ESSAY

COMMUNICATING WITH ANOTHER LAWYER'S CLIENT: THE LAWYER'S VETO AND THE CLIENT'S INTERESTS

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Disciplinary rule 7-104 of the American Bar Association Code of Professional Responsibility forbids a lawyer to communicate with a represented party without the permission of the party's lawyer.¹ Does this veto power, vested in a client's lawyer, promote the client's best interest? This essay will argue that it does not, and that a revised rule would protect clients without depriving them of the right to decide whether to communicate directly with opposing counsel.

Although the rule to be challenged here is not the most conspicuous of professional regulations, it is not insignificant. Lawyers obey it, disciplinary authorities enforce it,² and bar associations construe it.³ The rule has sometimes been stretched to extraordinary lengths. The American Bar Association's ethics committee once announced that a lawyer should dissuade a client from speaking to his own wife about a controversy in which the wife is also represented, even though the controversy is not in litigation.⁴ The same committee recently decided that counsel for a professional association member who was suing the association could not present the member's views to an association task force set up to consider whether the regulation challenged by the suit should be amended, unless the association's lawyer consented.⁵ Most appli-

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¹ ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) [hereinafter cited as ABA CODE].

Disciplinary rules are mandatory standards of conduct that serve as the basis for disciplinary action should an attorney fail to conform with their directives. Unlike disciplinary rules, ethical considerations are theoretically not compulsory. They are "aspirational in character and represent the objectives toward which every member of a profession should strive." ABA CODE, Preliminary Statement.

² See Annot., 1 A.L.R.3d 1113 (1965) (disciplinary proceedings based on DR 7-104 and its predecessor, former Canon 9).

³ See O. MARU, 1975 SUPPLEMENT TO THE DIGEST OF BAR ASSOCIATION ETHICS OPINIONS 580 (1977) (opinions indexed under "communications with opposing party").

⁴ ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 524 (1962). See text accompanying notes 52-59 *infra*.

⁵ ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1362 (1976).

cations of the rule are less likely than these to obstruct the transactions of life. Yet all applications of the rule reinforce traditional patterns of lawyer control over information vital to clients, and hence over those clients' affairs.

This essay contends that the current version of disciplinary rule 7-104 does more harm than good. It will be shown that the rule is broader than the interests advanced to support it would warrant, that its exceptions exemplify, without curing, its tendency to subordinate clients to lawyers, and that it is inconsistent with principles of personal responsibility recognized elsewhere in the law. Finally, I will suggest a revision meant to remove these problems without leaving clients unprotected against the onslaught of opposing counsel.

I. THE RULE AND ITS REASONS

Only in this century did the rule acquire its present form and rationale. That rationale, concerned with the risks attending communications between lawyers and opposing clients, masks the real issue: is it the lawyer or the client who should decide whether the client should run those risks? As a result, the bar has instituted a rule empowering the attorney to make the decision without considering powerful contrary arguments.

A. *The Rule's Origins*

Although the directive now embodied in disciplinary rule 7-104 can be traced to Hoffman's treatise, published in 1836,⁶ an English authority of that period treats it as more a professional courtesy than a binding tenet:

Let your love of harmony lead you to recommend your clients to make greater concessions, for the sake of tranquillity, than rigid justice could require; and even dare to sacrifice punctilio to concord, when you believe an interview with the adverse party will be more conducive to the extinction of animosity, the settlement of a dispute, and the renewal of good-will, than any negotiation with his legal adviser.⁷

⁶ "I will never enter into any conversation with my opponent's client, relative to his claim or defence, except with the consent, *and* in the presence of his counsel." 2 D. HOFFMAN, A COURSE OF LEGAL STUDY ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 771 (2d ed. Baltimore 1836) (1st ed. Baltimore 1817) (emphasis in original).

⁷ A.C. & W.H. BUCKLAND, LETTERS TO AN ATTORNEY'S CLERK, CONTAINING DIRECTIONS FOR HIS STUDIES AND GENERAL CONDUCT 226 (London 1824). Perhaps

Treatises from later in the nineteenth century disregarded the precept altogether.⁸ State codes of ethics often limited it to settlement negotiations, and only one of them allowed the bypassed lawyer to veto the communication; the rest found it sufficient to require advance notice to the lawyer that opposing counsel proposed to communicate with his client.⁹

General acceptance in this country of the attorney's absolute control over such communication dates only from the American Bar Association's canons of 1908.¹⁰ The rule set forth in the canon was carried forward without much change or discussion when the American Bar Association adopted its Code of Professional Responsibility ("ABA Code," "Code"). Disciplinary rule 7-104(A) of the Code provides:

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 party or is authorized by law to do so.
- (2) Give advice to a person who is not represented by a lawyer other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

similar ideals prompted Dickens' Mr. Perker to settle *Bardell v. Pickwick* directly with Mrs. Bardell. C. DICKENS, *THE POSTHUMOUS PAPERS OF THE PICKWICK CLUB* 508-17 (ch. 47) (London 1837). But her counsel may have ceased to be such when they imprisoned her for not paying their costs; if so, she was unrepresented and could properly be approached even under the rule.

⁸ E.g., G. SHARSWOOD, *AN ESSAY ON PROFESSIONAL ETHICS* (2d ed. Philadelphia 1860) (1st ed. Philadelphia 1854); S. WARREN, *THE MORAL, SOCIAL AND PROFESSIONAL DUTIES OF ATTORNEYS AND SOLICITORS* (1870) (1st ed. London 1848). In Warren's legal novel, a solicitor—unscrupulous, but careful to avoid detectable impropriety—meets with a represented adverse party, and asserts the propriety of his doing so. 2 S. WARREN, *TEN THOUSAND A YEAR* 251-303 (ch. 8) (1889) (1st ed. London 1841).

⁹ Committee on Code of Professional Ethics, *Report*, 31 A.B.A. REP. 676, 706 (1907) (describing previous codes).

¹⁰ "A lawyer should not in any way communicate 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." ABA CANONS OF PROFESSIONAL ETHICS No. 9. This rule was binding in Canada by 1867. *Bank of Montreal v. Wilson*, 2 Ch. Chrs. Rep. 117 (Ont. Ch. 1867). Former Canon 9 was superseded by the ABA's adoption of the Code of Professional Responsibility in 1970.

B. *The Rule's Rationale*

The reasons behind the rule are more elusive than its origins. The standard justification also stresses the dangers of open communication without recognizing its possible benefits.

Neither Hoffman's treatise of 1836 nor the canons of 1908 articulated a rationale for the rule. The Code of Professional Responsibility gives a conclusory justification:

The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person.¹¹

This does not tell us why people cease to be "represented by their own counsel" when, for instance, they receive letters directly from someone else's lawyer. Nor does it explain why forbidding such letters will ensure that the "legal system in its broadest sense functions best."

Authorities that go beyond these generalities usually base the rule on the danger that lawyers will bamboozle parties unprotected by their own counsel.¹² A less dramatic possibility is that conversations between a nonlawyer and an adverse lawyer will lead to disputes about what was said, which may force the lawyer to become a witness.¹³ Professor Kurlantzick has imaginatively developed some related justifications: protecting the client from inadvertently disclosing privileged information or from being subjected to unjust pressures;¹⁴ helping settle disputes by channelling them through dispassionate experts;¹⁵ rescuing lawyers from a painful conflict

¹¹ ABA CODE EC 7-18.

¹² *E.g.*, *State v. Thompson*, 206 Kan. 326, 330, 478 P.2d 208, 212 (1970); *In re Atwell*, 232 Mo. App. 186, 115 S.W.2d 527 (1938); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 108 (1934). Lawyers have apparently disdained the opposite danger—that the party might mistreat opposing counsel—although that danger has been portrayed in literature. See C. DICKENS, *supra* note 7, at 198-210 (ch. 20) (slander and potential assault); *L'Avvocato Veneziano*, in 2 *TUTTE LE OPERE DI CARLO GOLDONI* 705 (G. Ortolani ed. 1954) (amorous entreaties, bribes, and threats).

¹³ See ABA CODE DR 5-101(B), DR 5-102.

¹⁴ Kurlantzick, *The Prohibition on Communication with an Adverse Party*, 51 CONN. B.J. 136, 145-46 (1977).

