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The Legal Ethics Project. Supporting professionalism with information.

Q: Dear Ethics Lawyer,

I represent a company in an effort to settle an employee's discrimination claim. The employee's lawyer seems to be on a crusade against the company, and appears to have no interest in settlement. Her strategy is to seek to try the matter in order to boost her profile for other cases, whether or not that is in her client's best interests. The company suspects she is not adequately communicating with her client about its position and generous offer. My client contact has always had a good relationship with the employee and wants me to prepare specific talking points to use to approach the employee directly. May I do so?

A: As counsel for the company, you cannot communicate with the employee, a represented party, without the consent of opposing counsel. Model Rule 4.2. Rule 8.4(a) also prohibits the lawyer from violating the rules "through the acts of another." But, comment 4 to Rule 4.2 (added subsequent to the original version) now states that "[p]arties 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."

So, where is the line in this situation between improperly communicating "through the acts of" the client v. "advising a client concerning a communication?" ABA Formal Ethics Op. 92-362 (1992) counsels that Rule 4.2 does not prohibit a lawyer in this situation from advising the lawyer's client on the client's ability to communicate directly with the opposing party about a settlement offer, or about the most effective method of doing so. More recently, ABA Formal Ethics Op. 11-461 ("ABA Op. 11-461")(2011) surveyed a mixed landscape of cases and ethics opinions, concluding that a lawyer may advise a client of the client's right to communicate with a represented party, and may assist the client in the substance of any proposed communication, even on the initiative of the lawyer, i.e., the communication does not have to be the idea of the client.

While this provides an answer to the question, it may not be dispositive for you. You must check the cases and opinions in your relevant jurisdiction—the Committee issuing ABA Op.11-461 acknowledged that decisions and opinions in some states are contrary to both of the ABA opinions, to the effect that counsel violates the rule by "encouraging or failing to discourage a client speaking directly to the other party" and/or that "a lawyer may not 'script' or 'mastermind' a client's communication with a represented person."

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by Mark Hinderks, former managing partner and counsel to an AmLaw 132 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's Legal Ethics & Professional Responsibility practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.