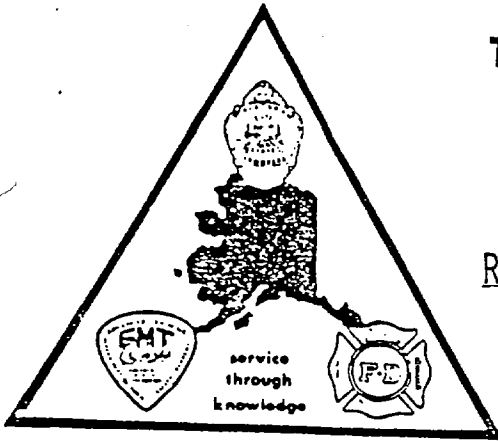


# DEPARTMENT OF PUBLIC SAFETY

## TRAINING ACADEMY

LEGAL BULLETIN NO. 87  
August 3, 1984



### RIGHT TO COUNSEL--VOLUNTARY WAIVER

Reference: Harold C. DEPP  
v.  
State of Alaska

Alaska Court of Appeals  
Opinion No. 390  
686 P.2d 712  
July 27, 1984

#### FACTS:

DEPP was the principal of Unalaska City School. He sexually assaulted an eleven-year-old boy. The case was investigated by the Unalaska Police Department. A police officer went to DEPP's office to interview him, but first advised him of his Miranda rights. While in the office, DEPP received a telephone call from his attorney instructing him not to talk to police. DEPP told the officer he wanted to disregard his attorney's advice and talk about the offense. The officer urged DEPP to heed his attorney's advice, but DEPP still insisted on talking. Several days later, an assistant District Attorney was in Unalaska for a criminal trial. The police officer asked DEPP if he would consent to talk with the assistant District Attorney and he agreed. The police officer and District Attorney spoke with DEPP at his residence. The District Attorney talked about procedural matters (arraignment, bail, etc.), but did not talk about the case. Prior to this conversation, DEPP was again advised of his rights. The District Attorney left the premises. The police officer stayed and tape recorded a statement from DEPP. The statement was used at his trial. DEPP appealed, arguing that the statement was obtained in violation of the Code of Professional Responsibility from the Alaska Bar Association's Disciplinary Rules.

Disciplinary Rule 7-104, entitled "Communicating with One of Adverse Interest," provides in part:

"(A) During the course of his representation of a client, a lawyer shall not:

- (1) communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." (emphasis added)

#### ISSUE:

Did the police officer violate DR 7-104 when he took the statement while knowing DEPP was represented by counsel?

HELD: No.

REASONING:

1. The statements were voluntary and no constitutional violation occurred.
2. There is no evidence that the police officer acted at the request of the prosecutor and the interviews occurred at the investigative stage of the case, prior to any formal action against DEPP. (emphasis added)
3. Although the statements appear to have been the product of police interrogation, the interrogation was clearly non-custodial. (emphasis added)
4. Even though the officer was aware that DEPP was represented by counsel, it is not clear whether the Disciplinary Rules apply directly to the officer since he was not an attorney and his contact with DEPP occurred at the investigative stages of the case and were apparently not instigated nor encouraged by the prosecutor. (emphasis added)

NOTES:

It is clear in this case that the officer was not acting as an agent of the prosecutor. The prosecutor cannot communicate with the client of another lawyer without his permission, nor can he have you do so in his behalf. Normally, in fact, if a prosecutor is aware that you as a police officer are communicating with a person represented by counsel, he will probably tell you to cease and additionally contact the attorney of the accused.

DEPP was not in custody and the police officer gave him his Miranda rights on numerous occasions.

Compare this case with Legal Bulletin No. 55, Sheakley v. State, wherein the jailed defendant first requested an attorney, then "changed his mind" and gave a statement which was used against him. In that case, Sheakley "instituted the contact and waived his right to counsel," which resulted in taking of his statement.