¹⁵ *Id.* 148-49. Some think it less desirable to push parties to the margin of their own disputes. See Christie, *Conflicts as Property*, 17 BRIT. J. CRIM. 1 (1977).

between their duty to advance their clients' interests and their duty not to overreach an unprotected opposing party;¹⁶ and providing parties with the rule that most of them would choose to follow anyway.¹⁷

How often the dangers feared by some will materialize is open to debate. The claim that a lawyer is so noxious that only another lawyer can neutralize him harmonizes oddly with the themes of professional nobility echoing through the Code.¹⁸ But incongruity is not refutation. There are certainly lawyers whom one would be reluctant to leave alone with one's clients.

It is necessary, however, to consider the other side of the balance. Requiring both lawyers to be present whenever one is present imposes inconvenience and expense. Meetings can occur only when they can be fitted into two lawyers' busy schedules, and at a place convenient for the lawyers. If there are many parties, there will have to be many lawyers present. Some of them may expect to be paid. Insurance against fraud is a fine thing, but fifty dollars an hour may be too high a premium.

These costs may be entirely unnecessary. Some clients are sophisticated, some lawyers trustworthy, and some communications innocuous. If fraud does occur, legal remedies are available.¹⁹ Disciplinary rule 7-104 (A) (1), moreover, is not limited to litigation; it covers every matter in which different persons have different lawyers—or at least those in which there may be a possible conflict of interests. In many instances—for example, when two small business firms are working out the details of a joint venture—there is not the slightest reason why every inquiry coming to or from one lawyer must travel by way of another. In such situations, it might be perfectly sensible for one party to do without a lawyer altogether. Surely it can also make sense to hire a lawyer but keep him in reserve for private advice and grand confrontations.

Some clients may even be better suited than some lawyers to conduct some meetings. The case may have scientific or business aspects that the client understands better than the lawyer. The client may be a politician, union official, or business executive, skilled in getting along with people without making imprudent re-

¹⁶ Kurlantzick, *supra* note 14, at 152. But the conflict may be resolved by ABA CODE EC 7-10.

¹⁷ Kurlantzick, *supra* note 14, at 153-54.

¹⁸ *E.g.*, ABA CODE Preamble, EC 3-1, EC 3-2, EC 3-3; *see* *Bates v. State Bar of Arizona*, 433 U.S. 350, 379 (1977).

¹⁹ *But see* Kurlantzick, *supra* note 14, at 140-43 (arguing that fraud remedies are more cumbersome and expensive than a prophylactic prohibition).

marks. The lawyers may have developed a personal antagonism. Direct, personal involvement by a client may show his good faith and reliability better than a meeting filtered by counsel. Nor should one disregard as irrational a client's belief that, because he understands his affairs better and cares about them more than his lawyer, he can present his position better at a meeting not attended by counsel. Indeed, significant first amendment problems may be raised by a rule that allows one lawyer to isolate his client from speaking with another lawyer.²⁰

C. *The Rule's Fulcrum: Who Decides to Communicate?*

The real issue is not whether a client and opposing lawyer can ever communicate directly but whether the decision to allow or prevent this should be made by the client or by his counsel. However dangerous direct communications may sometimes be, no one has proposed to ban them entirely. Yet no one seems to have discussed the interests served by the current allocation of the power to permit direct communications between opposing counsel and client. Because this issue has not been properly resolved, disciplinary rule 7-104 is deeply flawed.

At present, the lawyer is in control: there can be no communication with a represented party unless his lawyer consents in advance.²¹ The ABA Code provides no guidance as to when consent should be given. A client who wants to confer with opposing counsel may be able to put pressure on his own lawyer to consent, albeit at the risk of alienating the lawyer. But the client may not

²⁰ See *Vega v. Bloomsburgh*, 427 F. Supp. 593 (D. Mass. 1977); *Rodriguez v. Percell*, 391 F. Supp. 38 (S.D.N.Y. 1975). When made binding on lawyers by a rule of court or the like, DR 7-104(A) constitutes state action directly forbidding speech. The communications forbidden may be commercial speech, or they may be classical instances of political speech, as when citizens who have sued their city seek to assert their grievances at a public meeting held by the mayor and corporation counsel. Cf. *City of Madison Joint School Dist. v. WERB*, 429 U.S. 167 (1976) (nonunion teacher has first amendment right to speak at open meeting of board of education when this does not constitute bargaining with a member of the collective bargaining unit other than the exclusive bargaining representative). The prohibition is not limited to lies or threats, but bans a whole category of speech, cf. *In re Primus*, 436 U.S. 412, 437-38 (1978) (solicitation of political, nonremunerative case by ACLU attorney is constitutionally protected; rule banning all solicitation is overbroad), subject only to the standardless discretion of the clients' attorneys to allow such communications as they think appropriate. Further, the prohibition is based on the assumption that clients must be shielded from the speech of opposing counsel because they cannot be trusted, even after consulting their own lawyers, to weigh its reliability, an assumption squarely contrary to first amendment principles. See *Linmark Assocs. v. Willingboro*, 431 U.S. 85, 96-97 (1977).

²¹ ABA CODE DR 7-104(A)(1). The same result was reached under old Canon 9, despite its failure to refer to waiver. E.g., ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 517 (1962).

even be aware that opposing counsel wishes to speak to him, or that the mysterious fiats of professional ethics can be waived. There is no requirement that his lawyer tell him either of these things, and opposing counsel cannot enlighten him without herself running afoul of the ABA Code.²²

The rule is thus more than a mere statement that, in the view of the organized bar, lawyers are better suited than clients to decide whether the clients may communicate with opposing counsel. The rule says that the attorney *shall* decide. And yet the justifiability of vesting the power to decide in lawyers rather than clients is not discussed in the ABA Code, or elsewhere.

If one view must be codified, it should be the view that clients are better able to decide whether communications with opposing counsel should occur. Whether conferences involving the client are safe and worthwhile turns on appraisals of practicality and human nature that should not be beyond the powers of clients. How adverse are the concerns of the parties? How tricky is opposing counsel? What fatal step could be made by this client at this conference? Is the client used to handling such situations? How does the cost of having counsel present compare with the risks caused by his absence? These are questions that can be answered even by people ignorant of legal technicalities. One can ensure, moreover, that the client will not make his decision without receiving his lawyer's advice by requiring advance notice to his lawyer of any communications initiated by opposing counsel.²³ Most clients will give their lawyers' views at least as much weight as they deserve. A legal system valuing informed personal choice should not assume that a client aided by his lawyer cannot make a sound decision whether to communicate with opposing counsel.

The issue, moreover, is not simply one of the comparative competence of lawyer and client to make the decision; there are also conflicts of interest between them. If the lawyer is paid by the hour, he will profit if all communications go through him. In

²² ABA CODE DR 7-104(A)(2) (advising opposing party prohibited). Even if the client fires his lawyer, dealing with him directly may get opposing counsel into trouble. See *In re Frith*, 361 Mo. 98, 233 S.W.2d 707 (1950); cf. NEW YORK COUNTY LAWYERS' ASS'N, OPINIONS, No. 625 (1974), summarized in O. MARU, *supra* note 3, para. 9216 (direct communication forbidden even when opposing counsel does not answer letters and calls and may no longer represent party).

The Code can be interpreted as implying that in some situations an attorney should tell his client that opposing counsel wishes to communicate directly with the client. See ABA CODE EC 7-7 (client has authority to make decisions affecting merits of case); ABA CODE EC 7-8 (lawyer should ensure that client makes decision after being informed of relevant considerations).

²³ See text accompanying notes 75-83 *infra*.

addition, direct communication with opposing counsel may reveal to a client that his lawyer is lazy or uninformed, or that the client's prospects of success differ from what his lawyer has led him to believe. These possibilities may well bias the lawyer against consenting to direct communications with his client.

