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COMMUNICATING WITH REPRESENTED PERSON FOR THE PURPOSE OF PROVIDING A “SECOND OPINION”

Adopted January 19, 2002.

Introduction

The Colorado Bar Association Ethics Committee (the “Committee”) has received inquiries from members of the bar regarding the ethical conduct of a lawyer (“Lawyer No. 2”) who is contacted by a person (the “Client”) Lawyer No. 2 knows is represented by counsel (“Lawyer No. 1”), when the Client requests a second legal opinion.

The issues stated below will be discussed within the context of the ethical questions raised in the following circumstance: The Client, who is currently represented by Lawyer No. 1 in connection with a pending or contemplated legal proceeding, transaction or other situation involving legal representation (the “Matter”) initiates communication with other counsel, Lawyer No. 2, in order to obtain advice or a second opinion concerning the Matter or a review of Lawyer No. 1’s representation of the Client in the Matter (collectively, the “Second Opinion”).

Issues

(1) Whether Lawyer No. 2 is ethically required to obtain the consent of Lawyer No. 1 before communicating with the Client about the Matter or before providing the Client with a Second Opinion; and

(2) Whether Lawyer No. 2 is ethically required to decline (or discontinue) representation of the Client regarding the Matter if the Client refuses to authorize Lawyer No. 2 to contact Lawyer No. 1 to discuss Lawyer No. 1’s representation of the Matter.

Scope and Purpose

The purpose of this opinion is to provide guidance to attorneys in evaluating the ethical propriety of communications with the Client where the communications are initiated by the Client for the purpose of obtaining a Second Opinion, and to identify the ethical issues that may confront Lawyer No. 2. This opinion does not purport to address considerations of professionalism or professional standards which may or may not apply to the circumstances presented in the Introduction noted above.

Syllabus

Rule 4.2 of the Colorado Rules of Professional Conduct (“Colo. RPC”) does not require Lawyer No. 2 to obtain the consent of Lawyer No. 1 in order to communicate with the Client concerning the Matter where the Client initiates the communication for the purpose of obtaining a Second Opinion. Colo. RPC Rule 4.2 does not apply to the circumstances presented in the Introduction of this Opinion. Lawyer No. 2, however, must take measures required to (i) avoid any conflicts of interest, and (ii) provide competent representation to the Client in extending a Second Opinion, considering any limitations on his knowledge of relevant facts.

Opinion

Rule 4.2 of the Colorado Rules of Professional Conduct

Rule 4.2 of the Colo. RPC governs attorneys’ communications with persons represented by counsel. Colo. RPC 4.2, “Communications with Person Represented by Counsel” provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so.

Colo. RPC 4.2 prohibits a lawyer, in the course of representing a client, from communicating about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, without the consent of the other lawyer. The essential purpose of the Rule is to prohibit *ex parte* contacts or communications between lawyers representing clients and persons or parties known to be represented in the matter by counsel unless such counsel consents. The Rule does not apply to the circumstance described in the Introduction. The Committee believes that Colo. RPC 4.2, by its terms, does not apply to the situation presented by the Client's request for a Second Opinion, because the party protected by Colo. RPC 4.2 is a person other than the Client.

The Committee further believes that an extension of the prohibitions of Colo. RPC 4.2 to the Second Opinion situations would infringe upon the Client's inherent right to seek advice or representation from counsel of the Client's choosing. The Committee believes the Client should be free to seek other or additional advice or opinions on the Matter, including opinions on the merit of previous advice or the competency of Lawyer No. 1's representation. Thus, it is the opinion of the Committee that it is not necessary for Lawyer No. 2 to obtain the consent of Lawyer No. 1 to communicate or consult with the Client for the purpose of providing a Second Opinion.

Colo. RPC 1.7 – Conflicts of Interest

In accepting employment by the Client for the purposes of rendering a Second Opinion, Lawyer No. 2 must, as in all cases, comply with the proscriptions of Colo. RPC 1.7 relating to conflicts of interest. In particular, Lawyer No. 2 must be careful to maintain his or her professional independence such that Lawyer No. 2's own interests in the possible representation of the Client in the Matter do not influence the nature of the advice or the Second Opinion.

If the Client contacts Lawyer No. 2 to discuss the Client's concerns about the competence of Lawyer No. 1's representation, Lawyer No. 2 may discuss these concerns with the Client without first obtaining the consent of Lawyer No. 1. Lawyer No. 2 should be careful to clarify the analyses and conclusions of the Client pertaining to Lawyer No. 1's conduct. Lawyer No. 2 should be familiar with the facts of the underlying matter as a means for clarifying analyses and conclusions reached by the Client regarding Lawyer No. 1's conduct and representation.

Colo. RPC 1.1 – Competence

Lawyer No. 2 also should be cognizant of, and give deference to, the requirements of Colo. RPC 1.1 that require Lawyer No. 2 to provide competent representation to the Client in providing the Second Opinion. Competent representation requires Lawyer No. 2 to possess the requisite legal knowledge and skill, and to employ the thoroughness and preparation reasonably necessary to extend the Second Opinion to the Client. Thus, Lawyer No. 2 must consider and evaluate the nature of the Second Opinion sought by the Client and whether, or to what extent, communication with Lawyer No. 1 concerning the Matter may be necessary or advisable in order to render a Second Opinion competently, pursuant to Colo. RPC 1.1.

For example, where Lawyer No. 2 is asked to provide a Second Opinion on the merits of a settlement offer made in pending litigation, or the soundness of the advice Lawyer No. 1 has given with respect to a settlement offer, Lawyer No. 2 must consider issues of liability, applicable defenses to liability, availability and admissibility of evidence, credibility of witnesses, recoverable damages and costs of trial, as well as other factors in rendering an opinion. It would be extremely difficult, if not impossible, to make such an evaluation and render a competent Second Opinion without communication and consultation with Lawyer No. 1 concerning the Matter and the basis for Lawyer No. 1's advice relating to the settlement offer. Likewise, Lawyer No. 2 may be unable to render a Second Opinion competently regarding a transaction such as the merger of two businesses or the acquisition of a business or real property without first discussing with Lawyer No. 1 the facts and support for decisions made by Lawyer No. 1 prior to the Client contacting Lawyer No. 2. When the Client, for whatever reason, refuses to authorize Lawyer No. 2's contact or communication with Lawyer No. 1 concerning the Matter for which the Second Opinion is sought, it may be impossible for Lawyer No. 2 to consider fully all relevant facts and circumstances necessary to

render competent representation required by Colo. RPC 1.1 in providing a Second Opinion. In such a case Lawyer No. 2 must either refrain from extending a Second Opinion, or clearly limit the scope of the Second Opinion to the facts and circumstances Lawyer No. 2 was able to obtain.

On the other hand, when the Second Opinion requested by a Client relates to a review of the legal issues involved in the Matter, Lawyer No. 2 may competently discuss the Matter with the Client and render a Second Opinion without obtaining the prior consent of Lawyer No. 1. For example, if Lawyer No. 1 told the Client that the law governing a particular tort action or business transaction allows or disallows a particular cause of action or course of conduct, and the Client does not like the governing law, Lawyer No. 2 may render an opinion regarding the existence and scope of such law. Such an opinion may not require extensive knowledge of the facts related to the underlying case when the issue presented is sufficiently objective and related to the existence of governing law.