

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-365
Issued: March 1994

Since the adoption of the Rules of Professional Conduct in 1990, the Kentucky Supreme Court has adopted various amendments, and made substantial revisions in 2009. For example, the opinion refers to Comment (3) to Rule to 4.2, which was renumbered to Comment (4) and to Rule 8.3, which was renumbered to Rule 8.4. See also Rule 2.4 entitled "Lawyer serving as third-party neutral." Lawyers should consult the current version of the rules and comments, SCR 3.130 (available at <http://www.kybar.org>), before relying on this opinion.

Question 1: Has a lawyer necessarily violated Rule 4.2 if his or her client talks to the opposing party?

Answer: No. But counsel should not deliberately circumvent a disciplinary Rule through another. See Rule 8.3.

Question 2: Must a divorce mediator attempt to ascertain that a participant is represented by counsel?

Answer: Yes.

OPINION

Regarding Question 1 see Rule 4.2 Comment [1]. The ABA has rescinded all opinions purporting to make such contacts per se violations of the Model Code or the Model Rules. However, such communications are usually unproductive if not counterproductive. Conventional wisdom suggests that the lawyer should discourage such contacts, but he or she cannot be responsible for a "violation" simply because his client makes such a contact. Furthermore, there are rare circumstances in which discussions between the parties can further the resolution of a controversy.

On the other hand, we must warn that a lawyer is not permitted to circumvent a disciplinary rule or attempt to do so through the acts of another. Rule 8.3(a). See also Comment [3] to Rule 4.2.

Regarding Questions 2, we refer the reader to KBA E-335 (1989). That Opinion refers to the ABA Standards of Practice for Divorce and Family Mediation. Those standards indicate that the mediator "shall" inform the participants of the need for independent legal counsel. It seems obvious that a mediator should make inquiry as to whether the participants already have legal counsel. It also seems to follow that such counsel should be notified of the mediation unless his or her client-participant has some objection.

The Committee has received a number of inquiries suggesting that some lawyers may be urging their divorce clients to obtain signatures on settlement agreements, or to rush the other

spouse into mediation, behind the back of opposing counsel. Such conduct may violate Rules 4.2 and 8.3. Such conduct may also undermine the validity of any agreement or settlement, although that is a legal question.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). The Rule provides that formal opinions are advisory only.