Settlement negotiations provide the clearest instance of how the rule can help lawyers subordinate client interests to their own. It is also the most important example, because virtually all disputes involving counsel are settled without a court decision. A lawyer can block settlement negotiations by refusing to transmit offers to the client. Bar associations have ruled that this does not warrant the opposing counsel's sending a copy of the offer directly to the client.²⁴ A lawyer selected by an insurance company can thus prevent the insured from learning that a plaintiff is willing to settle for less than the policy limits, although, if the offer is rejected and the case goes to trial, the insured may be personally liable for damages in excess of policy limits.²⁵ Even should the client learn of a settlement offer and approve it, the negotiations needed to complete the settlement may be impeded by a lawyer who wishes the litigation to continue, in order, for instance, to increase his own fees.²⁶

In these situations disciplinary rule 7-104(A)(1) protects the lawyer at the expense of the client. It also frustrates the established rule that a contract by which a client agrees not to settle a dispute without his lawyer's permission is void as against public policy.²⁷

²⁴ *E.g.*, ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1348 (1975) (rejecting contrary intimations in ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 517 (1962)); New York County Lawyers' Ass'n, Opinion No. 235 (1925), *reprinted in* OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS' ASS'N 655 (1956) [hereinafter cited as NEW YORK OPINIONS].

²⁵ Philadelphia Bar Ass'n, Opinion No. 65-1 (1965), *summarized in* O. MARU, 1970 SUPPLEMENT TO THE DIGEST OF BAR ASSOCIATION ETHICS OPINIONS para. 7224 (1972); State Bar of Texas Comm. on Canons of Ethics Opinion No. 78 (1953), *reprinted in* 16 TEX. B.J. 701 (1953). *Contra*, Los Angeles County Bar Ass'n, Opinion No. 220 (1954), *reprinted in* 30 LOS ANGELES B. ASS'N BULL. 145 (1955).

²⁶ Comm. on Professional Ethics of the Ass'n of the Bar of the City of New York Opinion No. 186 (1931), *reprinted in* NEW YORK OPINIONS, *supra* note 24, at 90; *see* Smith v. South Side Loan Co., 567 F.2d 306 (5th Cir. 1978) (plaintiff's lawyer tried to appeal adverse judgment after plaintiff settled directly with defendant; the court held that the lawyer had no standing, but scolded the plaintiff for circumventing his lawyer).

²⁷ Compare 1 S. SPEISER, ATTORNEYS' FEES 203 (1973) and Annot., 121 A.L.R. 1122 (1939) with Hayes v. Eagle-Picher Indus., Inc., 513 F.2d 892 (10th Cir. 1975). Some practicing lawyers do not agree that whether to settle should ultimately be decided by the client. *E.g.*, L. NIZER, THE IMPLOSION CONSPIRACY 199-200 (1973).

The client's abstract power to settle is meaningless if his attorney controls his knowledge of settlement offers. This evil is only slightly mitigated by the lawyer's duty to pass on settlement offers to his client.²⁸ The duty is enforceable only through disciplinary proceedings of dubious effectiveness. Counsel cannot contact the opposing client to find out whether the offer has been delivered, and will therefore not know of any default unless the culprit himself confesses.²⁹ The lawyer may also transmit the settlement offer but then use his position athwart the communication lines to discourage an agreement. Asking the court to order a lawyer to transmit a settlement offer³⁰ does not avoid the last two difficulties, while it is impossible in cases not yet before a court. The obvious solution of allowing counsel to send a written copy of a settlement offer to a client whose lawyer will not forward it was apparently adopted in England.³¹ Refusal to adopt it here suggests that protecting clients is not the only force behind the present rule.

The rule can be misused to promote bad settlements as well as to frustrate good ones. Professor Levin relates the story of a lawyer who persuaded a client to accept a \$19,000 settlement offer by inventing smaller offers and advising the client to reject them. After tantalizing his client with these fictitious offers, the lawyer triumphantly disclosed the \$19,000 offer, which the client happily accepted. Professor Levin was less happy: "With some diffidence, I inquired: 'Suppose your client had met the attorney for the other side during the time the check was in your drawer?' . . . Without a moment's hesitation my lawyer-friend responded with some vigor. 'The other attorney talk to him? Talking to *my* client? Why,

²⁸ ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 326 (1970). The ABA recently executed an agreement with liability insurers that the insurer or its attorney should notify the insured of settlement negotiations in suits that may involve liability in excess of policy limits and keep him informed if he so requests. 6 MARTINDALE-HUBBELL LAW DIRECTORY 76C (1977). See Annot., 80 A.L.R.3d 1240 (1977) (lawyer's duty to communicate with client).

²⁹ See *In re Schwabe*, 242 Or. 169, 408 P.2d 922 (1965) (counsel may not contact opposing client to see if his purported lawyer really represents him, even though client previously asserted to counsel that he wanted no lawyer).

³⁰ ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1348 (1975); H. DRINKER, *LEGAL ETHICS* 203 (1953). Drinker also suggests that, in extreme cases, opposing counsel should be allowed to use his own client as a messenger.

³¹ T. LUND, *A GUIDE TO THE PROFESSIONAL CONDUCT AND ETIQUETTE OF SOLICITORS* 78-79 (1960). A recent authority states the exception more narrowly. THE COUNCIL OF THE LAW SOCIETY, *A GUIDE TO THE PROFESSIONAL CONDUCT OF SOLICITORS* 71-73 (1974).

that's unethical!' ”³² Professor Alschuler reports similar tactics when pleas are bargained in criminal cases.³³

The rule's tendency to subordinate clients to lawyers is not entirely accidental. One reason for its creation was to ensure that lawyers who catch clients would be able to enjoy them undisturbed. Older writers on professional ethics were more willing than those of today to equate virtue with professional self-interest.³⁴ What seems to be the only discussion antedating the 1930s of the reasons for the rule is quite frank on this point:

To deal with the client directly, and especially to make a monetary settlement with him, embarrasses the lawyer concerned by rendering possible the dictation of the amount of fees by the client, who, having the money in his own possession, is likely to wish to keep as much of it as he possibly can. . . .

There is also a duty to the profession that this long established custom, which has been shown to be wise and prudent and necessary to the welfare of the individual lawyer, be preserved both by precept and example. The dignity of the profession and its standing with society in general demands that one lawyer show no disrespect to another by ignoring him in a settlement with his client.³⁵

It is true that the moralist goes on to mention the party's interest in not talking with opposing counsel: “Few laymen have the good judgment and the resolution to refer the matter to their lawyer and positively refuse to discuss it. It is human nature to talk, especially when the subject is one's own rights.”³⁶ But this is presented as

³² Levin, *The Lawyer's Professional Responsibilities in Trial Advocacy and Civil Procedure*, in *EDUCATION IN THE PROFESSIONAL RESPONSIBILITIES OF THE LAWYER* 135, 147 (D. Weckstein ed. 1970).

³³ Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 *YALE L.J.* 1179, 1194-98 (1975).

³⁴ E.g., W. VINCENT, *THE LAWYER IN HIS SEVERAL RELATIONS* 25 (1910) (“Any expression of disapproval or criticism as to the methods or manner in which a lawyer is conducting his client's business made to the client is certainly unwarranted and inexcusable. Every lawyer should mind his own business and not meddle with the business of other members of the bar.”); G. WARVELLE, *ESSAYS IN LEGAL ETHICS* 201-02 (1902).

³⁵ G. ARCHER, *ETHICAL OBLIGATIONS OF THE LAWYER* 154-56 (1910). The ABA Ethics Committee also related the rule to the need of protecting lawyers' fees, ABA COMM. ON PROFESSIONAL ETHICS, *OPINIONS*, No. 124 (1934), and Professor Kurlantzick continues to accept this rationale. Kurlantzick, *supra* note 14, at 154. On the shift to a less self-serving rationale, see Note, *DR 7-104 of the Code of Professional Responsibility Applied to the Government “Party,”* 61 *MINN. L. REV.* 1007, 1009-13 (1977) [hereinafter cited as *Government “Party”*].

³⁶ G. ARCHER, *supra* note 35, at 156.

only one of several reasons for the rule. And it is not explained how clients are so foolish when talking to counsel for their adversaries and yet so astute as to cheat their own.

