133 ETHICAL DUTIES OF A LAWYER WHO IS PARTY TO A MATTER SPEAKING WITH A REPRESENED PARTY

Adopted October 27, 2017

Facts

A lawyer who is a party in a legal matter desires to discuss settlement with the opposing party without seeking the consent of the opposing party's lawyer. The lawyer/party does not represent any other party in the lawsuit.

Question Presented

May a lawyer who is a party in a legal matter communicate directly with a represented adverse party concerning the matter without the consent of the adverse party's lawyer?

Discussion

Rule 4.2 of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) provides that: "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."[1]

There are two scenarios to consider when applying Colo. RPC 4.2 to a lawyer who is a party to a case: (1) when the lawyer/party is representing himself or herself in the matter; and (2) when the lawyer/party is represented by counsel.[2] In the first instance, the Colorado Supreme Court Office of the Presiding Disciplinary Judge (OPDJ) recently held that a lawyer appearing *pro se* was acting as his own lawyer in the matter and, therefore, violated Rule 4.2 when he communicated directly with a represented adverse party.[3] The OPDJ specifically rejected the lawyer/party's argument that he was communicating with the opposing party as a *pro se* party, not as a lawyer "representing a client" under the plain language of the Rule.[4] The OPDJ concluded that Rule 4.2 applies to a lawyer's communication while acting *pro se*, based on relevant Colorado precedent, the weight of authority from other jurisdictions, and the OPDJ's assessment that such a conclusion supports the

[1] Colo. RPC 4.2 is identical to ABA Model Rule 4.2. Other states mentioned in this opinion likewise have adopted either the Model Rule *verbatim* or a materially similar version of the Model Rule.
[2] For purposes of this Opinion, it is assumed that the lawyer/party does not have the consent from the opposing party's lawyer to communicate about the subject matter of the case with opposing party nor is authorized or prohibited from such communication by law or a court order.
[3] *People v. Wollrab,* 16PDJ062 (Colo. O.P.D.J. 2017); *see also People v. Crews*, 901 P.2d 472 (Colo. 1995); *People v. Marquardt,* 03PDJ053 (Colo. O.P.D.J. 2003); *People v. Waitkus,* 02PDJ022 (Colo. O.P.D.J. 2002).
[4] *Wollrab*.

purposes of the rule.[5] Based on an ABA formal opinion, the OPDJ identified three purposes of Rule 4.2: (1) to provide protection of the represented person against overreaching by adverse counsel; (2) to safeguard the client-lawyer relationship from interference by adverse counsel; and (3) to reduce the likelihood that clients will disclose privileged or other information that might harm their interests.[6] The recent OPDJ decision is consistent with decisions in other jurisdictions, which have unanimously held that when a lawyer represents his own interest in a case, Rule 4.2 prohibits the lawyer/party from discussing the matter with another party who is represented by counsel.[7]

Only two jurisdictions have addressed the facts in the second scenario—when the lawyer/party is represented by counsel—and this case law is split. The Connecticut Supreme Court held that a lawyer/party who had hired an attorney did not violate Rule 4.2 when he sent correspondence regarding the case directly to the opposing party who was also represented by counsel.[8] This opinion has been criticized in some states and an intermediated appellate court in Texas rejected its conclusion on the basis that it allowed a lawyer/party to "do that which he would otherwise be unable to do if he represented himself, by simply employing a counsel of record."[9]

No Colorado decision has directly addressed the second scenario. The Colorado Bar Association Ethics Committee (Committee) concludes that Rule 4.2 does not prohibit a lawyer/party from discussing the matter with a represented adverse party when the lawyer/party is also represented by counsel. The Committee relies on the basic canon of statutory construction: if the plain language permits, , then a rule "should be construed as written, giving full effect to the words chosen, as it is presumed that the General Assembly meant what it clearly said."[10] This rule of statutory construction applies equally to court rules.[11] Rule 4.2's prohibition against communication with a represented adverse party is qualified by the phrase, "when representing a client." When a lawyer/party is himself or herself represented by counsel, then the lawyer/party is not acting as his or her own counsel and is not communicating with a represented adverse party while "representing a client."[12]

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[5] *Id.*
[6] ABA Standing Comm. on Ethics and Prof. Resp., Formal Op. 95-396, "Communications with Represented Persons" (1995).
[7] *See Runsvold v. Idaho State Bar*, 925 P.2d 1118 (Idaho 1996); *In re Segall*, 509 N.E.2d 988 (Ill. 1987); *In re Discipline of Schaefer*, 25 P.3d 191 (Nev. 2001), *In re Disciplinary Proceeding against Haley*, 126 P.3d 1262 (Wash. 2006); *Comm. on Legal Ethics v. Simmons*, 399 S.E.2d 894 (W. Va. 1990); *Sandstrom v. Sandstrom*, 880 P.2d 103 (Wyo. 1994).
[8] *Pinsky v. Statewide Grievance Comm.*, 578 A.2d 1075, 1079 (Conn. 1990).
[9] *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 259 (Tex.App. Houston [14 Dist.] 1999); s*ee also Schaefer*, 25 P.3d at 199 (finding "[t]he lawyer still has an advantage over the average layperson, and the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se."); *Haley*, 126 P.3d at 1269 (noting the apparent discrepancy in holding that Rule 4.2 applies to a *pro se* lawyer/parties but not to a lawyer/party represented by counsel); *see generally Nieto,* 993 P.2d at 501 (stating "in construing a statute, we must seek to avoid an interpretation that leads to an absurd result"); § 2-4-201(1)(c) C.R.S. (2017) ("A just and reasonable result is intended.").
[10] *See State Dep't of Corrections v. Nieto,* 993 P.2d 493, 500 (2000); *see also* § 2-4-101 C.R.S. (2017) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage.").
[11] *See In re Marriage of Wiggins,* 279 P.3d 1, 7 ¶ 24 (Colo. 2012).
[12] *See generally Fasing v. LaFond,* 944 P.2d 608, 612 (Colo. App. 1997) ("an attorney seeks legal counsel as a client, not as an attorney")

Conclusion

Absent a court order to the contrary, a lawyer who is representing himself or herself in a legal matter may not communicate about the matter directly with a represented adverse party without the consent of the adverse party's lawyer. However, the same lawyer/party may communicate about the matter directly with a represented adverse party when the lawyer/party himself or herself is represented by counsel.