

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 11-461 Advising Clients Regarding Direct Contacts with Represented Persons

August 4, 2011

Parties to a legal matter have the right to communicate directly with each other. A lawyer may advise a client of that right and may assist the client regarding the substance of any proposed communication. The lawyer's assistance need not be prompted by a request from the client. Such assistance may not, however, result in overreaching by the lawyer.¹

A lawyer may not communicate with a person the lawyer knows is represented by counsel, unless that person's counsel has consented to the communication or the communication is authorized by law or court order. ABA Model Rule 4.2 (sometimes called the "no contact" rule). Further, a lawyer may not use an intermediary, i.e., an agent or another, to communicate directly with a represented person in violation of the "no contact" rule.²

It sometimes is desirable for parties to a litigation or transactional matter to communicate directly with each other even though they are represented by counsel. Two examples may be where the parties wish to cement a settlement or break an impasse in settlement negotiations. In this opinion, the Committee explores the limits within which it is ethically proper under the Model Rules of Professional Conduct for a lawyer to assist a client regarding communications the client has a right to have with a person the lawyer knows is represented by counsel. Even though parties to a matter are represented by counsel, they have the right to communicate directly with each other.³ In addition, a client may require the lawyer's assistance and a lawyer may be reasonably expected to advise or assist the client regarding communications the client desires to have with a represented person. A client may ask the lawyer for advice on whether the client may lawfully communicate directly with a represented person without their lawyer's consent or their lawyer being present. The comments to Rules 4.2 and 8.4(a) state that such advice is proper.⁴ Even if the client has not asked for the advice, the lawyer may take the initiative and advise the client that it may be desirable at a particular time for the client to communicate directly with the other party.

For example, a lawyer represents a client in a marital dissolution. The client's husband also is represented by counsel. The parties and their lawyers have reached an impasse in their negotiations over various issues. The client may ask her lawyer if she may communicate directly with her husband to see if an agreement can be reached on some contested issues. Alternatively, the lawyer might independently

¹ This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2011. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

² Rule 8.4(a). The Rule states: "[i]t is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-395 (1995) ("Since a lawyer is barred under Rule 4.2 from communicating with a represented party about the subject of the representation, she [under Rule 8.4(a)] may not circumvent the Rule by sending an investigator to do on her behalf that which she is herself forbidden to do."); ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 408 (ABA 7th ed. 2011) ("A lawyer may not, however, "mastermind" a client's communication with a represented person.").

³ See *Holdren v. General Motors Corp.*, 13 F.Supp.2d 1192, 1195 (D. Kan. 1998) ("there is nothing in the disciplinary rules which restrict a client's right to act independently in initiating communications with the other side, or which requires that lawyers prevent or attempt to discourage such conduct." (citing New York City Bar Association Formal Opinion No.1991-2, at 5-6)); *Dorsey v. Home Depot U.S.A., Inc.*, 271 F.Supp.2d 726, 730 (D.Md.2003) ("Nothing in the law prohibits litigants or potential litigants from speaking among and between themselves, as opposed to attorneys for such parties attempting direct communications with represented parties."); *Northwest Bypass v. U.S. Army Corps of Engineers*, 488 F.Supp.2d 22, 28-29 (D.N.H. 2007) (not improper for represented party to communicate directly with represented opponent).

⁴ See Rule 4.2 cmt. 4 ("A lawyer may not make a communication prohibited by this Rule through the acts of another. See also Rule 8.4(a) cmt. 1 ("Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.").

suggest that the possibility of resolving outstanding issues would be enhanced if the client communicates directly with her husband. The client also might benefit from the lawyer's advice on how she should conduct such settlement negotiations, the topics or issues to be covered, and the goals or objectives to be reached. The client also could ask the lawyer to prepare a marital settlement agreement with the goal of having her husband execute the agreement during her meeting with him.