Although the deliberate use of the rule to deceive clients may be rare, the interests of clients can be subordinated in less malevolent ways. Without any conscious intention of advancing their own interests, lawyers naturally prefer to keep charge of their own cases and to sequester their clients from disquieting contacts with the opposition. This is the traditional and comfortable course. And it is easy for most lawyers to believe that they are more wary of professional ambushes than their clients. The result is that lawyers' decisions will be slanted against direct contact and in favor of the inherited system under which clients resign their affairs almost entirely into the hands of their lawyers. Yet such evidence as is available suggests that relegating clients to the sideline harms their interests³⁷ and frustrates their wishes.³⁸

All in all, I do not believe that it is justifiable to empower lawyers to decide whether their clients will be able to talk with other lawyers. The rule so providing is not rooted in antiquity, serves no compelling interest, and was probably influenced by an improper desire to protect lawyers against their own clients. Granting the possible dangers of uncounseled communications, it by no means follows that the lawyer is best suited to decide whether a client should risk them, particularly when the client can obtain the lawyer's advice before deciding. In its present form, disciplinary rule 7-104 gives lawyers unnecessary power over their clients' decisions and may lead to conscious or unconscious subordination of the interests of the clients.

II. EXCEPTIONS TO THE RULE

The recognized exceptions to disciplinary rule 7-104 do not remove its defects. In some instances, examining the exceptions brings the defects into sharper focus; in others, alleviation has been purchased at the price of inconsistency. At the very least, the exceptions should be remodeled. My own belief is that more basic amendment of the rule is required.

³⁷ D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974); see Clifton, *The Shreveport Plan for Providing Legal Services*, 3 YALE REV. L. & SOC. ACTION 290, 297-98 (1973) (fear of "loss of control over both process and outcome" discourages potential clients from seeking lawyers).

³⁸ J. THIBAUT & L. WALKER, *PROCEDURAL JUSTICE* 119-22 (1975); see Mazor, *Power and Responsibility in the Attorney-Client Relation*, 20 STAN. L. REV. 1120, 1138-39 (1968).

A. *Contact with Unrepresented Parties*

Although the rule cannot apply to communications with an unrepresented party, it is the unrepresented party who is most in need of protection. The exception, furthermore, goes further than necessary: a lawyer is free to contact an unrepresented party even if it is apparent that the party will soon require representation. In a recent case, for example, a corporate executive was questioned by corporate counsel without being told that he had been sued by the corporation and would soon be fired—circumstances that would have led him to retain counsel immediately. Although the Second Circuit criticized counsel's deceptive tactics during the interrogation, it held that disciplinary rule 7-104(A)(1) had not been violated.³⁹

Decisions like this are obviously incongruent with a policy of protecting clients. They probably indicate how the rule gives way, albeit not very consistently, when confronted with a legitimate need to gather evidence. A more cynical view would be that the heart of the rule is the protection of good relations among lawyers, so that it has no applicability when a party is unrepresented.⁴⁰ This view is supported by an interesting detail. Old Canon 9 forbade a lawyer to advise an unrepresented party, or mislead him.⁴¹ Disciplinary rule 7-104(A)(2) keeps the first prohibition but says nothing about misleading the party.⁴² And it adds a clause allowing the lawyer to advise the party to hire a lawyer, this being the one form of advice that the codifiers would never consider harmful.

B. *Contact with Employees of a Party*

Another instance in which the protection of clients has been sacrificed is the exception allowing the employees of a party to be

³⁹ *W.T. Grant Co. v. Haines*, 531 F.2d 671 (2d Cir. 1976) (relying on the executive's sophistication and willingness to be interviewed, as well as his lack of counsel). *Accord*, ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 908 (1966); *contra*, State Bar of Texas Comm. on Canons of Ethics Opinion No. 117 (1955), *reprinted in* 18 Tex. B.J. 524 (1955). For a discussion of plea bargaining with criminal defendants before counsel has been appointed or waived, see Alshuler, *supra* note 33, at 1270-78. See also *In re Primus*, 436 U.S. 412 (1978), in which a lawyer obtained a release from a woman his client had sterilized, and then charged another lawyer who had offered to represent her with unethical solicitation.

⁴⁰ See F. BENNION, PROFESSIONAL ETHICS 124 (1969) (treating the rule as an example of professional courtesy).

⁴¹ "It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise that party on the law." ABA CANONS OF PROFESSIONAL ETHICS No. 9.

⁴² But see ABA CODE DR 1-102(A)(4) (general prohibition of fraud and misrepresentation).

interviewed without notice to the party's counsel.⁴³ This exception cannot be justified by the simple argument that, because the employer is the client, the employees are unrepresented and hence not covered by the rule. Surely the applicability of the rule should not turn on whether the employer asks its employees to retain its lawyers as their own. The reality is that the employer is usually a corporation that can act only through its employees. The corporation and its employees are just as indistinguishable when they defend a claim as when they commit the acts from which it arises. If it is desirable to protect the corporation from being outwitted by opposing counsel, this can only be done by protecting the employees through whom it speaks.⁴⁴ If the rule were limited to managing agents with power to bind the corporation to a settlement,⁴⁵ it would not achieve its declared purpose of protecting clients against dangers sweeping far beyond improvident settlement.

A more plausible reason for the exception is the need to keep the testimony of employees freely accessible to all parties.⁴⁶ To let a corporation barricade crowds of witnesses from interviewers would frustrate the right of litigants to a fair trial.⁴⁷ To some extent, the rule must give way.

But the way in which the compromise has been made seems inconsistent with the purported grounds of the rule. The high

⁴³ E.g., ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 117 (1934).

⁴⁴ See FED. R. EVID. 801(d)(2)(D) (statements of a party's agent concerning matters within agent's authority admissible as admissions of the party); cf. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 608-09 (8th Cir. 1977) (corporation's attorney-client privilege not limited to statements by top executives).

The no-interview rule has been applied to bar interviews with the mother of an infant plaintiff and with an insured whose claim had been paid by an insurer that then sued as subrogee. *Obser v. Adelson*, 96 N.Y.S.2d 817 (1949), *aff'd*, 276 App. Div. 999, 95 N.Y.S.2d 757 (1950); ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1149 (1970). How are employees distinguishable from these people?

⁴⁵ See ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1377 (1977); H. DRINKER, *LEGAL ETHICS* 201 (1953). But see *In re FMC Corp.*, 430 F. Supp. 1108 (S.D. W.Va. 1977).

⁴⁶ See ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 117 (1934); *Government "Party," supra* note 35, at 1013-17.

⁴⁷ Cf. *IBM Corp. v. Edelstein*, 526 F.2d 37 (2d Cir. 1975) (court order forbidding defendant's counsel to interview plaintiff's witnesses when plaintiff's counsel is absent and interview is not transcribed impairs defendant's right to effective use of counsel); *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966) (prosecutor's advice that in his absence witnesses not speak to defendant's lawyer denies defendant a fair trial); *Vega v. Bloomsburgh*, 427 F. Supp. 593 (D. Mass. 1977) (first amendment forbids state agency to order employees not to speak with plaintiff's attorney without approval of agency's attorney); *Rodriguez v. Percell*, 391 F. Supp. 38 (S.D.N.Y. 1975) (similar); *United States v. City of Milwaukee*, 390 F. Supp. 1126 (E.D. Wis. 1975) (Title VII forbids disciplining employees for talking with Justice Department attorney regarding civil rights suit).

executives who are protected by the rule against opposing counsel are the employees most able to protect themselves and their employer, if necessary by calling in counsel.⁴⁸ The employees least likely to be wary and with the least access to good advice are left exposed to prowling attorneys.⁴⁹ If this is acceptable, it can only be because the dangers against which disciplinary rule 7-104 guards seem less than overwhelming when viewed in the light of a practical problem.

The rule would probably give way to similar pressures in some class actions. Suppose that an employer is sued by thousands of employees.⁵⁰ Can the employer's lawyer speak directly to employees who are potential witnesses? Can she address a mass meeting of employees and urge them to drop their claims for the good of the firm? The courts might well allow these acts.⁵¹ Employees are not particularly resistant to legal tricks, but it seems intolerable to quarantine them when the result is to frustrate the search for evidence and to prevent free speech on an issue of general concern. Yet if we choose to allow direct communication in cases involving thousands of clients, it is hard to see why it should be inhibited when only a few clients are involved.

C. Contact Through Intermediaries

There is authority that a lawyer is not only barred from communicating with an opposing client directly or through an agent,⁵²

⁴⁸ See *Meat Price Investigation Ass'n v. Iowa Beef Processors, Inc.*, 448 F. Supp. 1 (S.D. Iowa 1977), *aff'd sub nom. Meat Price Investigators Ass'n v. Spencer Foods, Inc.*, 572 F.2d 163 (8th Cir. 1978).

