Ethics Opinion 385

Advising Clients About Communications with Represented Opponents

Parties to a legal matter generally have a right to communicate directly with each other. This Opinion provides guidance for lawyers about when and how they may counsel their clients regarding communications with represented opposing parties. It does not address the question of how a litigant (plaintiff or defendant) may communicate directly with a witness or third party represented by counsel.

A lawyer may advise a client about communications with represented opponents (herein, "opponent-party") in which the client legally is entitled to engage without running afoul of D.C. Rules of Professional Conduct 4.2 and 8.4(a) ("D.C. Rules" or "Rules"). In doing so, a lawyer may provide assistance to the client, including recommending that the client undertake direct communications with the opposing party, identifying general topic areas and specific issues for discussion, discussing the goal or goals of such communications, and preparing or revising talking points representing the client's viewpoints, questions, and proposals. A lawyer may not, however, advise a client about legally-permissible communications solely for the purpose of evading the prohibitions of Rule 4.2. Even if the lawyer does not intend to evade Rule 4.2, the lawyer's assistance should not result in the client acting as a surrogate for the lawyer.

Although a lawyer may provide a client with assistance in communicating directly with an opponent-party, the lawyer may not attend or otherwise participate in party-to-party communications with an opponent-party, unless opposing counsel provides consent. This bar on attendance and participation includes a bar on monitoring party-to-party communications or consulting with the client in real time while such communications are going on.

Furthermore, a lawyer who advises a client about communications with a represented opponent-party should advise her client that the opponent-party may want an opportunity to consult with

opposing counsel before entering into any agreements, making admissions, or disclosing confidential information. Under certain circumstances, such consultation should be encouraged by the party initiating the direct party-to-party communications.

Applicable Rules

- Rule 1.2 (Scope of Representation)
- Rule 1.3 (Diligence and Zeal)
- Rule 1.4 (Communication)
- Rule 1.13 (Organization as Client)
- Rule 1.14 (Client with Diminished Capacity)
- Rule 4.2 (Communication Between Lawyer and Person Represented by Counsel)
- Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)
- Rule 8.4 (Misconduct)

Inquiry

1. May a lawyer encourage her client to communicate directly with a represented opposing party, without opposing counsel's knowledge or participation? If yes, to what extent may a lawyer assist her client in preparing for such communications?

2. May a lawyer attend or observe party-to-party communications and assist his client during them?

Discussion

Rule 4.2 prohibits a lawyer, during the course of representing a client, from "communicat[ing] or caus[ing] another to communicate about the subject of the representation with a person known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law or a court order to do so."[1] This prohibition extends to non-lawyer assistants who are employed or retained by or associated with the lawyer.[2] Indeed, "[i]t is professional misconduct for a lawyer to . . . [v]iolate 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."[3]

Rule 4.2 applies to communications related to a matter with *persons* -- and not just *parties* -- represented by counsel. Persons include opponents, third parties brought into the litigation by formal process, and witnesses. Here, the Committee addresses only how the rule applies to opponent-parties.

The commentary to Rule 4.2 states:

> parties to a matter may communicate directly with each other . . . [and] a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client communication is not solely for the purpose of evading restrictions imposed on the lawyer by this rule.

Rule 4.2 cmt [2].[4] Thus, although a lawyer and her non-lawyer agents may be prohibited from communicating with a represented opponent-party, the same prohibition does not extend to the lawyer's client or an agent of the lawyer's client, and the lawyer may advise the client or client's agent accordingly.

What "accordingly" means, however, is a question that many state bars, the ABA, and ethics counsel have struggled to answer. Numerous authorities concur with the dictate of Comment [2], that a lawyer may not advise a client about legally permissible communications solely for the purpose of evading the prohibitions of Rule 4.2. But this boundary is so extreme, practically requiring an attorney to admit (at least to himself) bad faith, that it is not particularly useful. This Opinion, therefore, provides some considerations that will allow practitioners to gauge whether their contemplated involvement in party-to-party communications may be considered permissible under the D.C. Rules of Professional Conduct.

