

Ethics Advisory Opinion Committee

Ethics Opinion 22-06

Issued November 8, 2022

ISSUE

1. Is it a violation of the Utah Rules of Professional Conduct (the “Rules”) for a lawyer to coach a client during the client’s telephone conversation with a third-party, who the lawyer knows is represented by another lawyer, and conversation relates to a dispute between the third-party and some other party unrelated to the client?

ANSWER

2. It is a violation of Rule 4.2 of the Rules, as well as Rules 4.1 and 8.4(c), for a lawyer to coach a client during the client’s telephone conversation with a third-party regarding when the lawyer knows the third-party is represented by a lawyer regarding the subject of the conversation.

FACTS

3. The lawyer for Party A attends, causes to be recorded, and coaches Party A during Party A’s telephone conversation with Party B, relating to an existing matter between the third-party and an unrelated party. The lawyer for Party A knows that Party B is represented by a lawyer in the matter subject to the conversation. Party A does not inform the Party B of the presence of the attorney for Party A; nor has the lawyer for Party B consented to lawyer for Party A communicating with Party B.

DISCUSSION

4. Subject to some exceptions and limitations that are not pertinent to this opinion, Rule 4.2 of the Rules provides that “[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by a legal professional in the matter,” without consent of the other lawyer.

5. Comment 6 to Rule 4.2 provides in part:

A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.

6. Comment 6 makes clear that clients of lawyers may communicate with one another regarding the subject matter of a dispute. *See also* Or. Formal Op. 2005-147 (“Client A and Client B have a right to speak directly to each other that Lawyer A may not abridge.”). It is likewise not a violation of Rule 4.2 for the lawyer to advise the client that the client may communicate with the opposing represented party. *See* Hazard, Hodes & Jarvis “The Law of Lawyering” § 41.03 (4th Ed. 2019); ABA Formal Opinion 92-362 (“Likewise, the offeror-party's lawyer has a duty to that party to discuss not only the limits on the lawyer's ability to communicate with the offeree-party, but also the freedom of the offeror-party to communicate with the opposing offeree-party.”).

7. Although a lawyer may advise the client that the client may speak with the opposing party even if represented, there is a limitation on the degree of the lawyer's involvement with the communication. Comment 6 cites to Rule 8.4(a). Rule 8.4(a) provides: “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....” Accordingly, the reference to Rule 8.4(a) suggests that the lawyer is prohibited from communicating through the client with the adverse party who is represented.

8. The question becomes how involved the lawyer can be in the direct communications between parties represented by a lawyer. There is some debate in the literature and cases regarding the extent of a lawyer’s involvement in the communications between the client and another represented party before there is a violation of Rule 4.2 through the prohibition contained in Rule 8.4(a). What is clear is that the lawyer cannot script the communication between client and adverse party. *See* Or. Formal Op. 2005-147 (“Nevertheless, even if Client A initiates the communication with Client B, a represented adverse party, Lawyer A must not instruct Client A to convey a particular message because Oregon RPC 8.4(a) provides that a lawyer cannot violate the Oregon Rules of Professional Conduct ‘through the acts of another.’”); Cal. Formal Opinion No. 1993-131 (concerning a similar but not identical rule: “When the content of the communication to be had with the opposing party originates with or is directed by the attorney, it is prohibited by Rule 2-100. Thus, an attorney is prohibited from drafting documents, correspondence, or other written materials, to be delivered to an opposing party represented by counsel even if they are prepared at the request of the client, are conveyed by the client and appear to be from the client rather than the attorney.”); *Miano v. AC & R Advert., Inc.*, 148 F.R.D. 68, 89 (S.D.N.Y.), *as amended* (Mar. 4, 1993), *adopted*, 834 F. Supp. 632 (S.D.N.Y. 1993) (“Here, Meiorowitz did not suggest, plan or supervise what Miano was doing, and what Miano was doing was not illegal.”); *McClelland v. Blazin' Wings, Inc.*, 675 F. Supp. 2d 1074, 1077 (D. Colo. 2009) (“[H]ere is no allegation that the plaintiff’s lawyers violated Rule 4.2 by personally contacting Mehas. Instead, the defendant claims that the plaintiff’s lawyers engaged Cinquanta, who violated the rule.”).

9. In the circumstances described above, it is our opinion that the extent of the involvement of the attorney for Party A substantially crossed the line established by the prohibition in Rule 4.2 through the use of the client as a conduit, which circumvents the proscription in Rule 8.4(a). Although a “lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make,” that does not include the lawyer’s active involvement in the substance of the communication.¹

10. The circumstances also constitute a violation of Rule 4.1. “Truthfulness in Statements to Others”, and Rule 8.4(c). “Misconduct.” Rule 4.1 states:

In the course of representing a client a lawyer shall not knowingly:

- (a) Make a false statement of material fact or law to a third person; or
- (b) Fail to disclose a material fact, when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 8.4(c) provides: “It is professional misconduct for a lawyer to: ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” The lawyer’s failure to reveal (or the lawyer’s failure to insist that Party A reveal), the lawyer’s presence during the conversation and that the lawyer is actively involved, is misleading and dishonest because of the failure to identify the actual participants in the conversation.

11. The court in *Scranton Prod., Inc. v. Bobrick Washroom Equip., Inc.*, 190 F. Supp. 3d 419, 425 (M.D. Pa. 2016) found a violation of Rule 8.4(c) involving facts similar to this matter. Prior to the commencement of litigation, the president of Scranton Products (“Scranton”) initiated a call with the president of Bobrick Washroom Equipment, Inc. (“Bobrick”) to discuss

¹ The Committee has already issued an opinion on unilaterally recording a conversation, Utah Opinion No. 96-04, and will not be addressed in this Opinion.

the parties' ongoing dispute. The attorney for Scranton was in the room and listened to the conversation and took notes. The attorney had advised his client before the conversation by providing “talking points.” Both Scranton and its attorney believed that Bobrick was represented, which it was. Scranton’s attorney claimed that he found it unnecessary to disclose his presence because he “was just there to witness the call” and “wasn't participating on the call” or “making any statements.” *Id.* The court concluded that “there is insufficient evidence, on the record thus far,” that the lawyer directed or caused Scranton president to communicate with Bobrick in violation of Rules 4.2 and 8.4(a). *Id.* at 430. The court did refer the matter to the appropriate disciplinary authorities for investigation.

12. The Scranton court did find a violation of Rule 8.4(c), and stated: “At bottom, [the lawyer’s] conduct warrants a conclusion that he knowingly or, at a minimum, recklessly engaged in deceitful and dishonest conduct, and therefore he violated Rule 8.4(c)'s proscription on attorney dishonesty and deceit. *Id.* at 432. *See also McClelland v. Blazin' Wings, Inc.*, 675 F. Supp. 2d 1074, 1079 (D. Colo. 2009) (“Cinquanta's statement at the beginning of the Mehas' interview identifying himself as “Daril Cinquanta the investigator” is a partially true but misleading statement which is the equivalent of a false statement condemned by Rule 4.1(a). In particular, Cinquanta failed to identify himself as an investigator engaged by plaintiff's counsel in connection with a lawsuit against Mehas' employer.”).

CONCLUSION

13. It is our opinion that a lawyer coaching a client in a communication with a third party who is represented by a lawyer regarding the subject matter of the communication is violating the prohibition of Rule 4.2 that “a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by a legal professional in the

matter,” without consent of the other lawyer. Additionally, such coaching under the circumstances described above is a violation of Rules 4.1 and 8.4(c) because of the inherent misrepresentation regarding the parties participating in the conversation.