THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2007-1

APPLICABILITY OF DR 7-104 (THE "NO-CONTACT RULE") TO CONTACTS WITH IN-HOUSE COUNSEL

TOPIC: Contact with in-house counsel of a represented party.

DIGEST: DR 7-104(A)(1) prohibits a lawyer from communicating with a party that the lawyer knows to be represented in that matter by another lawyer. Nevertheless, DR 7-104(A)(1) does not prohibit a lawyer from communicating with an in-house counsel of a party known to be represented in that matter, so long as the lawyer seeking to make that communication has a reasonable, good-faith belief based on objective indicia that such an individual is serving as a lawyer for the entity.

CODE: DR 7-104.

QUESTION

Does DR 7-104(A)(1) prohibit communication with in-house counsel of an organization known to be represented in the matter by outside counsel?

INTRODUCTION

Many business entities and other organizations employ in-house counsel who perform legal (and sometimes other) services solely for the organization. In-house counsel may, without engaging outside counsel, represent the organization with respect to particular matters. An organization may also engage outside counsel to represent it in a matter. In those cases, the inside and outside counsel typically will together provide legal representation to the entity. The precise relationship and division of responsibilities between inside and outside counsel will vary widely from organization to organization and matter to matter. In other instances an in-house counsel may serve generally as a lawyer to the entity without having specific responsibility for the matter on which outside counsel has been retained. The question therefore arises whether, under DR 7-104(A)(1), counsel representing another party in a matter may communicate directly with the organization's in-house counsel, without the consent, knowledge, or participation of the

organization's outside counsel. This question most often will arise as an ethical consideration for the lawyer who wishes to bypass opposing outside counsel and to initiate contact with in-house counsel. The question also will apply when an in-house counsel of an organization seeks to initiate contact with an adverse party's outside counsel, who would be obligated to determine whether he or she must decline to participate in the communication. It also will arise when, as is sometimes the case, in-house counsel for one party wishes to have a dialogue with in-house counsel for another party, even though both parties are also represented by outside counsel.

DISCUSSION

DR 7-104(A)(1) states that "[d]uring the course of the representation of a client[,] a lawyer shall not . . . communicate . . . with a party the lawyer knows to be represented by a lawyer in that matter" without the other lawyer's prior consent. When an organization with an in-house counsel retains outside counsel for a particular matter, the question arises whether, for purposes of DR 7-104(A)(1), the inside counsel is "a party . . . represented by" the outside counsel with respect to that matter, or whether the in-house counsel, just like the outside counsel, is a "lawyer" "represent[ing]" the organization for the purposes of the Rule. If the in-house counsel is a represented party (*i.e.*, a client of the outside lawyer), then DR 7-104(A)(1) would prohibit contact with the in-house counsel by an attorney representing another person in the matter whenever the attorney is aware that outside counsel has been retained. On the other hand, if in-house counsel is a lawyer representing a client, then such contact would not be prohibited, in the same way that, as an ethical matter, a lawyer in a given matter is free to contact any one of several co-counsel (*e.g.*, a local counsel or a lead counsel) representing an opposing party in that matter without the consent of the remaining co-counsel.

Neither the text of the Rule nor the relevant Ethical Consideration (EC-18) distinguishes between outside and inside counsel, and the Code in general views an in-house

legal department as the equivalent of a traditional law firm. *See* 22 N.Y.C.R.R. § 1200.1 (definition of "law firm"). When only inside counsel represents an organization, obviously opposing counsel is free to communicate with that inside counsel even though he or she is forbidden from communicating with at least some of the other employees of the same organization.[1] Nothing in the text of the Rule or related Ethical Consideration suggests that the result should change simply because the organization chooses to retain outside counsel to represent it, when it is also represented by in-house counsel. To the contrary, the Rule distinguishes between two (presumably mutually exclusive) categories of persons — lawyers representing a client, on the one hand, and parties represented by a lawyer, on the other. If an in-house counsel represents his or her employer, nothing in the Rule suggests that contact with such a lawyer is barred.