The Duty of Zealous and Diligent Representation Is Bounded By Duties to The Legal System and Other Parties

Among the first principles of legal representation are that a lawyer has a duty to zealously and diligently represent his client and to consult with the client about the means by which the client's objectives can be pursued.[5] Additionally, a lawyer is obligated to pursue the client's objectives through whatever reasonably available means are permitted by law and the disciplinary rules.[6] Throughout, a lawyer is required to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[7]

There often are circumstances under which party-to-party communications may succeed in bringing about a resolution. These circumstances may arise from the posture of the matter, the relationship between the parties, or the nature of the parties' dispute. Perhaps the most common dynamic where direct party-to-party communications may be helpful are settlement negotiations that have hit a stand-still and one party questions whether its settlement overtures have been conveyed promptly and accurately to the opposing party. Parties to contract or commercial disputes that have an on-going business relationship (including conflicts between principals of a small business) will sometimes benefit from informal, direct communications. And, the areas of family law (divorce, custody), will contests, and intra-family torts are frequently referenced as matters in which the principals may be better positioned, at times, to resolve their disputes than their counsel are – or, at least, may have a better chance of reaching agreements that will preserve future family relations. These are but some examples, sufficient for the Committee to find that a reasonable practitioner may believe that party-to-party communications might advance her client's interests and that a diligent and zealous practitioner may wish to recommend that her client engage in such direct communication with his opponent-party.[8]

Rule 4.2 Is Intended to Protect Fundamental Aspects of the Legal System: The Adversarial Process, Professional Advocacy, and Attorney-Client Privilege

As this Committee has previously observed:

> Among [the] main purposes [of Rule 4.2] is the protection of the adversary system. A client who receives a communication from opposing counsel without the participation of his own counsel may not be able to evaluate the correctness of statements of law made by opposing counsel. Without the participation of his lawyer, an unprotected client may be induced by opposing counsel into making admissions, waiving confidentiality, or taking positions detrimental to the client's interest without the client realizing it because the client's lawyer is not aware of, and not participating in, the communication.

D.C. Legal Ethics Opinion 274 (1997).

The Committee has specifically noted that lawyers generally have a substantial advantage over lay persons in discussing legal matters. This inequality, as well as the integrity of the attorney-client relationships that are intended to keep adverse parties on equal footing, are the core

purposes of the Rule.

> Rule 4.2 has at its core the concern that lawyers generally are in a better position, by education and training, to overwhelm a lay party and exploit his lack of legal knowledge in the course of communicating directly with the lay party. Courts and this Committee have noted that the Rule is intended to protect against the lawyer who might coax a statement or settlement or otherwise take advantage of the unsuspecting and momentarily uncounseled lay person. Thus, courts have noted the "difficulty the uncounseled lay person has in marshalling the information and foresight required to conduct negotiations about complex legal issues with a lawyer representing [an adverse party]."
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> Courts also have observed that Rule 4.2 helps prevent the inadvertent disclosure of privileged information and has "preserved the proper functioning of the legal system" by protecting the integrity of the lawyer-client relationship.

D.C. Legal Ethics Opinion 258 (1995).

With these considerations in mind, a lawyer is permitted to counsel his client on party-to-party communications without engaging in an overreach that would compromise any of the purposes underlying Rule 4.2.

Striking the Proper Balance Between Zealous Representation and the Safeguards of Rule 4.2

Comment [2] to Rule 4.2 permits a lawyer to respond to a client's proposal for party-to-party communications and to answer the client's questions regarding such communications. The Committee additionally believes that nothing in Rule 4.2 or the commentary prevents a lawyer from affirmatively suggesting that a client should communicate directly with his opponent-party when, in the lawyer's opinion, the client's objectives may be advanced by such outreach.

Beyond this threshold advice, counsel may assist a client in preparing for party-to-party communications. Counsel may not, however, participate in such communications, in any respect, unless opposing counsel has been advised in advance of such participation and consented to it.

