knows to be represented by counsel upon a subject of controversy, without the express consent of such counsel. This rule shall not apply to communications with a public officer, board, committee or body.

The California provision was originally promulgated in 1928, pursuant to
decided that the public's interest in promoting unrestricted access to government outweighs the government's interest in having counsel present during interrogation of any of its employees.61

The New York State Bar has reached a similar result with respect to communications with certain elected officials. In a 1975 opinion, the New York State Committee on Professional Ethics stated that an attorney could communicate with individual minority members of a board of education62 about a contested board decision.63

The overriding public interest compels that an opportunity be afforded to the public and their authorized representatives to obtain the views of, and pertinent facts from, public officials representing them. Minority members of a public body should not, for purposes of DR 7-104(A) (1), be considered adverse parties to their constituents whom they were selected to represent.

Thus DR 7-104(A) (1) is read as implicitly creating a limited exception to its otherwise broad prohibitions because a pub-

authority granted the Board of Governors of the State Bar Association by the California legislature under CAL. BUS. & PROF. CODE § 6076 (West 1974). The original rule was retained unchanged in the revised Code of Ethics adopted by the California Bar and approved by the state supreme court in 1974.

In recent years, an effort has been made to modify rule 7-103 by restricting the circumstances under which direct communication with government employees is allowed. In February 1977, hearings were held before the California Board of Governors Committee on Professional Responsibility to discuss a redraft of the rule. See letter from Ronald Stovitz, State Bar of California, to author (Mar. 4, 1977) (on file with MINNESOTA LAW REVIEW). As of June 1977, however, a draft proposal had not yet been prepared.

61. Another plausible explanation for the California rule is that the California Bar wanted the legislative and executive branches to determine when, if ever, communication with government officials should be restricted. Hence, the California drafters may have excepted the government from the Code, expecting those branches to formulate their own positions.

62. In one sense, minority board members are not really adverse parties at all and perhaps should never be subject to the rule since they opposed the decision being challenged. See text accompanying notes 74-76 infra, for discussion of adverseness. More importantly, their interests may not even be represented in the controversy. Not only will the board's counsel reflect the position taken by the board majority, but he might also attempt to prevent an outside attorney from contacting minority members insofar as they may have information prejudicial to the board's interests in the case.

63. NEW YORK STATE BAR ASS'N, OPINIONS, No. 404 (1975). Because the facts underlying the opinion are unclear, it is difficult to discern whether the board was itself in the process of reviewing its earlier decision, whether the decision was being reviewed by some higher administrative body, or whether it was being attacked in court.
lic body is involved and [the exception] is not intended to extend beyond such public entities. 64

It might be argued that this ruling should apply only to contact with elected officials because they have a greater responsibility to be accessible to their constituents than nonelected officials have to the public generally. The New York State Bar opinion, however, is based on the rationale that members of the public should be permitted to communicate directly with their representatives, and this rationale seems applicable to any contact with a government entity. 65 Thus, following a broad reading of the New York State opinion, the existing language of DR 7-104 could be interpreted to be inapplicable to communication with all government entities. 66

Making DR 7-104 totally inapplicable to the government, as California does explicitly and as New York may have done implicitly, strikes the balance between competing values incorrectly. The California decision to sacrifice the rule's protection of a party from damaging statements in order to encourage unrestricted public access to all government officials can be justified as essential to responsive and responsible government. But the

64. Id.

65. A different result would be required when a board was acting in an adjudicative capacity. The applicable ethical provision in that situation is DR 7-110, which provides that a lawyer may not discuss the merits of a case with a judge or an official before whom the proceeding is pending except: (1) in the course of official proceedings, (2) in writing but only if a copy of the writing is delivered to opposing counsel, (3) orally but only upon giving adequate notice to opposing counsel, or (4) as otherwise provided by law. ABA Code of Professional Responsibility DR 7-110 (B).