The relatively few courts and other authorities that have addressed this question have not reached a uniform conclusion whether communication with an in-house counsel is proscribed, but the majority view is that such communication is generally permissible.[2] The District Court for the District of Connecticut opined on the issue in *In re Grievance Proceeding*, 2002 WL 31106389 (D. Conn. July 19, 2002). In that case, the general counsel for the defendant corporation, in a litigation in which the defendant corporation was also represented by outside counsel, received two letters from plaintiff's counsel. *Id.* at *1. The letters at issue were (1) a copy to the general counsel of a letter addressed to the defendant corporation's outside counsel

[1] Whether the Rule prohibits contact with all non-attorney employees of a represented entity, or only a core group of employees, is beyond the scope of this opinion. *Cf. Niesig v. Team I,* 558 N.E.2d 1030, 1035 (N.Y. Ct. App. 1990) (holding that direct communication by adversary counsel is prohibited "with those officials, but only those, who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation"). (citation omitted)

[2] Most of these pronouncements have been interpretations of the corresponding provision of ABA Model Rule 4.2, which is not materially different from DR 7-104(A)(1).

regarding ongoing settlement negotiations, and (2) a letter addressed directly to the defendant corporation's general counsel notifying him of the outside counsel's failure to respond to plaintiff's counsel's inquiries. ("[I]t has been several weeks since I have been able to get in touch with your client's [outside] attorney. Please advise if the firm still represents your client.") *Id.* Noting that "[t]he rule's primary concern is to avoid overreaching caused by disparity in legal knowledge . . . [*i.e.*,] to protect lay parties" and that "communication with a general counsel generally will not raise the same concerns as communication with a lay employee" because "[t]he general counsel's training in the law helps ensure a level playing field of legal expertise in communications with opposing counsel," the court found that "the purpose of [the Rule] is simply not implicated, and [thus] the Rule . . . does not prohibit" such contact. *Id.* at *2-3. *See also* ABA Formal Op. 06-443 (2006) ("[contact with] an inside lawyer, unless that lawyer is in fact a party in the matter and represented by the same counsel as the organization . . . is not prohibited"); Washington, D.C. Bar Ass'n, Ethics Op. 331 (2005) ("a lawyer generally is not proscribed . . . from contacting in-house counsel even though the entity is represented by outside counsel" because "the in-house counsel is not also the 'party' within the meaning of [the Rule]"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100 cmt. c (2000) (contact with an in-house counsel generally not barred); Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part I)*, 70 Tenn. L. Rev. 121, 184-87 (2002) (same).

A few authorities have taken a more restrictive stance. For example, in Philadelphia Bar Ethics Op. 2000-11 (2001), the committee stated without elaboration that "ordinarily [the Rule] prohibits direct contact with in-house counsel"—although it found such contact permissible in that particular case because in-house counsel had actively represented the organization in a prior, related administrative proceeding. *See also* N.C. State Bar Ass'n, Ethics

Op. RPC-128 (1993) (contact prohibited with in-house counsel who appeared in case as management representative).

New York courts have not ruled on this question. *See Tylena M. v. HeartShare Human Servs.*, 2004 WL 1252945, at *1-2 (S.D.N.Y. June 7, 2004) (raising but declining to resolve the issue). One commentator has stated that such communications are "ethically risky" under the New York Code of Professional Responsibility and that the question should be decided on a case-by-case basis, upon consideration of a number of highly fact-specific questions. ROY SIMON, SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 1057-58 (2006 ed.).[3]