Preparing for Party-to-Party Communications

Party-to-party communications may be carried out through written, telephone, digital (*e.g.*, video conference), or in-person communications. Regardless of the medium, a lawyer may assist his client in preparing for such communications.

Given that a lawyer cannot communicate directly with a represented opponent-party, and cannot use his client for the same purposes, the lawyer should be mindful of not dictating or directing the communications and not coaching the client to seek confidential information, admissions, or binding agreements. The lawyer may, however, do the following:

- Solicit and clarify the client's objectives for the communication or meeting;
- Remind the client of previously stated objectives in the litigation and propose objectives for the communication or meeting;
- Assist the client in drafting talking points or questions to present during the meeting;
- Advise the client on how the client should respond to information or questions that the opponent-party may present during the meeting.

The lawyer may not, however, attempt to script the communication or coach the client to handle the communications as the lawyer would. The point of encouraging the parties to speak directly to one another is to use the dynamics between them, and their own voices, to find common ground.[9] When the lawyer's level of assistance in preparing for these communications turns the client into the lawyer's surrogate, it has gone too far.

A lawyer can help his client draft a letter or e-mail to the opponent-party and may even draft such correspondence for his client to send to the opponent-party. But the lawyer may not prepare binding legal documents – *i.e.*, formal statements, admissions, contracts, or settlement agreements –for the client to present to the opponent-party.[10]

Should the parties, in the course of a direct communication, reach an agreement to settle their dispute, counsel may help his client reduce that agreement to writing for subsequent presentation to the opponent-party by his client.

In addition to helping a client prepare for a party-to-party communications, the lawyer should advise his client that the right of the parties to communicate directly with one another is not absolute. Coercive or harassing communications are not permissible.[11]

Furthermore, a lawyer who advises a client about communications with a represented opponent-party should advise her client that the opponent-party may want an opportunity to consult with opposing counsel before entering into any agreements, making admissions, or disclosing confidential information. Under certain circumstances, such consultation should be encouraged by the party initiating the direct party-to-party communications.

The Committee notes that the ABA has published an opinion allowing lawyers to play a greater role in preparing their clients for party-to-party communications, including drafting a settlement agreement for presentation by the client to the opponent-party with the goal of having the opponent-party sign it during the party-to-party meeting. ABA Op. 11-461. The Committee notes that the ABA opinion is based upon ABA Model Rule 4.2, which is structured and written differently than Rule 4.2, and is supported by different commentary. The ABA opinion created some controversy at the time of its publication and was inconsistent with legal ethics opinions issued by numerous state bar associations.[12] The ABA advised members in 2012 that the opinion might be revised, but in the intervening years it has not been revised[13] or superseded. At least one state has rejected it outright and others have not adopted its conclusions.[14] It is also worth noting that the conduct approved in ABA Opinion 11-461 is conditioned upon the inclusion in any document prepared by counsel for the opponent-party's signature of a prominent notice advising the opponent-party to consult his counsel before signing.[15]

Participation in Party-to-Party Communications

Participation in party-to-party communications is limited to the parties themselves unless counsel for one party has sought and received the opposing counsel's consent to attend. This means that it is not permissible for a lawyer to provide advice or commentary to his client while a communication is being conducted – even though technology would permit real-time monitoring and correspondence via email, text, chat, or any other means between the lawyer and the client. This bar on participation includes a bar on silent attendance or observation, in-person, telephonically, virtually, or remotely. Even if a lawyer plans to remain silent, and not communicate with either party, he should not attend a party-to-party communication.

It is possible that one party-to-party communication – an email, a phone call, or a meeting – could lead to a series of communications over time, during which one of the parties is intermittently consulting with his counsel. When this happens, the guidance provided above ("Preparing for Party-to-Party Communications") applies. Although the rules allow counsel to advise his client

on a party-to-party communication, they do not allow counsel to negotiate with the opponent-party through his client without providing notice to and obtaining consent from opposing counsel.

