

## Utah Ethics Opinions

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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 110

Approved February 25, 1993

**Issue:** May an attorney give a "second opinion" on a legal matter, when approached by a non-client who is represented by counsel?

**Opinion:** Rule 4.2 of the Rules of Professional Conduct prohibits a lawyer, "[i]n representing a client," from "communicat[ing] about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter." A lawyer does not violate the letter or purposes of this rule by rendering a second opinion on a legal matter, when the lawyer is not "representing a client" on the same subject. However, the lawyer should make every effort neither to impair the first attorney-client relationship nor to use the consultation as a means of soliciting the represented party.

**Rationale:** Rule 4.2 of the Rules of Professional Conduct prohibits a lawyer, in representing a client, from communicating with a party the lawyer knows is 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." The main thrust of this rule is "to prevent situations in which a represented party may be taken advantage of by adverse counsel; . . ."1 Of course, an attorney cannot give advice to an unrepresented person with the exception of suggesting that he or she seek counsel.2

A lawyer does not violate the letter or purposes of Rule 4.2 by rendering a second opinion to a represented party, when the lawyer is not "representing a client" in the same matter. Under its express terms, Rule 4.2 applies only to situations in which the lawyer is "representing a client" in making the communications. Moreover, the situation is not one "in which [the] represented party may be taken advantage of by adverse counsel; . . ."3 The Ethics Advisory Opinion Committee is, therefore, of the view that an attorney does not violate the Rules of Professional Conduct by rendering a second opinion, when the lawyer is not representing a client in the same matter.

This conclusion is supported by *In re Mettler*,4 where the

Supreme Court of Oregon addressed the scope of DR7-104(A)(1), the predecessor to Rule 4.2. DR7-104(A) provided:

During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation . . . with a person he knows to be represented by a lawyer on that subject . . .

The court concluded that the phrase "during the course of his representation of a client" acts "as a threshold requirement for unethical conduct" and that a lawyer, therefore, cannot violate the rule unless he or she communicates with a represented person in the course of representing a client.5

This conclusion is also consistent with the ethics advisory opinions of other jurisdictions. In 1987, Kentucky considered the issue and concluded that a lawyer may provide legal advice to a person who is represented by counsel and is seeking a second opinion. The opinion cautioned, however, that the lawyer must make every effort neither to impair the first relationship nor to use the consultation as a means of soliciting the client. The opinion also suggested that the lawyer should obtain the party's consent to consult the first lawyer so that all significant facts can be taken into account in rendering the second opinion.6 In Philadelphia, a lawyer who is approached by a represented party may ask the party to review how his or her present lawyer is handling the case. However, the opinion advises lawyers to be prudent in questioning the represented parties and to exercise discretion in evaluating the work of other lawyers.7

The prudential concerns noted in these opinions, while not expressly addressed in the Rules of Professional Conduct, are consistent with the spirit of the rules as well as the candor, discretion, and fair dealing that should characterize the legal profession. As second opinions become more acceptable, a policy of disclosure to the first attorney could prevent undue influence or overreaching by the attorney rendering the second opinion. Further, an attorney may be able to give a better evaluation if he or she communicates with the first attorney as well as with the client. The purposes of Rule 4.2, however, are not served by restricting an individual's ability to discuss his or her case with an attorney who is not connected with the matter.

## Footnotes

1. *Wright v. Group Health Hosp.*, 103 Wash. 2d 192, 691 P.2d 564, 567 (1984) (en banc) (construing Code of

Professional Responsibility DR7-104(A)(1).

2. Rules of Professional Conduct 4.3(a).

3. 691 P.2d at 567.

4. 305 Or. 12, 748 P.2d 1010 (1988).

5. *Id.* at 1011-12.

6. Kentucky Ethics Opinion No. 325 (1987).

7. Philadelphia, Pa., Bar Ethics Opinion No. 86-137.

Rule Cited:

4.2