The Rule should be interpreted in accordance with its purposes. Although in-house counsel may well be among the category of decision-makers within the organization with whom contact would be prohibited under even a relatively narrow version of the rule, *see Niesig*, 558 N.E.2d at 1031 n.1, the fact that such counsel are trained in the law and often assigned to represent an organization places them in a different position than a non-lawyer employee—a distinction that *Niesig* did not need to, and did not, address. The principal purposes of the Rule are to prevent a lawyer from taking advantage of a non-lawyer who is represented by counsel (for example, in eliciting damaging admissions or agreement to unfair settlement terms) and to preserve the attorney-client relationship once it has been established. *See, e.g., Tylena M.*, 2004

[3] Professor Simon lists eleven "factors that may be relevant": (1) size of the corporation whose in-house counsel is to be contacted; (2) size of its legal department; (3) degree of experience of the in-house counsel with the type of litigation involved; (4) degree to which the in-house lawyers are involved in the litigation; (5) assuming the desired contact is motivated by the behavior of the outside counsel, "[w]hat is stopping the . . . corporation from simply instructing its outside lawyers to change their behavior"; (6) who initiated the communication; (7) whether the corporation's "control group" is aware of the communication or desires it to take place; (8) whether the outside counsel has acted unreasonably or unethically; (9) whether a judge or magistrate has encouraged the communication; (10) whether the communications are "intended to undermine the opposing corporation's relationship with its outside lawyers," or whether the communication is occurring "precisely because that relationship has already deteriorated"; and (11) whether the communication will allow the communicating party to "take advantage" of the opposing party or will result in an "unfair agreement." SIMON, *supra*, at 1057-58.

WL 1252945, at *1; *In re Grievance Proceeding,* 2002 WL 31106389 at *2-3. These purposes are at best attenuated when the recipient of the communication is a lawyer, and is acting as such. It fairly may be presumed that an in-house counsel, trained in the law, can exercise judgment as to whether he or she should engage in a given communication. Moreover, in most cases it should be a simple matter for in-house counsel to refuse to engage in such a communication and refer the caller to outside counsel. If the in-house counsel chooses to engage in the communication, the risk of making damaging admissions or entering into prejudicial agreements would seem to be no greater than with any other lawyer-to-lawyer communication.

The reasons why a lawyer may seek to bypass outside counsel and communicate directly with in-house counsel are many and varied; some may be salutary or at least innocuous (*e.g.*, to break an impasse in negotiations with outside counsel; to make a time-sensitive communication when outside counsel is incommunicado; to take advantage of a particularly good working relationship with in-house counsel from prior matters), while others may be less so (*e.g.*, to seek to marginalize outside counsel in order to diminish his or her effectiveness). It is possible that, in some cases, a lawyer in a matter may be attempting to drive a wedge between in-house and outside counsel by contacting in-house counsel directly. Yet, such a communication would not exploit the imbalance of power inherent in lawyer-layperson contact that is the concern of DR 7-104(A)(1). For example, when a party retains two or more outside counsel, it is permissible for a lawyer for another party in the matter to contact any of them without the others' permission. Even though this could indirectly undermine the attorney-client relationship as between the adverse party and the lawyers excluded from the communication, DR 7-104(A)(1) has no bearing on the issue.

As a general proposition, the applicability of the Rule should not turn on the subjective motivations of the communicating lawyer because of the difficulty in assessing actual motivations after the fact and the possibility of mixed or unprovable motives. Nor should the permissibility of contact depend on data likely to be unknowable to the attorney seeking to make the contact. *Cf.* Simon, *supra* note 3. Such a fact-specific, subjective test would reduce the predictive value of the Rules and chill the prudent practitioner from making even those contacts with in-house counsel that are not prohibited by the Rules—effectively turning DR 7-104(A)(1) into a blanket "no-contact" rule for any reasonably cautious lawyer who wishes to communicate with in-house counsel.

