

STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 54

QUESTION PRESENTED

Does an attorney violate Rule 4.2, which prohibits contact with a person who is represented by counsel, by making public records requests to a state or local government agency or department when the attorney is actively involved in litigation against that agency or department?

ANSWER

No, as long as the attorney otherwise observes the restrictions placed on communications with represented parties.

DISCUSSION

Rule 4.2 of the Nevada Rules of Professional Conduct (NRPC) states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Thus, an attorney may not communicate with an officer or employee of a state or local agency or department about the subject of litigation unless, *inter alia*, the attorney is otherwise authorized by law to make the communication.

NRS 239.010(1) states that, with certain enumerated exceptions:

[A]ll public books and public records of a governmental entity must be open at all times during office hours to inspection by any person, and may be fully copied or an abstract or memorandum may be prepared from those public books and public records. Any such copies, abstracts or memoranda may be used to supply the general public with copies, abstracts or memoranda of the records or may be used in any other way to the advantage of the governmental entity or of the general public. This section does not supersede or in any manner affect the federal laws governing copyrights or enlarge, diminish or affect in any other manner the rights of a person in any written book or record which is copyrighted pursuant to federal law.

For purposes of this opinion, the requested records are presumed to be public records pursuant to the Public Records Act. The statute clearly and unequivocally states that public records are available to inspection by "any person." There is no indication in Chapter 239 that attorneys

involved in litigation against the public entity are exempted. To the contrary, the statute goes on to state that public records may be used in "any other way ... to the advantage of the general public." This broad language would encompass the use of public records in connection with discovery.

Legislative findings and declarations set out in NRS 239.001 confirm the broad scope of access to public records envisioned by the Public Records Law. NRS 239.001(2) states that the provisions of Chapter 239 "must be construed liberally" to carry out the purpose of providing members of the public with access to public books and records to the extent permitted by law. NRS 239.001(3) states that any exemption, exception, or balancing of interests which limits or restricts access to public books and records by members of the public must be narrowly construed. The provisions of 239.001, read together with the provisions of NRS 239.010(1), clearly indicate that public records requests by attorneys involved in litigation against a public entity are "otherwise authorized by law" and do not run afoul of Rule 4.2.

The Oregon State Bar has addressed this question in Formal Opinion No. 2005-144 [Revised 2007]. The opinion sets out the following hypothetical facts: "Lawyer A represents a client who opposes certain County action. County is represented in the matter by Lawyer B." In response to the question "May Lawyer A contact a County employee to obtain copies of public records without first obtaining Lawyer B's consent?" the Formal Opinion gives the brief answer "Yes."¹ The Formal Opinion, in analyzing Oregon's counterpart to Rule 4.2, finds that the lawyer is "authorized by law."

The Oregon Formal Opinion notes that the "authorized by law" exception has been narrowly construed to be limited to a request for documents without further communication between the lawyer and the government employee:

Thus, for example, Lawyer A would violate Oregon RPC 4.2 by asking a person who is deemed to be represented to explain the legal significance of the document. Similarly, questions to such persons that are intended to elicit statements or admissions against the interest of the public body would be improper.

This reasoning is consistent with Rule 4.2 and NRS 239.010. Any communication with a represented government employee going beyond the public records request would no longer be "authorized by law" and would be a violation of Rule 4.2.²

¹ The Oregon Formal Opinion notes that, pursuant to state statute, ORS 192.420(2)(a), if a person who is a party to a civil judicial proceeding to which the public body is a party, or who has filed a notice of tort claim with the public body, makes a request for public records that the person knows relate to the subject of the litigation or claim, the person must submit the request in writing to the custodian of records and also to the attorney for the public body. There is no similar statute in Nevada; this opinion is addressed only to the ethical requirements of Rule 4.2.

² The above analysis is also applicable to the service of a notice of attorney's lien pursuant to NRS 18.015(3), which requires an attorney to serve notice of such lien "in person or by certified mail ... " upon a client and also "upon the party against whom the client has a cause of action..." Pursuant to NRS 18.015(3), the service of such notice, to the extent it may be construed as a communication with a represented party, is explicitly authorized by law and therefore does not run afoul of Rule 4.2. However, any communication beyond the service allowed by law would violate Rule 4.2.

CONCLUSION

An attorney does not violate Rule 4.2 by making public records requests to a state or local government agency or department when the attorney is actively involved in litigation against that agency or department, provided that the attorney otherwise observes the restrictions placed on communications with represented parties.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.

AUTHORITIES

NRS 18.015

NRS 239.001

NRS 239.010

NRPC 4.2

ORS 192.420

State Bar of Oregon, Formal Op. No. 2005-144 [Revised 2007]