The administrative director of the Minnesota State Ethics Panel has advised that when an agency has both legislative and adjudicative responsibilities, DR 7-110 is controlling. See letter from R. Walter Bachman, Jr., Administrative Director, Minnesota Professional Responsibility Board, to a member of the Minnesota Public Service Commission (Jan. 25, 1977) (on file with MINNESOTA LAW REVIEW).

66. Opinion 404 is confusing because the New York State Bar cited, without overruling, an earlier opinion that held DR 7-104 applicable to governmental entities. New York State Bar Ass'n, Opinions, No. 160 (1970). It is unclear whether the Bar in the later opinion intended to overrule its former position or whether, instead, it simply wanted to permit contact with minority elected board members because of their special situation.

North Carolina has explicitly allowed direct communication with all officials and employees of a municipality regardless of whether an action has been instituted against the municipality. North Carolina Bar Ass'n, Opinions, No. 184 (1956). The North Carolina Bar, however, details neither the facts on which it based its conclusion nor the rationale for its result.
California position undermines another major purpose of the rule: to protect a party from agreeing to unwise settlements. The public is interested not only in maintaining open communication with the government but also in ensuring that the government does not concede lawsuits it should win. Thus, to protect the latter interest, DR 7-104 should apply to some contacts with some government officers.67

In the corporate context, extending the "party" label to top level executives will probably ensure, in the majority of instances, that those individuals having the authority to conclude a settlement on behalf of the corporation will be protected under the rule. This is not true in the case of a government body. A relatively low ranking government employee, such as a welfare technician, would be able to "settle" on the government's behalf, if "settle" is taken to mean "bind the government" to the resolution of any dispute; a welfare technician, for example, could reinstate a benefit erroneously denied. Requiring an attorney to contact the government's counsel in situations such as this, however, would turn the governmental process into an administrative nightmare. Direct contact with many government employees is essential to the efficient resolution of the myriad minor disputes between the public and government agencies. Indeed, to require an attorney to contact a government attorney to discuss settlements of minor matters could produce the anomalous result that a represented person would be disadvantaged relative to someone who had not sought legal assistance at all. An unrepresented party would be free to negotiate at will with government employees. DR 7-104, however, expressly prohibits an attorney from "causing" another to communicate directly with a party he knows to be represented by counsel.68 The ABA Committee on Professional Ethics has interpreted this language broadly to prohibit a lawyer not only from instructing his client to communicate with an opposing party but also from tolerating acts

67. See note 36 supra. Since the major concern is to protect the government party against unwise settlement, not against harmful disclosure, the rule could theoretically prohibit communication with a government employee only if that communication dealt with settlement issues. Such an interpretation of the rule would be awkward to apply in practice, however, since attorneys would be forced to cut off any conversation during the course of an interview that seemed to be moving toward a discussion of possible terms of settlement. From a functional point of view, it seems more feasible simply to preclude all conversation with a government employee deemed a "party."

68. See note 2 supra.
by others that are contrary to his own ethical obligations. 69 Thus, a represented party's opportunity to talk directly with
government employees about a controversy could be cut off solely
because he is represented.

To properly protect the government's interest, yet permit the
vast majority of day-to-day "settlements" to proceed unham-
pered, a different definition of "party" is required from the gen-
eral limitation to "executive" officials with the authority to bind
the agency in any dispute. In general, the advice of counsel is
apt to be most helpful to the government in cases involving the
kinds of issues likely to lead to litigation. Moreover, in terms
of the functioning of the legal system, the need to assure that
parties are represented by counsel is greatest when the parties
are engaged in a matter likely to lead to a lawsuit. Therefore,
the rule should be confined to situations involving either a litiga-
ted issue or an issue likely to lead to litigation and then should
extend only to those individuals who have the authority to bind
the government to a settlement. This restricts the range of po-
tential parties for purposes of the rule to those government em-
ployees who would have the authority to act for the government
were a matter to be litigated, 70 which would probably include,
in most situations, only a handful of high ranking officials within
an agency. 71 Not only would this test free the attorney from

69. See ABA Comm. on Professional Ethics, Opinions, No. 95
(1933); No. 75 (1932). Cf. J.M. Clark & C. Wolfram, supra note 53, at
731 (the word "cause" in DR 7-104 should be read, in view of the Code's
preamble, to include "permit" or "fail to restrain").

