

# Ethics Opinion

## 951229

**FACTS:** Attorney is defending a personal injury action on behalf of an insurance company for its insured. The plaintiffs are husband and wife, and are represented by counsel. Attorney hired a private detective with whom attorney had no previous relationship. Attorney requested that the detective conduct activity checks on the plaintiffs and *specifically instructed the detective not to contact the plaintiffs under a pretext*, as the detective had suggested. However, the detective later engaged the plaintiffs in a conversation under a pretext. From this conversation, the detective learned that both plaintiffs have had significant back and neck pain prior to the accident in question. The detective relayed this information to attorney.

### **QUESTIONS PRESENTED:**

1. Where an independent contractor communicates directly with a represented party, contrary to the attorney's direction, has the attorney violated Rule 4.2, prohibiting communication with a party known to be represented?
2. If there is a violation or an appearance of impropriety, is the attorney obligated under Rule 8.3 to report himself to the ethics committee?
3. Is there a method for an attorney to voluntarily cure an ethical violation in a case such as this where any violation was purely unintentional?
4. Is there a violation of the Rules in using the information acquired?
5. Is there an obligation under the Rules to disclose the occurrence to opposing counsel (excluding discovery issues)?

### **SHORT ANSWERS:**

1. No.
2. No. There is no obligation to report to the ethics committee.
3. Yes, the methods are discussed in issues 4 and 5.
4. Yes.
5. Attorney's receipt of confidential information under these circumstances triggers a procedure that attorney must follow: Attorney must make a limited disclosure to ( the court and opposing counsel, allowing the court to determine whether attorney may use the information acquired.

### **DISCUSSION:**

**Issue 1.** Attorney has not violated Rule 4.2, which 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."*

Implicit in Rule 4.2 is that the attorney act knowingly. "Know" as used in Rule 4.2 does not mean "reasonably should know." The Rule does not imply a duty to inquire. Nonetheless, actual knowledge may be inferred from the circumstances. A lawyer may not avoid the Rule's bar against communication with a represented person simply by closing his eyes to the obvious. However, there is no violation of the Rule where, as here, the attorney knew the party was represented and specifically directed his detective to not speak with the party. The detective's violation of the attorney's direction was without the attorney's knowledge. As such, the violation cannot be attributed to the attorney.

The court in *Stagg v. New York Health and Hospitals Corporation*, 556 N.Y.S 2d 779 (A.D. 2 Dept. 1990), confronted facts nearly identical to those presented here. There, the court denied a motion to strike the testimony of an investigator who acted as did the detective in this opinion, holding that the attorney did not violate DR 7-104(A)(1) (one of the precursors to Rule 4.2), explaining:

*There is no proof that counsel for the defendant, either directly or through communications with the investigative agency, instructed the investigator in this case to speak with the plaintiff and misrepresent his identity. Absent such evidence, the plaintiff failed to sustain his claim of ethical violations.*

*Stagg*, 556 N.Y.S. 2d at 780; see also *Barham v. Turner Construction Co.*, 803 S.W. 2d 731 (Tex. App. 1990) (where attorney did not instruct investigator to contact opposing party outside presence of counsel, such contact did not result in attorney violation of DR 7-104).

Had the detective's conversation with the opposing parties been at the direction of the attorney, then Rule 4.2 would have been violated, as the act of contact is attributable to the attorney through Rule 8.4. Generally stated, Rule 4.2 prohibits an attorney from communicating with an opposing, represented party, and Rule 8.4 prohibits the attorney from circumventing Rule 4.2 through the use of a third person. Rule 5.3(c) is also involved in that it defines the lawyer's responsibilities concerning non-lawyer assistants<sup>1</sup>.

Here, attorney did not instruct his investigator to contact plaintiffs outside the presence of their counsel. In fact, attorney specifically instructed his investigator *not to contact plaintiffs under any circumstances*. Attorney took reasonable action to conform his conduct, as well as that of his investigator, to the Rules. Therefore, attorney has not violated 4.2, nor has he violated 8.4 or 5.3.

**Issue 2.** An attorney's obligation to report violations of the Rules are defined in Rule 8.3. First, a lawyer has no duty to report his or her own violation of the Rules, as the Rule only provides for reporting other lawyer or judge misconduct. Second, where, as here, the attorney has not violated

any ethical Rules, there is no reason for the attorney or anyone else to inform the Commission on Practice of this incident . (The duty to inform "the appropriate professional authority" means that a report be made to the Commission on Practice, Montana's disciplinary authority. The Ethics Committee is charged with interpreting the Rules, not enforcing them.) Additionally, beyond the absence of an affirmative duty in the Rules, there are legal defenses in the protection afforded by the Fifth Amendment. Generally speaking, a lawyer may not be penalized for failure to furnish information to a disciplinary authority when his failure is predicated upon his constitutional right not to incriminate himself.