Based on D.C. Legal Ethics Opinion 258, which generally prohibits an attorney acting pro se from communicating directly with his opponent-party without opposing counsel's permission, the Committee also concludes that in-house counsel cannot participate in party-to-party communications without opposing counsel's agreement.

Circumstances Outside the Scope of This Opinion

This Opinion does not address what role counsel may play in advising or preparing a client for party-to-party communications where the opposing party is a government agency. As recognized in Rule 4.2(d), Comments [9] and [10] to Rule 4.2, and related D.C. legal ethics opinions, government agencies have experience and expertise that distinguish them from many non-lawyer clients and are capable of representing their own interests in direct communications initiated by their opponent-parties.[16] Because of this institutional advantage, counsel for an opponent-party is permitted to meet with a governmental entity without the government's lawyer present. See D.C. Legal Ethics Opinion 280 (1998). The Committee believes the same reasoning should permit a lawyer greater leeway in preparing his client for a party-to-party communications with a government agency, including the preparation of binding documents for presentation by her client to a government representative in a party-to-party meeting.

Nothing in this Opinion is intended to disturb the provisions of Rule 1.2(c) governing limited scope representations. Should, for example, a lawyer agree to represent a client under Rule1.2(c) for the limited purpose of drafting a contract, the client would be free, subsequently, to present that contract to a potential business partner in a party-to-party meeting without opposing counsel's knowledge or participation because the lawyer is not representing the client in contract negotiations or advising the client on the broader commercial relationship contemplated in the contract. If, however, the limited scope agreement is broader – *e.g.*, to represent the client in securing business partners – the guidelines set forth above ("Preparing for Party-to-Party Communications and Participation in Party-to-Party Communications) would apply. Lawyers should not attempt to evade the general limits described in this Opinion by structuring representation of a client as a series of limited scope representations.

This Opinion has no application to the practice of assisting *pro se* litigants in preparing court papers, which is discussed in D.C. Legal Ethics Opinion 330 (2005). Such conduct is often controlled by court rules and court papers are served on opposing counsel. Thus, the concerns animating this Opinion are not present.

Conclusion

A lawyer may encourage her client to communicate directly with a represented opposing party, without opposing counsel's knowledge or participation. A lawyer may also assist her client in preparing for such communications in several ways, but should not direct the communications or coach the client to seek confidential information, admissions, or binding agreements.

A lawyer may not attend or observe party-to-party communications or assist his client during them. This is so, even though technology would easily allow a lawyer to do so undetected and would allow a client to seek real-time assistance during telephonic, virtual or remote meetings.

As stated above, the duty of zealous and diligent representation is bounded by duties to the legal system and other parties. Whether certain actions cross the fuzzy line between permissible and impermissible is a fact-bound issue. A lawyer should remember to balance these duties and consider his conduct from the perspectives of an objective person and opposing counsel.

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1. Rule 4.2(a).

2. Rule 5.3(b) ("With respect to a nonlawyer employed or retained by or associated with a lawyer . . . [a] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."); *see also* D.C. Legal Eth. Op. 295 (2000) (concluding that a guardian *ad litem* representing a minor is prohibited by Rules 4.2 and 8.4(a) from using a social worker or any other third party to communicate with the represented parent of the guardian *ad litem's* client "as a go-between to circumvent Rule 4.2"); *cf.* D.C. Legal Eth. Op. 321 (2003) (concluding that, under Rules 5.3 and 8.4, respondent's counsel in a domestic violence matter must "make reasonable efforts to ensure that the non-lawyer assistants, including investigators, conduct themselves in a

manner consistent with the D.C. Rules" when communicating with an unrepresented petitioner).

3. Rule 8.4(a); *see also* Rule 5.3(c) ("A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) The lawyer requests or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) The lawyer has direct supervisory authority over the person, or is a partner or a lawyer who individually or together with other lawyers possess comparable managerial authority in the law firm or government agency in which the person is employed, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.").