The language of Rule 4.2 Comment [4] raises the primary question addressed in this opinion, to what extent may the lawyer advise and assist the client in communicating directly with the represented husband without violating Rule 4.2 through the acts of another, i.e., the client.⁵ However, there is tension between Comment [1] to Rule 4.2 and Rule 8.4(a). In ABA Formal Op. 92-362 (1992), this Committee opined that, without violating Rules 4.2 and 8.4 (a), a lawyer may ethically advise the client to communicate directly with a represented adversary to determine if the adverse party's lawyer had informed them that a settlement offer was pending.⁶ The inquiring lawyer in the opinion represented the plaintiff in a civil case in which the defendant also was represented by counsel. Previously, the plaintiff's lawyer made a settlement offer to opposing counsel. Plaintiff's lawyer had received no response, and the case was set for trial in two weeks. Plaintiff's lawyer suspected that opposing counsel had not informed the defendant of the offer. In that opinion, the Committee concluded that, although the plaintiff's lawyer could not communicate the settlement offer directly to the defendant without violating Rule 4.2, the plaintiff's lawyer had an ethical duty under Rules 1.1, 1.2(a), and 1.4(b) to advise the client that the lawyer believed his settlement offer had not been communicated by defendant's counsel to the defendant and that the plaintiff had the right to speak directly with the defendant to determine whether the settlement offer had been communicated.

ABA Formal Op. 92-362 acknowledged tension between the lawyer's decision to advise the client of the right to communicate directly with a represented adversary and Rule 8.4(a)'s prohibition against the lawyer's doing indirectly what the lawyer cannot do directly. Nevertheless, the Committee concluded that "where the purpose of the communication is to ascertain whether a settlement offer has been communicated to the other party, Rule 8.4(a) should not be read to preclude the lawyer's fulfilling the lawyer's duty, reasonably expected by the client, fully and fairly to advise the client of the lawyer's best professional judgment as to the exercise of the client's rights in furtherance of the representation."⁷ The Committee expressly indicated that it was not addressing what the lawyer might tell the client to say to the other party and where the line might be crossed before running afoul of Rule 8.4(a). The Committee was careful to note that if the client was only going to find out if the other party had been told of the offer, there would be no violation of the rules. Several bar ethics committees likewise have concluded that it is not a violation of the professional conduct rules for a lawyer to suggest or recommend that the client communicate directly with a represented person.⁸

The decision to communicate directly with a represented person may be the client's idea or the lawyer's. Some decisions and opinions suggest that counsel may be violating the rules prohibiting communication with a represented party by encouraging or failing to discourage a client speaking directly

⁵ We conclude that a lawyer's client is "another" for purposes of Rule 8.4(a). In re Marietta, 569 P.2d 921 (Kan.1977) (lawyer sanctioned for preparing release and advising client to pass it on to represented adverse party); S.F. Bar Informal Opinion 1985-1 (1985) ("it would be inappropriate ... for [a] lawyer to use the client as an indirect means of communicating with the adverse party" in settlement negotiations).

⁶ ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-362 (1992) (Contact With Opposing Party Regarding Settlement Offer), in FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 (ABA 2000) at 85, 88.

⁷ *Id.* at 89.

⁸ See, e.g., Massachusetts Bar Op. 11-03 (2011) (not violation of Rules 4.2 and 8.4(a) for lawyer to advise client to urge another person to release attachment on client's property, even though other person is represented by counsel); Oregon Eth. Op. Op. 2005-147 (1997) (Direct Communication Between Represented Parties) ("Allowing the parties themselves to discuss the issues and possible avenues for settlement does not conflict with the policy behind the rule [prohibiting a lawyer from causing another to communicate on the subject of the representation]."); California Comm. on Prof'l Resp. and Conduct Formal

Op. 1993-131 (1993) (lawyer may confer with client as to strategy to be pursued in, goals to be achieved by, and general nature of communication client intends to initiate with opposing party as long as communication itself originates with, and is directed by, client and not the lawyer); Michigan Eth. Op. CI-920 (1983) (in domestic relation case, it is permissible for lawyer to give client draft settlement proposal even when lawyer knows client may discuss document with spouse who is represented by counsel); San Francisco Bar Assoc. Informal Op. 1985-1 (1985) (lawyer may allow or encourage his client to attempt to resolve dispute by communicating directly with opposing party, so long as client is not directly or indirectly acting as agent of lawyer).

to the other party.⁹ The “no contact” rules applied in these opinions, however, differ from the Model Rules in that they do not contain the relevant language in Rule 4.2 Comment [4] that “a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.” As the Committee observed in Formal Op. 92-362, other rules may require that, in some situations, a lawyer advise the client to consider communicating directly with her represented adversary about a matter related to the representation. Rule 1.1 requires that “[a] lawyer shall provide competent representation to a client.” Rule 1.4(a)(2) requires the lawyer to consult with the client as to the means by which the client’s objectives are to be accomplished.¹⁰ These fundamental ethical principles, coupled with the comments to Rules 4.2 and 8.4(a), suggest that the assistance a lawyer may give to a client extends beyond advising her of her right to communicate with her adversary.