70. The Alaska Ethics Committee appears to have adopted this defi-
nition of the government party, at least in situations involving litigation.
In Alaska Bar Ass'n, Opinions, No. 71-1 (1971), it held:

[T]he Committee's answer to the question posed is that a lawyer
is ethically permitted to communicate with employees of a gov-
ernmental entity concerning a matter in controversy between
the party represented by the lawyer and the governmental
entity, so long as that communication is not made with em-
ployees of the entity who may reasonably be thought of as rep-
resenting the entity in matters related to the matter in contro-
versy, and assuming that full disclosure of the lawyer's repre-
sentation and the connection of that representation to the com-
munication is made (emphasis added).

If "representing" refers to those individuals having the authority to
negotiate on behalf of the government entity, the Alaska interpretation
coincides with that suggested by this Note.

71. It may not always be obvious which officials within an agency
have the authority to settle a litigated dispute. Those having statutory
authority can be readily identified. Agency heads, however, often sub-
delegate authority to lower level officials. See K. Davis, Administrative
Law Text §§ 9.01-03 (3d ed. 1972). The definition of "party" for pur-
poses of DR 7-104 should be such that both those officials with statutory
concern about violating the rule in most day-to-day contacts with agencies, it would also forewarn him that once a matter had been referred to a department head, the rule might apply.\textsuperscript{72}

The proposed restrictive definition need not unduly prejudice the government's interests. An agency could decide on its own initiative to further restrict access by private attorneys to government employees by, for example, simply informing all employees that they should refer inquiries from attorneys concerning legal matters to the general counsel's office. This approach places the burden, for the most part, on the government to determine whether, and under what circumstances, public access to government should be curtailed and has the advantage of making any restriction on government access a political determination subject to attack through the political process.

III. WHEN THE RULE APPLIES

DR 7-104 governs only when a lawyer representing a client seeks to communicate "on the subject of the representation with a party he knows to be represented by a lawyer in that matter."\textsuperscript{73} Without a narrow definition of "party," this language could be interpreted to mean that the government is always a party represented by counsel, and hence that the rule is applicable to all contacts. The United States government, for example, is always represented by the Justice Department, and a state by its attorney general, in whatever "matters" may arise. Defining "party" to mean an official with the authority to settle a litigable matter

authority to bind the agency and those to whom such authority has been subdelegated are included.

Whether an agency employee has the authority to bind the agency to a settlement often depends upon the particular circumstances of a case. As a practical matter, it may be difficult for an attorney unfamiliar with internal agency operation to know to whom authority has been subdelegated. For this reason, an attorney contacting an official other than someone statutorily authorized to settle a dispute should be allowed to proceed as if communicating with a nonparty unless the attorney is aware or informed of a specific subdelegation of authority to the person contacted. If the contacting attorney were required to reveal the nature of his representation and the purpose of his communication, see text following note 80 \textit{infra}, this would, in most instances, be sufficient to lead the contacted employee to inform the attorney of his authority, thus cutting off further contacts, provided the timing requirement were also met, see text accompanying notes 73-80 \textit{infra}.

72. The point in time when the rule would apply is discussed in text accompanying notes 73-80 \textit{infra}.

73. \textit{ABA Code of Professional Responsibility} DR 7-104(A)(1). The entire text of DR 7-104 appears in note 2 \textit{supra}. 

\textit{Supra},
narrow the scope of the rule but does not solve the problem of knowing when the official may be considered "represented."