4. The Committee has previously noted that Comment [2] to Rule 4.2 does not create an exception to Rule 4.2. D.C. Legal Eth. Op. 258 (1995). It "merely reflects the American jurisprudential tradition that parties generally are free to communicate directly with each other. This tradition is based on the belief that parties have a right to settle their disputes without the involvement or consent of their lawyers." D.C. Legal Eth. Op. 258 (discussing comment formerly numbered as Comment [1]).

5. Rule 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation [subject to certain limits] and shall consult with the client as to the means by which they are to be pursued."); Rule 1.3(a) ("A lawyer shall represent a client zealously and diligently within the bounds of the law.").

6. Rule 1.3(a), Rule 1.3(b)(1).

7. Rule 1.4(b).

8. Conversely, there are relationships and disputes that are facially ill-suited for direct communications between the parties. These include relationships in which the relative bargaining power and sophistication of the parties are significantly disparate. As discussed below, direct communications should not be encouraged where they are likely to be overbearing or harassing.

9. If the lawyer believes the objective of the meeting is something other than finding common ground – on some aspect of the dispute or proceeding, if not on resolution of the matter entirely

– she should question whether the proposed meeting is permissible. If, for example, the client wants to solicit information from the opponent-party outside of the rules of discovery, he is free to do so on his own, but he should not be doing so at the instruction of counsel.

10. The lawyer may, however, share a copy of a binding document with the client and recommend that the client send or present it to his opponent-party if that document has already been provided to opposing counsel.

11. "A party cannot achieve a settlement from another uncounseled party through 'duress, harassment, or overbearing conduct'." D.C. Legal Eth. Op. 258 (1995) (citing *Lewis v. S.S. Baune*, 534 F.2d 1115, 1122 (3d Cir. 1976)).

12. *See, e.g.,* Cal. Eth. Op. 1993-131 (prohibiting party-to-party communications that originate with or are directed by attorney for one party; permitting such communications where counsel advises the client on communications originating with and directed by the client; explicitly prohibiting counsel from "drafting documents, correspondence, or other written materials . . . even if they are prepared at the request of the client"); Mass. Bar Ass'n Op. 11-03 (2011) (giving client general advice regarding party-to-party communication is permissible, but preparing and presenting a binding legal document directly to the opposing party is not permissible); State Bar of Mich. CI-1206 (1988) (reviewing and affirming earlier decision holding that lawyer may prepare and share a draft settlement document with client knowing that client will discuss it with – but not present it to obtain signature from – opponent-party; affirming that attorney cannot encourage client to "take action which might tend to interfere with the lawyer-client relationship of an adverse party"); Ass'n Bar of City of New York Eth. Op. 2002-3 ("where the client conceives the idea to communicate with a represented party, [our rules do] not preclude the lawyer from advising the client concerning the substance of the communication. The lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient.") Or. Eth. Op. 2005-147 ("even if [a client] initiates communication with [an opponent-party], [counsel for the client] must not instruct [the client] to convey a particular message").

13. James Podgers, *On Second Thought*, 98-JAN A.B.A. J. 21 (2012).

14. Martin Cole, *Scripting Contacts with Represented Persons*, 68-NOV Bench & B. Minn. 12

(2011) (expressly rejecting ABA 11-461); Vir. Legal Eth. Op. 1890 (2021) (affirming earlier opinions prohibiting counsel from scripting a client's communications with opponent-party or directing client to make contact with opponent-party).

15. The New York ethics rules permit a lawyer to draft papers for his client to present to an opponent-party, but expressly require *advance* notice to opposing counsel *before* any party-to-party communications take place. *Compare* N.Y. Rule of Prof. Conduct 4.2(b) *and* Comment [11].

16. *See, e.g.,* D.C. Legal Eth. Op. 280 (1998) (The concern regarding exploitation of a lay party "is not fully applicable in the governmental context because government officials generally are presumed to be sufficiently capable of resisting legal or policy arguments that are not proper and genuinely persuasive. Moreover, government officials, by virtue of their experience and expertise, should be competent to decide whether to engage in such discussions with opposing counsel without seeking legal advice or having a lawyer present.") In dealings with government officials, however, a lawyer does need to disclose the representation of the adverse client and matter.