

ADVISORY ETHICS OPINION 2001-01

SYNOPSIS:

An attorney may communicate with a client seeking alternative representation without consent from the attorney appointed to represent the client.

FACTS:

Attorney A has been appointed as attorney for a proposed ward in a guardianship pending in a northern Vermont county. The guardianship hearing has not yet taken place. Several of the proposed ward's children object to the guardianship proceeding and do not wish to testify against their mother, who is the proposed ward. One of the children is the proposed guardian. The other children object to the proposed guardian and object to the guardianship taking place. The children who object to the choice of guardian and who wish to block the guardianship from occurring, contact Attorney B. They explain the circumstances of the case and ask Attorney B to meet with the proposed ward. Attorney B makes it clear that if he were to meet with the proposed ward, the meeting would be in private and that he would only represent the proposed ward in defending against the guardianship if that is her desire. Attorney B chooses to meet with the proposed ward.

The family members who are disputing the guardianship deliver the proposed ward to Attorney B. Attorney B determines that the proposed ward was oriented as to time and place and that the proposed ward was able to give clear directions as to what she wanted to occur with the guardianship.

The guardianship hearing had not occurred and that Attorney B's judgment was that the proposed ward had the right to seek alternative counsel for the purpose of discussing the guardianship.

QUESTIONS PRESENTED:

1. Was Attorney B obligated to obtain the consent of Attorney A prior to meeting the proposed ward?
2. Could Attorney B have met with the proposed ward even if Attorney A did not consent to the meeting?

Relevant Provisions of the Vermont Rules of Professional Conduct

Rule 4.2 of the Model Rules of Professional Conduct adopted by the State of Vermont states as follows: "In representing a client, a lawyer shall not communicate about the subject of the representation with the person 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."

ANALYSIS:

Rule 4.2 applies an anti-contact rule to all represented persons not merely parties to existing litigation. However, by its plain language, the rule is not specifically limited to communications with adverse parties but applies to any representation. The Professional Conduct Board and the Vermont Supreme Court have consistently applied the disciplinary rule only in situations involving communications with parties with adverse interests. e.g., In Re: Illuzzi, ___, Vt. ___, In Re: Smith, 132 P.C.B. (April 2, 1999), In Re: Illuzzi, P.C.B. 20, November 1, 1991. Although the ABA redrafted Rule 4.2 in 1995 to clarify that the anti-contact rule apply to all represented persons, not merely parties to existing litigation, there are no comments or reporters notes addressing contact where the lawyer is approached by the client and otherwise has no involvement in the representation. Application of the rule to require prior consent from court appointed counsel would tend to chill a client's right to obtain legal services and therefore, is inconsistent with the purpose of the rules to provide the broadest possible access to legal representation. Where, as here, a client seeks out alternative representation from a lawyer who does not represent any other parties or interests with respect to the representation. A rule requiring prior consent would tend to chill the client's free access to legal services. It is possible that the attorney already engaged in the representation could claim interference with advantageous relations which is an issue that exceeds the scope and purposes of this opinion.

CONCLUSION:

Where a client seeks alternative representation from an attorney who otherwise has no interest in the matter concerning which the client seeks representation, application of the anti-contact rule should not be required.