A number of authorities have recognized that in-house counsel often play multiple roles in an organization, including purely business roles. *See, e.g., U.S. Postal Serv. v. Phelps Dodge Ref. Corp.*, 852 F. Supp. 156, 160 (E.D.N.Y. 1994) ("[I]n house counsel . . . frequently have multi-faceted duties that go beyond traditional tasks performed by lawyers. House counsel have increased participation in the day-to-day operations of large corporations.")[4] For that reason, it would be inappropriate to conclusively presume that every in-house counsel is acting as a lawyer for the organization at all times and for all purposes. It is essential that the in-house counsel be acting as a lawyer for the entity, though not necessarily with respect to the subject matter of the communication at issue, for the communication to be proper. For contact with an organization's in-house counsel to be proper under DR 7-104(A)(1) in a situation where the organization is also represented by outside counsel, the contacting lawyer must have a good faith

[4] Many of those authorities arise in the context of a challenge to the privileged status of a communication between an in-house counsel and another employee of the organization on the ground that the in-house counsel was communicating in a business, not a legal, capacity. Because the application of the attorney-client privilege turns on considerations significantly different from those implicated in the present ethics question, nothing in this opinion should be read as taking a position on the privileged status of a communication with an in-house counsel.

belief based on objective evidence that the in-house counsel is acting as a lawyer representing the organization, and not merely as outside counsel's client.

Objective indicia that in-house counsel is acting as "lawyer" for the purposes of DR 7-104(A)(1) will vary from case to case, but may include:

> (1) Job title. Certain titles (*e.g.*, "General Counsel," whether alone or conjoined with an officer title such as "Senior Vice President and General Counsel") presumptively signify that the person acts as lawyer for the organization, unless there is notice to the contrary.[5] By contrast, other titles, such as "Director of Legal and Corporate Affairs" or "Director of Compliance" are ambiguous as to the role performed by the titleholder in a particular matter, and would not, standing alone, give rise to the same presumption.
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> (2) Court papers. If the matter in question is a litigation, papers filed in the case may list the in-house counsel as "Of Counsel." Such a reference would reasonably entitle another lawyer in the case to assume that the listed person is acting as a lawyer.
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> (3) Course of conduct. In both litigation and transactional matters, the course of conduct between the in-house counsel and the lawyer who wishes to contact him or her may give rise to the reasonable presumption that in-house counsel is acting as lawyer. Course of conduct may also include prior, related, or similar proceedings; if in-house counsel actively represented the organization in such a proceeding, one could fairly presume that he or she is fulfilling the same role in the current proceeding as well.[6]
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> (4) Membership in an in-house legal department. Corporations often maintain a legal department whose attorneys serve the needs of the business from a centralized location. In those instances, the similarity of the in-house lawyer's role to that of a member of an outside law firm is most pronounced, and ordinarily would indicate that the members of the department are serving the entity as lawyers.
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> (5) Inquiry. A lawyer who wishes to communicate with in-house counsel of another party can ask the in-house counsel if he or she

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[5] *See In re Grievance Proceeding*, 2002 WL 31106389, at *3 ("the general counsel by definition is a corporation lawyer and, absent notice that the general counsel is acting in a role other than as a lawyer with respect to a particular matter, opposing counsel can communicate with him or her").

[6] *See* Philadelphia Bar Ass'n, Ethics Op. 2000-11.

> is acting as attorney for the organization. In-house counsel should exercise candor in clarifying their role to opposing counsel[7] and a lawyer who makes such inquiry can ordinarily rely on the response.

Objective indicia may also establish that in-house counsel is *not* acting as lawyer for the purposes of DR 7-104(A)(1), and is instead merely an employee of a "represented party." For example, if the in-house lawyer was a participant in the events that form the basis of the action (such as drafter or negotiator of a contract now in dispute), one would not generally expect that in-house lawyer to be acting as counsel in the same matter because of, among other considerations, ethical constraints on attorneys serving as witnesses in matters where they represent a party. *See* DR 5-102.

[7] *See* DR 1-102(A)(4)("a lawyer . . .shall not . . . engage in conduct involving . . . misrepresentation.")