Rule 8.4(a)’s prohibition against a lawyer’s violating the rules through the acts of another raises questions about what a lawyer may or may not say to the lawyer’s client, or what the lawyer may do to assist the client in communicating directly with the represented opponent. These issues were explicitly left unaddressed in Formal Op. 92-362. When Formal Opinion 92-362 was issued, the comments to Rules 4.2 and 8.4 did not contain the current language that expressly permits the lawyer to advise the client regarding communications the client is legally entitled to make and actions the client is legally entitled to take. There is very little authority that provides guidance in any context regarding the scope of assistance and advice a lawyer may give a client under the comments to Rules 4.2 and 8.4. Some authority states that because of Rule 8.4(a)’s prohibition against violating or attempting to violate the Rules of Professional Conduct through the acts of another, a lawyer may not “script” or “mastermind” a client’s communication with a represented person and may violate Rule 4.2 by preparing legal documents for the client to have a represented person sign without the assistance of their counsel.¹¹ What constitutes “scripting” or “masterminding” the communication is not clear, but such a standard, if too stringently applied, would unduly inhibit permissible and proper advice to the client regarding the content of the communication, greatly restricting the assistance the lawyer may appropriately give to a client.¹² Relying on language similar to Comment [4] of Model Rule 4.2, the *Restatement (Third) of The Law Governing Lawyers* (2000) (“the *Restatement*”) explains:

The lawyer for a client intending to make such a communication may advise the client regarding legal aspects of the communication, such as whether an intended communication is libelous or would otherwise create risk for the client. Prohibiting such advice would unduly restrict the client’s autonomy, the client’s interest in obtaining important legal advice, and the client’s ability to communicate fully with the lawyer.”¹³

⁹ See, e.g., *Miano v. AC & R Advertising, Inc.*, 148 F.R.D. 68, 82 (S.D.N.Y. 1993) (“where a client directly asks his or her attorney whether he should approach a represented adversary, the attorney may not ethically recommend or endorse such action”); N.Y. City Ethics Op. 2002-3 (2002) (if client “conceives of the idea” of communicating with represented adversary, lawyer may advise client about it but must avoid helping client to either elicit confidential information or encourage other party to proceed without counsel); Massachusetts Bar Op. 82-8 (1982) (lawyer who has prepared settlement agreement on client’s behalf should discourage client from specifically discussing settlement with other party or directly sending letter that addresses settlement without consent of that party’s lawyer).

¹⁰ See ABA Formal Op. 92-362, FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998 at 88.

¹¹ See, e.g., *Holdgren v. General Motors Corp.*, 13 F.Supp.2d 1192, 1193-96 (D.Kan. 1998) (lawyer in age discrimination case violated rules of professional conduct “through the acts of another” by encouraging client to obtain affidavits from coworkers, advising him of difference between “out of court statements” and signed affidavits for trial purposes, and advising him how to draft affidavit); *In re Pyle*, 91 P.3d 1222, 1228-29 (Kan. 2004) (lawyer “circumvented the constraints” of Rule 4.2 by, at client’s request, preparing affidavit for her to deliver to represented defendant in personal injury case); California Comm. on Prof’l Resp. and Conduct Formal Op. 1993-131 (“An attorney is also prohibited from scripting the questions to be asked or statements to be made in the communications or otherwise using the client as a conduit for conveying to the represented opposing party words or thoughts originating with the attorney.”); Massachusetts Bar Op. 11-03 (“We believe, however, that the lawyer would cross the line if she prepared a release of the attachment and presented it to the sister for execution without the knowledge and express permission of the sister’s lawyer.”).

¹² See n.11.

¹³ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt (k) (2000). See also John Leubsdorf, *Communicating With Another Lawyer’s Client: The Lawyer’s Veto and the Client’s Interests*, 127 U. PA. L. REV. 683, 697 (1979) (“An extension of the [no-contact] 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

Restatement § 99 Illustration 6 clarifies this point with the following scenario. A lawyer represents a client who has a dispute with a contractor. On her own, the client drafts a letter outlining her position in the dispute and shows a copy to her lawyer. Viewing the draft as inappropriate, the lawyer redrafts the letter and recommends that the client send it out as redrafted. The client does so. The *Restatement* concludes that the lawyer's assistance to the client was not an improper communication with a represented person.