⁴⁹ See note 45 *supra*. For an example of the outwitting of an unsophisticated employee by opposing counsel, see G. BELLOW & B. MOULTON, *THE LAWYERING PROCESS* 404-07 (1978).

⁵⁰ To avoid disputes about whether members of a class are "clients," assume that each of them has individually authorized suit to be brought in his behalf. This is in fact the procedure used in Fair Labor Standards Act suits. 29 U.S.C. § 216(b) (1976).

⁵¹ See *Lewis v. S.S. Baune*, 534 F.2d 1115 (5th Cir. 1976) (improper to enjoin defendant and its agents and attorneys from offering settlement directly to represented plaintiffs, because voiding any fraudulently procured settlements is adequate remedy); *American Finance System, Inc. v. Harlow*, 65 F.R.D. 572, 579 (D. Md. 1974) (defendant allowed to send plaintiff class members carefully worded settlement offer that invited them to contact class counsel or defendant's counsel); *cf. City of Madison Joint School Dist. v. WERB*, 429 U.S. 167 (1976) (nonunion teacher has first amendment right to speak at open meeting of board of education when this does not constitute bargaining with a member of the collective bargaining unit other than the exclusive bargaining representative).

⁵² E.g., ABA COMM. ON PROFESSIONAL ETHICS, *INFORMAL OPINIONS*, No. 663 (1963); ABA COMM. ON PROFESSIONAL ETHICS, *OPINIONS*, No. 95 (1933). *But see Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268, 271 (2d Cir. 1975) (*dictum*).

but may not benefit from the communications of others;⁵³ he is even obliged to dissuade his client from communicating directly with a represented party.⁵⁴ Whether all of this authority is still valid is unclear. It was based primarily on the provision of old Canon 16 that "[a] lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do."⁵⁵ This, however, has not been carried over into the present ABA Code, which says only that a lawyer should not "cause another to communicate" with a represented party.⁵⁶

An extension of the rule to communications between clients is hard to reconcile with its ostensible purposes. Whatever dangers flow from the confrontation of professional guile with lay innocence are absent when two nonlawyers communicate. One client may trick another, but is this more likely than that one lawyer will trick another? And even if direct communication is sometimes dangerous, how can that justify a rule requiring lawyers to discourage it in *every* case? Perhaps we have again come across the desire to keep disputes safely in the control of lawyers.

Whatever the reason for the power to control communications between clients, it has not been carried far. Most authorities do not forbid a lawyer to use the fruits of such a communication, much less do they require his withdrawal when one occurs; they merely call on him to attempt to dissuade his client.⁵⁷ No doubt this is often a ritual or omitted altogether. In many cases, the parties have long dealt with each other, and it is clearly desirable for them to keep on doing so. If the matter is not in litigation,

⁵³ See *United States v. Four Star*, 428 F.2d 1406 (9th Cir. 1970), *cert. denied*, 400 U.S. 947 (1976); *In re O'Neil*, 228 App. Div. 129, 239 N.Y.S. 297 (1930).

⁵⁴ ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 524 (1962); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 75 (1932); State Bar Ass'n of North Dakota Opinion of June 16, 1972, *summarized in* O. MARU, *supra* note 3, at para. 9662. In England, by contrast, a solicitor is free to advise a client to communicate directly with a represented party. THE COUNCIL OF THE LAW SOCIETY, *supra* note 31, at 73.

⁵⁵ ABA CANONS OF PROFESSIONAL ETHICS No. 16.

⁵⁶ *In re Marietta*, 223 Kan. 11, 567 P.2d 921 (1977) (attorney censured for causing client to communicate with opposing party); ABA CODE, DR 7-104(A)(1). See also ABA CODE DR 1-102(A)(2).

⁵⁷ ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 524 (1962); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 75 (1932); State Bar Ass'n of North Dakota Opinion of June 16, 1972, *summarized in* O. MARU, *supra* note 3, at para. 9662. *Contra*, Los Angeles County Bar Ass'n Informal Opinion No. 1966-16 (1966), in 2 LOS ANGELES BAR ASS'N, ETHICS OPINIONS, 84 (1971) *summarized in* O. MARU, *supra* note 3, at para. 7843 (house counsel should seek to prevent employer from communicating with represented party and withdraw if he fails); see authorities cited in note 53 *supra*.

their relations may be friendly; even if it is, they may still be able to settle it without the help of lawyers.

These considerations do not apply to intermediaries other than the parties. If the rule is to be recognized at all, it cannot be circumvented by allowing lawyers to hire surrogates. Investigators hired by lawyers will be less restrained by professional standards and pressures than their employers, and more likely to share opposing parties. More difficult problems arise when the intermediaries are hired by a client—for instance, insurance adjusters or police officers.⁵⁸ Here, too, it is likely that the interlopers are at least as dangerous to clients as counsel. There is, however, no valid reason why rules of professional responsibility should be used to prevent nonlawyers from hiring nonlawyers to perform acts that do not constitute the practice of law. Requiring lawyers to boycott clients who do this, even if practicable, is beyond the proper scope of a code drafted by lawyers to govern their own behavior and might well violate the antitrust laws.⁵⁹ Instead, the behavior of non-lawyers hired by clients should be regulated by legislatures, courts, employers, and their own professional organizations.

These dilemmas point up a central paradox of disciplinary rule 7-104. The rule is premised on the dangers of allowing a lawyer to deal directly with an opposing party. Yet lawyers, whatever their faults, seem unlikely to be more dangerous than private detectives, insurance adjusters, police officers, and other intermediaries. From the orthodox standpoint, it might be desirable to prevent these intermediaries too from dealing with represented parties, bringing nearer the happy day in which all serious disputes are handled entirely by lawyers. But the bar just cannot do this. The result is that the rule keeps lawyers out of the field and leaves it open to intermediaries of no greater responsibility.

D. Contact With Government Officials

The California equivalent of disciplinary rule 7-104(A)(1) expressly allows "communications with a public officer, board, com-

⁵⁸ See ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 95 (1933); *In re O'Neil*, 228 App. Div. 129, 239 N.Y.S. 297 (1930). The ABA has secured agreements from various insurance groups that their claims adjusters will not deal directly with represented claimants. 7 MARTINDALE-HUBBELL LAW DIRECTORY 74M-75M (1978).

⁵⁹ See *American Medical Ass'n v. United States*, 317 U.S. 519 (1943); *Surety Title Ins. Agency, Inc. v. Virginia State Bar*, 431 F. Supp. 298 (E.D. Va. 1977), *vacated*, 571 F.2d 205 (4th Cir. 1978). The antitrust problem would probably vanish were the boycott to be required by professional rules imposed by a court or other state agency. See *Bates v. State Bar of Arizona*, 433 U.S. 350, 359-63 (1977).

mittee or body.”⁶⁰ This exception to the rule has not been generally accepted elsewhere.⁶¹ It should be, because the rule can operate to hinder the performance of the official's duties. Even when governmental counsel has been called in, a government official is not just a client but also a decisionmaker, and should not be prevented from receiving information and arguments.⁶² The information and arguments often concern the laws under which officials operate, and people should be able to present them through counsel.

Many governmental officials, moreover, do not select their own lawyers, but must be represented by state or municipal counsel. In these days of government by litigation, some of the officials thus represented may agree with the position of a nominally opposed private party.⁶³ Indeed, the Attorney General of Massachusetts has sometimes taken positions in litigation inconsistent with the views of his nominal clients.⁶⁴ To say that counsel for other parties may not communicate with such a client except with the consent of the state's lawyer is to imprison the official whom the rule purports to protect. Of course, a state is free to legislate that, once a matter goes to litigation, the views of the attorney general shall prevail over those of other state officials; but, until it does this, disciplinary rule 7-104 should not be applied to help the lawyer overrule the client.

⁶⁰ RULES OF PROFESSIONAL CONDUCT OF THE STATE BAR OF CALIFORNIA, Rule 7-103.