Rule 8.3 provides, in pertinent part:

*(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority. (emphasis added).*

For a discussion of the 5th Amendment's protection against self-incrimination as applied to attorneys, see *Spevck v. Klein*, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed. 2d 574 (1967)

**Issues 3, 4 & 5.** We will consider the issues of whether the attorney may use the information obtained by the investigator and whether the attorney must inform opposing counsel of his possession of such information together, as they are addressed in our discussion of the proper procedure for an attorney to follow in a situation such as this.

Research in the area of law known as inadvertent disclosure has revealed a procedure which, in modified form, we adopt here. In ABA Formal Opinion 94-382, the Committee considered the extent to which a receiving attorney could use confidential materials intentionally given to him by a person unauthorized to do so. The Committee, after balancing the need to uphold confidentiality protections against an absolute bar on the use of received confidential materials, developed the following procedure: Upon receipt of an opposing party's confidential materials, the receiving lawyer should:

- (a) refrain from reviewing materials which are probably privileged or confidential, any further than is necessary to determine how appropriately to proceed;*
- (b) notify the adverse party or the party's lawyer that the receiving lawyer possesses such documents;*
- (c) follow the instructions of the adverse party's lawyer; or*
- (d) in the case of a dispute, refrain from using the materials until a definitive resolution of the proper disposition of the materials is obtained from a court.*

Based loosely on the inadvertent disclosure procedure, and considering the factual situation before us, we reach the following conclusion: When an independent contractor hired by an attorney obtains information through direct communication (contrary to the attorney's explicit instructions) with an opposing party known to be represented by counsel, and then verbally relays this information to the attorney, the attorney must follow a two-step procedure. First, the attorney must notify opposing counsel that he has received information which will require

judicial review before the extent of its use can be determined. Second, the attorney must refrain from using such information until a definitive resolution of the proper disposition of the materials is obtained from a court.

We feel it necessary to clarify certain aspects of the procedure we have established here. First, the receiving attorney need not, although he may at his discretion, disclose to opposing counsel the substance of the information. Additionally, the receiving attorney need not divulge the information to his client. If the attorney chooses to inform the client, and the client does not allow the attorney to go to court with the information, the attorney may withdraw from representation. We so hold in accordance with Rule 3.3, Candor Toward the Tribunal. Finally, we note that it is our opinion, based on Rule 3.3, that upon a court's request, the receiving attorney must divulge the nature and substance of the information received.

Like the inadvertent disclosure procedure adopted in ABA Formal Opinion 94-382, this procedure strikes a balance between confidentiality protections and an absolute bar on the use of received confidential materials. We have not promulgated an iron clad Rule that cuts sharply - or unfairly - one way or the other; rather, we have formulated a procedure for attorneys to follow in which particular circumstances of a certain case may be considered by a court before the disposition of information is determined. While we emphasize that application of the procedure we have established today is limited to situations where, contrary to an attorney's express instructions, his investigator contacts an opposing party outside the presence of counsel and relays confidential information thus obtained to the attorney, we recognize that this situation will arise in many different factual contexts and feel that our procedure is flexible enough to account for such nuances accordingly.

**CONCLUSIONS:** First, an attorney has not violated Rules 4.2, 5.3, or 8.4 if he receives information from his investigator which was obtained, contrary to the attorney's instructions, through the investigator's contact with the opposing party outside the presence of counsel. Second, the attorney has no duty to report the incident to the Commission on Practice. Finally, upon receipt of such information, the attorney must follow the following procedure:

- (a) He must notify opposing counsel that he has received information which will require judicial review before the extent of its use can be determined;
- (b) He must refrain from using such information until a definitive resolution of the proper disposition of the information is obtained from a court.

**Note:** This is the majority opinion of the State Bar of Montana's Ethics Committee, based on a 6-2 vote.

### **THIS OPINION IS ADVISORY ONLY**

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#### **ENDNOTES**

1. Rule 8.4 states in pertinent part:

*It is professional misconduct for a lawyer to: (a) violate 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."*

2. Rule 5.3 states in pertinent part:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

*(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligation of the lawyer;*

*(b) 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 obligation of the lawyer; and*

*(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 orders or, with the knowledge of the specific conduct, ratified the conduct involved.*