



Alerts

Lawyers May Influence Their Clients' Communications With Represented Parties

October 13, 2011

Lawyers for the Profession® Alert

ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion No. 11-461 (2011)

Brief Summary

The American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility has concluded that lawyers may give substantial assistance to their clients regarding their clients' communications with represented parties, regardless of who conceives of the idea of communicating with the represented party. Such advice must not, however, result in overreaching.

Complete Summary

The Standing Committee clarified the extent to which a lawyer may advise a client regarding the client's communications with a represented party. The starting point for the Standing Committee's analysis was ABA Model Rules of Professional Responsibility 4.2 and 8.4(a), which generally prevent an attorney from communicating with a represented party either directly or through an agent. The Standing Committee also discussed when and under what circumstances a lawyer may suggest that his or her client communicate directly with a represented party, and noted that such a principle is not uniformly accepted. Here, the Standing Committee went a step further and addressed the scope of assistance and advice an attorney may give to the client regarding the communication.

The Standing Committee opined that lawyers may give substantial advice to their clients regarding substantive communications with opposing parties. However, such advice must not result in overreaching by, for example: securing an enforceable obligation, obtaining confidential information, or obtaining an admission against interest from the opposing party. Finally, the Standing Committee noted that its opinion did not address situations in which attorneys advise clients regarding the use of an investigator or agent to gather information from a represented person.

Significance of Opinion

This formal opinion attempts to clarify the extent to which lawyers may influence their clients' communications with represented parties. Although this opinion allows attorneys a substantial amount of influence over such communications,

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there is still authority in many states indicating that lawyers are more restricted than this formal opinion would suggest.

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