⁶¹ New York State Bar Ass'n Comm. on Professional Ethics Opinion No. 160 (1970), summarized in O. MARU, *supra* note 25, at para. 7043; Oklahoma Bar Ass'n Opinion No. 212 (1961), reprinted in 32 OKLA. B.J. 1572 (1961). But see State Bar of Texas Professional Ethics Comm. Opinion No. 233 (1959), reprinted in 24 TEX. B.J. 954, Insert at 159, (1961) (committee evenly divided). See generally *Government "Party," supra* note 35 (urging that the rule be retained but construed narrowly). There is sometimes room for dispute whether the matter in question has been referred to counsel, which raises the question whether officials must be deemed represented in that matter. *Id.* 1029-32.

⁶² See *Government "Party," supra* note 35, at 1019-29.

⁶³ See, e.g., D. HOROWITZ, *THE JUROCRACY*, 88-89 (1977) (conflicts between Justice Department lawyers and federal agencies); Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1367-69 (1975); cf. New York State Bar Ass'n Comm. on Professional Ethics Opinion No. 404 (1975), reprinted in 47 N.Y. St. B.J. 526 (1975) (opposing counsel may communicate with board of education dissenter).

⁶⁴ E.g., *Feeney v. Commonwealth*, 366 N.E.2d 1262 (Mass. 1977); *School Committee v. Board of Education*, 366 Mass. 315, 324 n.14, 319 N.E.2d 427, 433 n.14 (1974), cert. denied, 421 U.S. 947 (1975). To describe the official as the client may prejudice the issue, because the ultimate client may be the agency, the government, or the people, and it is often unclear who is empowered to speak for that client. See Federal Bar Ass'n Comm. on Professional Ethics Opinion No. 73-1, reprinted in 32 FED. B.J. 71 (1973).

E. Contact With Non-Adverse Parties

It is not clear if disciplinary rule 7-104(A)(1) is limited to parties whose interests conflict: its language applies to any party the lawyer "knows to be represented by a lawyer in that matter." A limitation can perhaps be implied from rule 7-104's general heading "Communicating With One of Adverse Interest," though it might be argued that this refers not to 7-104(A)(1) but to the ensuing prohibition in 7-104(A)(2) of advising any unrepresented person whose interests may conflict with those of the adviser's client.⁶⁵

The obscurity of disciplinary rule 7-104(A)(1), and the absence of opinions dealing with truly nonadverse parties, suggest that in practice the rule has not impeded such communications. When interests are not opposed, it is almost always desirable that all lawyers and all clients cooperate. Many lawyers have probably assumed that the rule was inapplicable. Others may have granted permission for communication to proceed. Even where one lawyer might prefer to route all communications through himself, an attempt to do so is unlikely to succeed, particularly when the clients are in contact with each other. In this context, therefore, the rule has done little harm, because it has had little effect.

III. TWO CRUCIAL CONTEXTS: CRIMINAL INTERROGATION AND WRITTEN COMMUNICATIONS

Disciplinary rule 7-104 has two major flaws. It makes it hard to avoid methods of communication that are sometimes impractical and expensive, and it tends to protect lawyers against clients rather than the reverse. The exceptions to the rule sometimes display the operation of these flaws, and sometimes constitute murky compromises in which neither practicality nor client protection necessarily triumphs. The rule hampers government officials who do not need it, but does not cover parties just about to retain counsel or lower corporate employees. It has required a lawyer to dissuade one party from meeting another, but in the process may have encouraged parties to hire nonlawyer intermediaries free of professional regulation. And authoritative delineation of the rule's applicability to employees, intermediaries, and nonadverse parties has been neither clear nor principled.

⁶⁵ The text of old Canon 9 likewise made no mention of adverse parties, but various textual features made it clearer that its title, "Negotiations with Opposite Party," was applicable to the whole canon. ABA CANONS OF PROFESSIONAL ETHICS No. 9.

The operation of the rule in two contexts vividly demonstrates the irony of the rule's impact on practicality and client protection. When criminal suspects are to be interrogated, the necessities of law enforcement have swept away any requirement that a lawyer consent before his client can be questioned in his absence, even though the client needs a lawyer far more than most beneficiaries of the rule. But when a lawyer in a civil matter wishes to avoid delay and obstruction by writing directly to the opposing party and sending a copy to opposing counsel, the rule is vigorously applied, even though the result is to protect opposing counsel against his own client.

A. Client Waiver in the Criminal Context

Criminal suspects usually are questioned in their lawyer's absence. Assuming that constitutional standards for interrogations are met, should any resulting evidence nevertheless be excluded because the suspect's attorney was not notified? Prosecutors have argued that rules of professional responsibility are inapplicable when the interrogator is not a lawyer. This has usually been rejected, partly because the interrogator may be considered an agent of the local prosecuting attorney, and partly because the dangers that a police interrogator will threaten or deceive a suspect are obviously as great as those that a lawyer will do so.⁶⁶ Prosecutors have had more success arguing that a mere breach of professional ethics should not free a guilty defendant.⁶⁷ Nevertheless, while reluctant to exclude evidence, courts have asserted the impropriety of interrogation by police and prosecutors without prior notification to counsel.⁶⁸

In the process, however, the rule has been changed. Some courts speak explicitly of the client's right to waive its protection.⁶⁹

⁶⁶ *E.g.*, *United States v. Four Star*, 428 F.2d 1406 (9th Cir.), *cert. denied*, 400 U.S. 947 (1970); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 95 (1933); *see* Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 599-604 (1963). *But see* *United States v. Massiah*, 377 U.S. 201, 210-11 (White, J., dissenting); *United States v. Massiah*, 307 F.2d 62, 66 (2d Cir. 1962), *rev'd*, 377 U.S. 201 (1964). On communication through agents, *see* text accompanying notes 52-59 *supra*.

⁶⁷ *E.g.*, *United States v. Crook*, 502 F.2d 1378, 1380-81 (3d Cir. 1974), *cert. denied*, 419 U.S. 1123 (1975) (18 U.S.C. § 3501(a) requires admission of voluntary confession regardless of violation); *Mathies v. United States*, 374 F.2d 312, 316-17 (D.C. Cir. 1967) (admission was harmless error).

⁶⁸ *State v. Yatman*, 320 So. 2d 401 (Fla. Dist. Ct. App. 1975); *see* cases cited in *United States v. Brown*, 569 F.2d 236, 249-50 (5th Cir. 1978) (Simpson, J., dissenting). *Contra*, *State v. Richmond*, 114 Ariz. 186, 191, 560 P.2d 41, 46 (1976).

⁶⁹ *United States v. Smith*, 379 F.2d 628, 633-34 (7th Cir. 1967); *see* *United States v. Monti*, 557 F.2d 899, 904 (1st Cir. 1977); *United States v. Cobbs*, 481 F.2d 196, 200 (3d Cir.), *cert. denied*, 414 U.S. 980 (1973).

Others simply describe the rule as requiring advance notice of any interrogation to the suspect's lawyer.⁷⁰ The interrogators are then free to proceed even without the lawyer's explicit consent, or indeed in the face of his objection. As a result, an interrogated suspect is free to talk regardless of his lawyer's views.

This shift in the rule no doubt results from the gravitational pull of decisions allowing suspects to waive their fifth and sixth amendment rights not to be interrogated in the absence of counsel.⁷¹ Those decisions balance the protection of suspects against the state's interest in interrogating suspects and the interest of some suspects in speaking at once. Judges naturally hesitate to modify that balance on the basis of professional punctilio. A modification that would favor only suspects who are already represented when arrested—that is, rich people and professional criminals—is particularly unappealing.⁷²

If a defendant is judged capable of deciding whether to submit to interrogation, why should other clients be denied the same right? The engines of criminal interrogation are more formidable than any the civil lawyer commands.⁷³ The possible consequences are more serious. The client is more likely to be unsophisticated. It is true that society's interest in investigating crimes is great, but this has not been thought sufficient to warrant extending discovery in criminal cases beyond what is allowed in civil cases. The fact is that the gentlemanly courtesies that gave rise to disciplinary rule 7-104, although they may endure in the chambers of ethics committees, have not survived exposure to the more critical world of adversary criminal litigation. The resulting precedents, although perhaps too unprotective of criminal suspects, cast grave doubt on the rule's premise that civil parties are incapable of making a responsible decision to meet with opposing counsel.

⁷⁰ *United States v. Thomas*, 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973); *United States v. Four Star*, 428 F.2d 1406 (9th Cir.), *cert. denied*, 400 U.S. 947 (1970); *Mathies v. United States*, 374 F.2d 312, 316-17 (D.C. Cir. 1967); *see Nai Cheng Chen v. Immigration & Naturalization Serv.*, 537 F.2d 566, 569 (1st Cir. 1976).

