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Answering some common questions about SCR 20:4.2

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Scenario One – What's a matter?

Criminal Defense Lawyer represents Client in Matter A. Lawyer is aware that Witness may have exculpatory information. Witness, however, is represented by a different lawyer in Matter B. Lawyer contacts Witness' lawyer and asks for permission to send investigator to interview Witness, but lawyer refuses to grant such permission.

What should Criminal Defense lawyer do?

SCR 20:4.2 Communication with a person represented by counsel

(a)In representing a client, a lawyer shall not communicate about the subject of the representation with a 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 to do so by law or a court order.

(b) An otherwise unrepresented party to whom limited scope representation is being provided or has been provided in accordance with SCR 20:1.2(c) is considered to be unrepresented for purposes of this rule unless the lawyer providing limited scope representation notifies the opposing lawyer otherwise.

Wisconsin Opinion EI-17-04

The Rule and comment make plain that the prohibition contained in SCR 20:4.2 applies only to a person or party represented in the same matter in which the contacting lawyer represents a client and prohibits communication about that matter. Thus, for example, a lawyer who represents a client charged with attempted homicide is free to contact a witness who is represented in connection with an unrelated burglary charge without the consent of the lawyer who represents the witness on the burglary charge. Lawyers are free to communicate with represented persons concerning matters outside the scope of the representation.

(footnotes omitted)

Wisconsin Opinion EI-17-04, footnote 3

Indeed, lawyers may be obligated to contact witnesses who are represented in different matters. In State v. Reno, 2017 WL 5077948, the Wisconsin court of appeals upheld a finding that a lawyer provided ineffective assistance of counsel because the lawyer failed to interview or subpoena an important witness who was represented on a different matter because the lawyer mistakenly believed he was prohibited from doing so by SCR 20:4.2.

State v. Reno 2017 WL 5077948 (2018) Unpublished

¶26 We do not find Maloney instructive under this set of facts. The Maloney court very narrowly decided the applicability of the no contact rule to the pre-charging investigation stage. The set of facts here deal with counsel's ability to interview, and perhaps subpoena, an eyewitness in a criminal proceeding. SCR 20:4.2 is neither unsettled nor unclear as to this issue. The rule prohibits a lawyer from communicating with a represented person about the subject of the representation. A.A. was charged with misdemeanor counts of prostitution and cocaine possession. The dates, locations, and subject matters of A.A.'s counsel's representation differed from Reno's case. Moreover, A.A. was not a codefendant in Reno's case and the State asserted that it was unlikely to prosecute A.A. with anything relating to Reno's case. Reno and A.A. were represented in separate and distinct matters. Accordingly, Reno's counsel had no interest in A.A.'s case or her counsel's representation of her in that matter. We conclude that Reno's trial counsel was not precluded by SCR 20:4.2 from interviewing A.A. or calling A.A. as a witness in Reno's trial.

State v. Reno 2017 WL 5077948 (2018) Unpublished

¶30 Counsel was aware that there would have been a discrepancy between N.B.'s testimony and what A.A. would have testified about because Reno was adamant that A.A. testify at Reno's trial. Indeed, A.A. testified at the postconviction hearing that she was willing to testify. Any hesitation counsel had about the applicability of SCR 20:4.2 could have easily been resolved. SCR 20:4.2 specifically provides for contact with a represented person if it is "authorized by a court order." See id. American Bar Association comment six to the rule underscores the obvious: "A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order." See, SCR 20:4.2, Comment 6. Counsel could have sought a court order to sort out questions regarding access to A.A. Counsel admitted that it did not occur to him to do so.

¶31 We conclude that counsel's failure to seek a court order allowing contact with A.A., and perhaps calling her as a witness, fell below an objective standard of reasonableness. See State v. Jeannie M.P., 2005 WI App 183, ¶25, 286 Wis. 2d 721, 703 N.W.2d 694. Counsel did not articulate a strategic reason for failing to seek to obtain access to A.A.; indeed, counsel did not make a decision at all. Counsel's failure to act was based upon being unaware of the plain language of a supreme court rule. This case turned on witness credibility; thus, trial counsel had a duty to investigate and present impeaching evidence when counsel knew or should have known of its existence. See id., ¶11.

Scenario Two – what's a matter? cont'd

Lawyer represents client who was injured in a traffic accident caused by a drunk driver. The drunk driver was convicted of a criminal OWI offense and is now represented by counsel in an appeal of the conviction. As far as Lawyer knows, however, drunk driver is not represented with respect to any civil claim arising out of the accident.

May lawyer contact drunk driver without the consent of drunk driver's appellate counsel?

Wisconsin Opinion EI-17-04

SCR 20:4.2 also does not prohibit a lawyer from contacting a person who is represented on a different, but related, matter. It is worth noting that SCR 20:4.2(a) prohibits communication about the matter in which the person is represented, but the Rule does not forbid communications about related matters, as long as the person is not represented in the related matters.4 Thus, a person may face criminal charges and a civil lawsuit arising from the same underlying facts, but the person may have counsel in connection with the criminal charges, but be unrepresented in the civil lawsuit. In such a situation, a lawyer representing the opposing party in the civil lawsuit may contact the person without the consent of the lawyer who represents the person in connection with the criminal charges.

Courts have consistently interpreted the Rule this way, particularly in criminal matters. For example, in People v. Santiago, 925 N.E.2d 1122, (Ill. 2010), the Illinois Supreme Court held that prosecutors did not violate Rule 4.2 by interviewing a mother who was a suspect in a child abuse case without notifying the lawyer who had been appointed to represent her in a separate child protection proceeding arising from the same underlying facts.