The lawyer also may draft a document for the client to deliver to the represented adversary although authority restricts the lawyer's assistance to situations where the client originates the communication, stating that it is improper for the lawyer to originate or direct the proposed communication.¹⁴ Section 99 of the *Restatement* does not explicitly address this question, although Comment (k) and Illustration 6 are based on the client having originated a proposed communication with a represented adversary. The line between permissible advice and impermissible assistance may not always be clear. This Committee does not think that line should be drawn based on who initiates the first draft of a communication with a represented adversary. Such an approach favors only those clients who have the sophistication to ask the lawyer to draft a document for the client to give to a represented adversary. In addition, allowing the lawyer to assist only if the client originates the substance of the communication leaves the unsophisticated client without the benefit of the lawyer's advice in formulating communications that the rules allow the client to have with a represented person. Instead, the line must be drawn on the basis of whether the lawyer's assistance is an attempt to circumvent the basic purpose of Rule 4.2, to prevent a client from making uninformed or otherwise irrational decisions as a result of undue pressure from opposing counsel.

This Committee believes that, without violating Rules 4.2 or 8.4(a), a lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who—the lawyer or the client—conceives of the idea of having the communication.

This Committee favors the approach taken by *Restatement* § 99 Comment (k). Under that approach, the lawyer may advise the client about the content of the communications that the client proposes to have with the represented person. For example, the lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary. Such advice enables the client to communicate her points more articulately and accurately or to prevent the client from disadvantaging herself. The client also could request that the lawyer draft the basic terms of a proposed settlement agreement that she wishes to have with her adverse spouse, or to draft a formal agreement ready for execution. Rules 4.2 and 8.4(a) may permit the lawyer to fulfill the client's request without violating the lawyer's ethical obligations. However, in advising the client, counsel must be careful not to violate the underlying purpose of Rule 4.2, as explained in Rule 4.2 Comment [1]:

This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.¹⁵

when two nonlawyers communicate.... Perhaps we have again come across the desire to keep disputes safely in the control of lawyers."); James G. Sweeney, *Attorneys' Arrogance: Warning Unheeded*, N.Y.L.J., June 17, 1991, at 2 col. 3 ("To deny or deter the client from the opportunity of entering into the gauging process of what value is to him in a particular dispute by denying him an opportunity to sit at the bargaining table with his adversary works against the very fundamental idea of the self and of human autonomy.").

¹⁴ See, e.g., California Comm. on Prof'l Resp. and Conduct Formal Op. 1993-131 ("When the content of the communication to be had with the opposing party originates with or is directed by the attorney, it is prohibited by rule 2-100.").

¹⁵ See ABA Formal Opinion 95-396 (1995), in *FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998* (ABA 2000) at 330, 334 ("The anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests."). See also *Niesig v. Team I*, 558 N.E.2d 1030, 1032 (N.Y. 1990) ("By preventing lawyers from deliberately dodging adversary counsel to reach-and-exploit the client alone, [the rule prohibiting communicating with a person represented by counsel] safeguards against clients making

Prime examples of overreaching include assisting the client in securing from the represented person an enforceable obligation, disclosure of confidential information, or admissions against interest without the opportunity to seek the advice of counsel. To prevent such overreaching, a lawyer must, at a minimum, advise her client to encourage the other party to consult with counsel before entering into obligations, making admissions or disclosing confidential information. If counsel has drafted a proposed agreement for the client to deliver to her represented adversary for execution, counsel should include in such agreement conspicuous language on the signature page that warns the other party to consult with his lawyer before signing the agreement.¹⁶

improvident settlements, ill-advised disclosures and unwarranted concessions."); *State v. Gilliam*, 748 So.2d 622, 638 (La. Ct. App. 1999), *writ denied*, 769 So.2d 1215 (La. 2000) (rule intended to "prevent disclosure of attorney-client communications and to protect a party from 'liability-creating statements' elicited by a skilled interrogator"); *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, 764 N.E.2d 825, 830 (Mass. 2000) (rule preserves counsel's "mediating rule" and protects clients from overreaching by other lawyers); *Polycast Tech Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990) (rule prevents lawyers from eliciting "unwise statements" from opponents, protects privileged information, and facilitates settlements by allowing lawyers to conduct negotiations); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS*, § 11.6.2, at 611 (1986) ("The prohibition is founded upon the possibility of treachery that might result if lawyers were free to exploit the presumably vulnerable position of a represented but unadvised party"); EC 7-18 ("The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel.").

¹⁶ This opinion does not address situations in which a lawyer advises a client with respect to using an investigator or agent to gather facts from a represented person. These situations may involve a variety of factors, not considered in this opinion, relevant to the presence or absence of overreaching.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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