One way to define "represented" for the purposes of the rule's application to a party that always has in-house counsel is to look to the relationship between the party and his opponent. The headnote to DR 7-104—"communicating with one of adverse interest"—suggests that the rule should not apply unless the parties are actually engaged in a dispute or perhaps on the verge of litigation. The rule, however, contains no further reference to "adverseness" and at least one source has argued that the word "adverse" should be ignored as a limitation on the rule's operation:

[U]nless "adverse" were defined so broadly as to include every party who might then or at any time in the future have interests that differed in any way from the contacting party, there would seem to be dangers of uncounselled concessions of interest of the kind that the rule apparently seeks to prevent.75

This argument has merit if the controversy involves private parties, for most contacts between an outside attorney and a private

74. A footnote to the headnote of DR 7-104 suggests that the government's interest should never be considered adverse to the interests of the public. The footnote quotes the California rule eliminating government entities and officials from the class of parties with whom communication is prohibited. Although the quote may be intended merely as a reference to a conflicting statute, it can also be interpreted as an aid to construing the scope of the ABA rule's proscription. The footnotes to the official ABA Code are not definitive, however; they are intended merely to relate the provisions of the Code to other sources. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preamble and Preliminary Statement, n.1.

Even if the government might sometimes be considered an adverse party, it is difficult to characterize certain government officials as persons of "adverse interest" within the rule's terms because of the special relationship of the government party with the public. This problem is illustrated in an informal opinion issued by the Chairperson of the Maine Ethics Committee in connection with litigation brought by certain Indian tribes against the government:

Where the State of Maine is the real party in interest, there are obvious problems about categorizing every state employee as either a "party" or a person of "adverse interest." The dilemma is illustrated by the suggestion of the Attorney-General's office that the Commissioner of Indian Affairs should fall within the meaning of the quoted language. The Commissioner obviously owes a strong duty to the Indian people who are his constituency as well as to the State from which his paychecks are issued. The Governor also has divided loyalties which make it difficult to categorize his interest as "adverse."

Letter from Curtis Webber, Chairperson, Ethics Committee of the Maine Bar Association, to Thomas Tureen (Mar. 12, 1973) (on file with MINNESOTA LAW REVIEW).

party who is represented by counsel are likely to concern matters that are sharply in dispute or virtually certain to result in a dispute. Even if this generalization is too broad, applying the rule by ignoring adverseness in the context of private parties works no particular hardship, for there are no overriding interests, such as the public's concern for easy access to the government, at stake.

In the context of a government party, however, the requirement of adverseness is a sound one. Contacts with the government, even with higher officials who are considered "parties," may often involve matters unlikely to lead to litigation or matters unlikely to result in serious conflict. Without a requirement of adverseness, numerous communications could be hampered. Just as the public's interest in the free exchange of information requires a narrowing of the definition of "party," it also suggests that the government party should be deemed "represented" only when the citizen's and the government's interests clearly and seriously conflict.

The test of when such adverseness exists must be based on some objective external criteria or the rule will be unworkable. The point at which a lawsuit is filed would be an obvious test, but filing suit is an event too easily manipulated. Outside attorneys could merely gather all the information they needed and then file suit, or settle before suit yet not be subject to discipline even if the government official had consulted counsel. These are precisely the situations the rule is designed to prevent. A better approach is that taken by the New York State Bar: the rule applies only when the public body involved has sought legal assistance on a matter. This step by the agency clearly indicates its belief that the matter is seriously in conflict or likely to lead to litigation, and, therefore, that all further communication should be channeled through counsel. The language of DR 7-104 itself suggests this result, for the rule covers situations in which a party is represented "in that matter." Thus, until the government's attorney has been contacted about a particular dis-

76. See ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 1524 (1962) (Informal Opinion) (DR 7-104 does not apply only to "litigated matters").

