

Ethics Opinion

900703

QUESTION PRESENTED: Can a lawyer advise people seeking a second opinion on a matter in which they are currently represented by other counsel without violating Rule 4.2?

ANSWER: Yes.

ANALYSIS: Rule 4.2 evolved from DR 7-104(a)(1), which is entitled, "Communicating With One of Adverse Interest". Both rules essentially bar an attorney from communicating with someone known to be represented by counsel without that counsel's advice or consent.

The operative word in the title of the Disciplinary Rule is adverse. The rule was originally designed to protect client involved in litigation from making damaging omissions or signing rights away without benefit of the advice of his or her own counsel. Clients are historically unsophisticated about the tactics of attorneys in litigation, and will tell the opposing attorney everything if given the chance because they believe the cooperating will resolve the dispute more quickly. This rule, then, keeps attorneys from stepping over that boundary.

The Ethics Opinions related to Rule 4.2 all deal with various aspects of the litigation question. None of the Ethics Opinions have ever addressed the situation where someone comes to an attorney for a second opinion during the course of a representation by another attorney, much the same way a patient would when confronted with a serious illness and several treatment options. So what is the appropriate and ethical response of an attorney in this position?

Doctors often recommend a patient obtain a second opinion when making a decision about treatment options. They want the patient to be well informed and not persuaded to make a decision just because that is what the doctor thinks is best. An attorney, however, does not generally advise a client to see another attorney in the middle of a representation. How, then, does a client go about getting a second opinion? Obviously, the attorney will not appreciate being second guessed. The client certainly does not want to tip his or her hand if all the client wants to do is get an objective, disinterested opinion.

The comments to the Rule provide us with very little guidance, but a large hurdle. The last line of comment 2 reads, "This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." From this, it would appear that a second opinion may be given only with the knowledge and consent of the first attorney.

The spirit of the rule is to protect the client from making disadvantageous admissions or agreements. A disinterested attorney contacted solely for the purpose of getting an objective opinion does not fit within the spirit of that protection. A phone call to the first attorney advising him or her of the situation would be polite. However, there appears no mandate in the Rule that this is necessary. If the attorney steps over the boundary of giving a second opinion, starts representing the client outright, then this Rule could give way to a charge of interference.

Until such time as this Rule is changed, or the comments are changed, or an ABA opinion is issued expanding the parameters of Rule 4.2, second opinions from a disinterested attorney where no interference in the course of the representation occurs will not be in violation of the Rule.

THIS OPINION IS ADVISORY ONLY