⁷¹ *E.g.*, *Brewer v. Williams*, 430 U.S. 387 (1977); *Miranda v. Arizona*, 384 U.S. 436, 475-79 (1966). *But see* *People v. Hobson*, 39 N.Y.2d 479, 384 N.Y.S.2d 419, 348 N.E.2d 894 (1976) (represented defendant in custody can waive state constitutional rights only in his lawyer's presence).

⁷² *See United States v. Masullo*, 489 F.2d 217, 223-24 (2d Cir. 1973); *Lee v. United States*, 322 F.2d 770, 777 (5th Cir. 1963).

⁷³ *See Miranda v. Arizona*, 384 U.S. 436, 445-56 (1966).

B. *Written Communications*

One might think that the rule would allow a lawyer to send a letter to another lawyer's client, with a copy to that lawyer. Any tricks in such a letter can immediately be met by the opposing lawyer, who can at once warn his client or even proceed against the offending lawyer. Indeed, letters of this sort are less likely to foster rascality and misunderstanding than spoken communications between lawyers, because whatever is said is recorded.

No such principle has been recognized. Bar association ethics committees have held that written communications violate the rule even when a copy is sent to counsel.⁷⁴ Unless one adopts the implausible view that a client's mind is tainted so deeply by opposing counsel's words that no later explanations can restore its ability to recognize the truth, these holdings sweep beyond any proper justification for the rule. They can be supported only on the theory that the profession should strive to keep control over the flow of vital information to the client firmly in the hands of his lawyer, regardless of the client's wishes.

IV. A PROPOSED REVISION OF THE RULE

By now it should be clear that giving counsel a veto over communications between his client and opposing counsel is not a trivial defect, but one that deflects the rule from its valid goals. Although reworking the exceptions to disciplinary rule 7-104 might reduce their failings and could hardly fail to increase their clarity, the root of the problem would remain. When no exception applied, the lawyer would still have his veto. When an exception did apply, the client could be confronted by opposing counsel without any chance to talk the matter over first with his own lawyer.

A more basic change would allow counsel to make written communications to the opposing party, provided the party's own lawyer received a simultaneous copy.⁷⁵ This change might con-

⁷⁴ *E.g.*, ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1348 (1975); North Carolina State Bar Opinion No. 679 (1969), in NORTH CAROLINA STATE BAR, STATUTES, RULES AND REGULATIONS, CANONS OF ETHICS AND OPINIONS INCLUDING RULES OF THE BOARD OF LAW EXAMINERS, at II-194 (R. Melott ed. 1970), summarized in O. MARU, *supra* note 3, at para. 9429. Such communication has been allowed only when there is another independent reason for ignoring the rule. See ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 66 (1932) (attorney may write directly to defendant when his attorney refuses to provide name of witness); New York County Lawyers' Ass'n, Opinion No. 406 (1952), in NEW YORK OPINIONS, *supra* note 24, at 792 (attorney may write to client to request return of file).

⁷⁵ See text accompanying note 74 *supra*.

ceivably be reached without formal amendment, by construction of disciplinary rule 7-104.⁷⁶ There would then be a safety valve allowing counsel to avoid the rule in intolerable situations without any real danger to the opposing party. But this would still leave conferences involving the lawyer subject to opposing counsel's veto and would provide no way by which the party himself could make contact with opposing counsel.

It is possible to rewrite the rule so as to give the client the final decision whether communications with an opposing lawyer will occur, while at the same time ensuring an informed decision and minimizing the likelihood of fraud. Here is one way in which this could be done:

DR 7-104 Direct Communications with Another Party

A lawyer who communicates directly with a party he does not represent during the course of his representation of a client shall:

- (A) Disclose his capacity as an attorney of another party.
- (B) Inform an unrepresented party of his right to secure counsel before initiating communication.
- (C) When the party is represented by counsel in that matter:
 - 1. Send counsel a simultaneous copy of any written communication he makes to the party.
 - 2. Notify counsel in writing of the terms of any settlement with the party a reasonable time before it is executed.
 - 3. Honor the party's written request that any future communication be with counsel.
 - 4. Notify counsel before engaging in any conversation with the party; except that this last provision shall not apply to a conversation with an employee of a party, without independent counsel, who is interviewed solely to obtain his testimony.

⁷⁶ It could be said that to send a letter to a client and his lawyer is not "to communicate . . . with a party" but to communicate with both client and lawyer, a step free from the dangers inspiring the rule. This reading would be stretched, but less so than some other constructions of the Code of Professional Responsibility. See, e.g., *Hirschkop v. Virginia State Bar*, 421 F. Supp. 1137, 1154-56 (E.D. Va. 1976) (construing rule prohibiting extra-judicial statements by counsel during litigation); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 342 (1975) (construing rule disqualifying all members of a firm when one member disqualified).

A. Operation of Revised Disciplinary Rule 7-104

The revised rule seeks to protect the represented party by providing his lawyer with a copy of any written communication and advances notice of any proposed oral communication.⁷⁷ This would enable the lawyer to rebut anything in the written communication, and to advise the client to conduct any oral interview cautiously, or only in the presence of the attorney, or not at all. The client, of course, would make the final decision.

One might suggest that these precautions should not be required when the party approaches the lawyer, instead of the other way around. The argument would be that a client's decision to forgo legal advice before communicating should be respected when reached in the absence of any conceivable influence from the opposing lawyer. This would also allow a client who suspected misconduct by his own lawyer to find out what was going on without first putting the lawyer on guard. Yet such a rule would also mean that a client who impetuously telephoned an opposing lawyer would be deprived of helpful advice from his own lawyer, not because of a conscious decision to do without it, but because the dangers of the situation had never occurred to him.

There would also be situations in which it would be unclear how far the opposing lawyer could go in responding to the party's overtures. If the party telephones to ask for information, may the lawyer mention a settlement? If the party promises to call back but does not, may the lawyer reopen the discussion? The revised rule adopts the simple and more conservative solution of requiring advance notice to the client's attorney. The party could then consider his attorney's advice before continuing the dialogue he started.

If the party sends an opposing lawyer a letter, most of these considerations do not apply, and the lawyer should not be obliged to ask whether the party's own lawyer has received a copy. Of course, a copy of any written reply by the lawyer must be sent to the party's counsel. And obviously, no lawyer should be obliged to accept spoken or written overtures from a party; when the party is unreliable, the lawyer might well refuse to communicate except with the party's lawyer, not to protect the party, but to protect himself and his own client.

A lawyer should not contact any represented party who informs the lawyer in writing that he wishes all communications to go through his own lawyer. This will protect clients from harass-

⁷⁷ The latter provision would restore the rule followed by many states before the ABA promulgated its canons. See text accompanying note 9 *supra*.

ment, as well as guard those who feel unable to resist the blandishments of an opposing lawyer or prefer to entrust their affairs to their own attorney.⁷⁸ The letter should come from the client, in order to prevent his lawyer from barring direct communications without the client's unambiguous consent.

One result of increasing the possibilities of communication would be to shift concern from the ability to communicate to the contents of the communication. There has been some tendency to read the prohibition against advising an unrepresented party, now embodied in disciplinary rule 7-104(A)(2), to forbid a statement of the arguments of the lawyer's own client.⁷⁹ Such an approach should not be followed when the opposing party is represented, as long as the lawyer explains that he is a lawyer representing another. There will then be no advice vitiated by conflict of interest or fraudulent concealment, but simply persuasion by a lawyer confronting a party wishing to discuss the case. Nor should a lawyer who has thus disclosed his capacity be forbidden to criticize the client's own counsel, because enlightening the client about such matters is one reason for allowing the communication. A client wishing to shun temptation need not speak to the opposing lawyer. There would also be checks against abuse. A lawyer—even an unscrupulous lawyer—might well shrink from undermining another lawyer from fear that his slanders might backfire, alienating the other lawyer or his client. Lawyers would be aware that even a statement that was technically proper might be remembered by the client in an exaggerated form and land the speaker in trouble. And the ABA Code forbids all “conduct involving dishonesty, fraud, deceit, or misrepresentation.”⁸⁰

A lawyer, lastly, should not execute a settlement reached directly with a represented party without sending a copy of the settlement's terms to the party's lawyer and giving him a chance to advise the party about it before the settlement is executed.⁸¹ A

⁷⁸ One might allow a lawyer to seek the retraction of such a letter, provided that this was done in writing with a copy to counsel. I do not think that this curlicue would add enough to the proposed rule to be worth the complication it would entail.