77. The New York State Bar in a 1970 opinion decided that a government body could be said to be represented by counsel only if counsel were "designated" for a particular "matter." NEW YORK STATE BAR ASS'N, OPINIONS, NO. 160 (1970).
It may not be obvious to the attorney seeking information whether a government attorney has become involved in the case. DR 7-104 requires an attorney to refrain from communicating with a party he "knows to be represented by a lawyer," but seems to impose no obligation on the attorney to inquire whether counsel has been retained. Particularly in contacts with higher level government officials, such an affirmative obligation appears to be unnecessary. The attorney should merely be required to identify himself and the purpose of his inquiry; it is very unlikely that a government official, at that point, would fail to inform the attorney in response that the matter had been turned over to the agency's counsel. Once informed of that fact, the attorney would be ethically obliged to refrain from further discussions with the official without the permission of the agency's lawyer. Unless he were so informed, or otherwise knew that the government had entrusted the matter to its counsel, however, the contacting attorney could proceed as if the government were unrepresented.

IV. DR 7-104(A)(2)

If the government is a represented party under the rule only after counsel has been brought in on a particular matter, the government would seem to be a person who is not represented under DR 7-104(A)(2) prior to this time. That subsection of the rule prohibits an attorney from giving advice, other than the advice to seek counsel, to a person not represented by a lawyer.
“if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.” A broad reading of this section of the rule could pose serious problems. Conceivably, for example, it could mean that an attorney could not discuss with a government agency his client’s opposition to or recommendations on a rule or regulation the agency was promulgating because this would constitute “advice.” While it is perhaps unlikely that the proscription would be so broadly construed, its application to the government nevertheless remains uncertain. The rationale for the rule seems to be that an attorney should not take advantage of an uncounseled lay person before that person is even aware that he needs legal advice. The opposing attorney’s advice thus alerts him to seek assistance he might otherwise forego. Government personnel, however, always have access to counsel, and the government agency itself is in a position to ensure that its employees are made fully aware of the kinds of situations in which they should consult counsel. Thus, since there is far less danger of overreaching by an attorney when contact is with the government, DR 7-104(A) (2) should not apply.

V. CONCLUSION

When interpreting DR 7-104 in a government context, two competing considerations must be balanced: (1) the desirability of affording the government, as a party, the same kinds of protection against uncounseled concessions of interest afforded other parties, and (2) the desirability of ensuring largely unrestricted public access to government as a check against mismanagement and malfeasance. DR 7-104, perhaps because it has emerged largely unchanged from a period when litigation against the government probably was not prevalent, and, therefore, not of major concern to the legal profession, does not adequately accommodate these concerns. Given the frequency of attorneys’ contacts with government bodies today, and given the ambiguity inherent in

81. ABA Code of Professional Responsibility DR 7-104(A) (2).
The entire text of DR 7-104 appears in note 2 supra.

82. Such a restriction could pose constitutional problems. The right to lobby the government is constitutionally protected. U.S. Const. amend. I. The traditional view has limited the right to petition to addressing legislatures concerning changes in statutory laws. See United States v. Cruikshank, 92 U.S. 542, 552 (1876); Note, The Right of Petition, 55 W. Va. L. Rev. 275, 278-79 (1933). The language of the amendment itself, however, is not so confined and suggests that the right extends to all branches of government.
the rule as it presently exists, an authoritative delineation by the ABA or the state bars of the rule's application in a government context is needed.

It is submitted that the rule should be narrowly construed when contact with the government is sought. A government "party" under the rule should be defined as any official who has the authority to bind the government in a matter that could be litigated. No restrictions should apply to communication with other government employees, except that the attorney be required to disclose his identity and the nature of his representation. Finally, DR 7-104 should be triggered only when a matter has been turned over to the government agency's legal counsel. This interpretation of the rule best accommodates the conflicting considerations that exist when the interests of the government as a party are adverse to those of a member of the public it is charged to serve.