⁷⁹ See ABA COMM. OF PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 1034 (1968); State Bar of Texas Comm. of Professional Ethics Opinion No. 380 (1975), reprinted in 38 TEX. B.J. 462 (1975).

⁸⁰ ABA CODE DR 1-102(A)(4). Cf. ABA CODE EC 7-37 (lawyer should not make unfair or derogatory references to opposing counsel).

⁸¹ Cf. New York County Lawyers' Ass'n Opinion No. 405 (1952), reprinted in NEW YORK OPINIONS, note 24 *supra*, at 790 (attorney suing former client for fee should notify defendant's lawyer before settlement worked out by mutual friend is executed). One might impose this requirement by a statute or procedural rule,

settlement is a decisive event, in which both parties have strong concerns. The many ethics committee opinions dealing with settlement problems give some reason to believe that a relaxation of disciplinary rule 7-104(A)(1) could lead to controversies over settlement tactics. To require notice would give represented parties the benefit of counsel without burdening their freedom to make their own decisions.

There is some temptation to add further safeguards to deal with disputes as to what was said at meetings between lawyers and parties. One might, for instance, require certain products of such meetings to be in writing if they are to be valid. But this is likely to be both cumbersome and unavailing. It seems better to rely on the safeguards that already exist,⁸² and on the willingness of judges to frustrate lawyers who deceive parties in the absence of their counsel by voiding settlements,⁸³ excluding evidence, awarding damages, and disciplining sneaky lawyers. The reason for allowing a party to meet with someone else's lawyer is not that the meeting will be a saintly symposium, but that the party should be free to decide whether the risks of being misled outweigh what may be substantial benefits. Human beings who confront lovers and car salesmen without assistance should also be free to meet lawyers.

B. The Old Exceptions and the New Rule

A refashioned rule provides a sounder basis for rationalizing the present exceptions to disciplinary rule 7-104. When the lawyer's veto is replaced by a procedure more responsive to the convenience and protection of clients, there is less pressure to deal with the rule's excesses by prying open exceptions. Because the proposed revision would allow direct communication subject to procedural safeguards ensuring informed consent, exceptions would become less important and less desirable than they are now.

1. Contact with Unrepresented Parties

The rule should be expanded to require that lawyers advise unrepresented parties of their right to secure counsel. This will

rather than a rule of professional responsibility. This would make it easier to set aside settlements, in addition to proceeding against the culpable lawyer, when the rule was violated.

⁸² *E.g.*, FED. R. EVID. 408 (inadmissibility of statements made in compromise negotiations as evidence of liability); ABA CODE, DR 5-101(B), DR 5-102 (restrictions on lawyer-witnesses).

⁸³ *See* *Lewis v. S.S. Baune*, 534 F.2d 1115, 1123 (5th Cir. 1976).

foster informed choice by such parties as to whether they wish to continue communications without first seeking the advice of an attorney. This duty, coupled with the requirement that the lawyer disclose that he is an attorney for another party, should avoid such questionable tactics as interrogating an employee without disclosing that a suit against him is already under way.⁸⁴ The unrepresented party would be free to communicate immediately if he wished, because it is up to him to decide whether and when he wishes to be represented.

2. Contact with Employees of Parties

The main difficulty in shaping a provision to govern direct communications with a party's employees is not the allocation of authority between lawyer and client, but that between employer and employee. If it is proper for an employer to forbid employees to deal directly with opposing counsel, the policies of the rule call for advance notice to the employer's counsel; the employer could then make an informed decision whether to allow its agents to proceed. But, if the employer should not be able to sequester its employees, giving notice to its counsel will put the employees under improper pressure. A further complication is that the powers of the employer are controlled by substantive law rather than lawyers' ethics and that this law is not clear.

My view is that opposing counsel should be free to contact directly any employee, high or low, who is a possible witness without notice to the employer's counsel. The public interest in obtaining testimony should not be frustrated by the massive embargo that a warned employer could impose.⁸⁵ But this exception would be limited by its purpose: counsel could deal with the employee only as a witness and would not be free to seek or obtain contracts, stipulations, or corporate documents without notifying the employer's counsel. And the usual rules would apply to employees represented by their own independent lawyers.⁸⁶

⁸⁴ *W.T. Grant Co. v. Haines*, 531 F.2d 671 (2d Cir. 1976) (allowing the interrogation). See generally Craver, *The Inquisitorial Process in Private Employment*, 63 CORNELL L. REV. 1 (1977). The proposed rule would leave courts free to decide whether evidence obtained by violating the rule should be excluded.

⁸⁵ See note 47 *supra*.

⁸⁶ There have recently been attempts to *require* groups of people called before grand juries to have separate counsel in order to prevent the adoption of a policy of silence that may help some but not all witnesses. See, e.g., *In re Investigation Before Grand Jury*, 531 F.2d 600 (D.C. Cir. 1976); *In re Investigative Grand Jury Proceedings*, 432 F. Supp. 50 (D.D.C. 1977). Even if it were desirable, one

3. Contact Through Intermediaries

The rule should preserve the principle that lawyers may not accomplish through others—whether agents, independent contractors such as detective agencies, or anyone else acting under the instructions of lawyers—what the rule forbids them to do themselves. This need not be specifically mentioned in the rule, because disciplinary rule 1-102(A)(2) already forbids circumventing any disciplinary rule through the actions of another. On the other hand, the parties themselves should be entirely free to communicate with each other, and lawyers should be free to advise them to do so. The rule should not deal with nonlawyers employed or retained by the parties and not acting under the instructions of lawyers. For reasons already given, what such nonlawyers do is beyond the just bounds of a code for lawyers.⁸⁷

4. Contact with Government Officials

The exception for communications with government officials that would be desirable under the present version of disciplinary rule 7-104(A)(1) would be unnecessary under the reconstruction proposed here. Under the reconstruction, lawyers would be free to interview employee witnesses without notice to government counsel, and to deal with government officials who wish to do so after they receive advice of counsel. No more is required.

5. Contact with Non-Adverse Parties

An exception for parties whose interests are not adverse would not be necessary under the reconstructed rule. Because it is often difficult to tell whether parties are truly adverse, and because the revised rule offers no real barrier to desirable communication, the simple solution is to require prior notice whenever different parties have different lawyers. If the parties are not adverse, the lawyer will recommend direct communication, or his client will disregard the recommendation.

could hardly call in a judge to decide which employees could appropriately be represented by the employer's counsel for communications purposes. Hence, I proceed on the assumption that notice to the employer's lawyer would in practice leave employees exposed to undesirable pressure from the employer even when the same lawyer also represented the employees.

⁸⁷ See text accompanying note 59 *supra*.

CONCLUSION

On examination, the rule restricting direct communication with a represented party proves to have a political as well as an ethical side. It gives the lawyer control over the flow of information to and from his client, and therefore tilts the balance of power between them toward the lawyer. One result is to foster roundabout communications and higher attorney fees. Another is to make it easier for lawyers to neglect or deceive their clients. Another is to increase the inequality and dehumanization that are almost inevitable when a professional confronts a client needing help.⁸⁸ Still another is to make it harder for clients to keep the threads of their own affairs from passing into the hands of their lawyers. Some would say that this last effect is a good one, because lawyers protect the interests of clients most effectively when their professional activities are free from interference. Good or not, it should not be imposed on clients who have not consented.

There is no empirical evidence to tell us whether abuses of disciplinary rule 7-104 are in fact common, though a survey of ethics committee opinions certainly suggests that there are points of tension. My own belief is that problems do occur. At the same time, I admit to some discomfort at the thought of other lawyers poking about behind my back and meddling with my clients. It is important to realize that such discomfort reflects self-interest as much as concern for the clients' welfare. Clients can be better protected by revising the imprisoning rule now in force.

⁸⁸ Christie, *supra* note 15; Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1, 15-24 (1975). See generally Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.