People v. Santiago, 925 N.E.2d 1122, (Ill. 2010)

We agree with the State that a plain reading of Rule 4.2 demonstrates the rule was not violated in this case. Defendant focuses on the phrases “the subject of the representation” and “that matter” in arguing that the “matter” and “the subject of the representation” was the injury to S.H. However, defendant fails to reconcile her interpretation of Rule 4.2 with the language of the rule as a whole.

The beginning language of Rule 4.2 provides that, “[d]uring the course of representing a client” a lawyer shall not communicate on the subject of the representation with “a party the lawyer knows to be represented by another lawyer in that matter” unless the first lawyer obtains the prior consent of the “lawyer representing such other party.” (Emphases added.) 134 Ill.2d R. 4.2. As the State argues, the phrases “the subject of the representation” and “that matter” refer back to the phrase “[d]uring the course of representing a client.”

People v. Santiago, 925 N.E.2d 1122, (Ill. 2010)

As the State argues, had the drafters of Rule 4.2 intended the parameters of the rule to be defined from a fact perspective rather than a case perspective, the drafters would have included language to that effect. In fact, other rules in the Illinois Rules of Professional Conduct do use the broader phrases “same or substantially related matter” or “the subject matter” of the representation.

Scenario Three – second opinion

Lawyer is contacted by a prospective client who is currently represented by another law firm in a matter. Prospective client tells Lawyer that she is dissatisfied with her current lawyers and would like to meet with Lawyer to consider changing counsel.

May Lawyer meet with prospective client?

Does Lawyer owe any duties to the lawyers currently representing prospective client?

Wisconsin Opinion EI-17-04

The Comment thus again provides a clear answer; as long as lawyer is not representing another person in the matter, a lawyer may meet with a represented person without the consent of that person's lawyer to discuss the matter and consider forming a lawyer-client relationship.

When such a meeting occurs, the lawyer's responsibilities are governed by SCR 20:1.18 (Duties to Prospective Client). Rule 1.18(b) provides that, even if no client-lawyer relationship ensues from the meeting, "a lawyer who has learned information from a prospective client shall not use or reveal that information learned in the consultation." That information includes the existence of the consultation itself. So the lawyer should not notify the client's other lawyer of the fact of the consultation without the informed consent of the prospective client.

Question

Does lawyer who contacts a person who is represented in connection with a separate matter have any special obligations?

Wisconsin Opinion EI-17-04

A lawyer may contact a person with respect to a matter in which the person is unrepresented without violating SCR 20:4.2. However, for purposes of SCR 20:4.2, a lawyer has obligations when, in the course of representing a client, he or she contacts an unrepresented person. The Committee discussed these obligations in Wisconsin Ethics Opinion E-07-016:

To summarize these duties, when contacting a constituent of a represented organization (or any unrepresented person), the applicable Rules mandate:

1. The lawyer must inform the unrepresented constituent of the lawyer's role in the matter (see SCR 20:4.3).

2. The lawyer must refrain from giving legal advice to an unrepresented constituent if there is a reasonable possibility that the interests of the client may conflict with those of the unrepresented constituent (see SCR 20:4.3).

3. The lawyer must not ask any questions reasonably likely to elicit information that the lawyer knows or reasonably should know is privileged and, if necessary, should caution the unrepresented constituent not to reveal such information (see SCR 20:4.4).

4. The lawyer must not make any false statements of material fact to or mislead an unrepresented constituent (see SCR 20:4.1 and SCR 20:8.4).

(footnote omitted)

Scenario Four – represented person initiates contact

Defendant is arrested on drug charges and taken into custody. Defendant is appointed counsel makes first appearance. While in jail, defendant writes directly prosecutor and offers to cooperate and assist the police in making controlled drug buys. Prosecutor meets with Defendant several times and works out a cooperation agreement in return for consideration in sentencing. Defendant does not copy his own lawyer nor does defendant wish to have lawyer present during meetings with prosecutor. Prosecutor eventually informs defense counsel of the agreement.

Has defendant waived the protections of SCR 20:4.2?

SCR 20:4.2, ABA Comment

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

Public Reprimand of Carpenter 1992-9

The Board concluded that by meeting with the inmate on three occasions without the consent of the inmate's attorney on matters relating to the pending criminal charges on which Mr. Carpenter knew that the inmate was represented by counsel, Mr. Carpenter violated SCR 20:4.2.

Scenario Four – “He’s not my lawyer.”

Lawyer represents a mother seeking the termination of the parental rights of the father of her two children. The father is indigent and has appointed counsel representing him in this matter. A few days ago, the father showed up at Lawyer’s office unannounced. Lawyer has secretary tell him that I couldn’t speak to him because he was represented, but he insisted that he wanted to see Lawyer and said that he no longer had a lawyer. Lawyer meets the father and he said that he didn’t need or want a lawyer, his appointed lawyer was “not my attorney” and he just wanted to give up his rights and get the whole thing over with. Lawyer calls his appointed lawyer and got a message that he was out of the office for few days so Lawyer leaves a message on the machine. After asking again and being assured that the father did not want a lawyer in this matter, Lawyer has the father sign affidavits stating that he wanted to terminate his rights with respect to the children and filed them with the court.

Problem?

OLR Private Reprimand 2003-4

By obtaining the father's signature on the affidavits of consent to the termination of parental rights and the stipulation concerning child support, when the attorney knew the father was represented by a lawyer and without the lawyer's consent, the attorney knowingly communicated about the subject of the representation with a party she knew to be represented by another lawyer without consent of that lawyer, in violation of SCR 20:4.2.

ABA Formal Opinion 95-396

As a practical matter, a sensible course for the communicating lawyer would generally be to confirm whether in fact the representing lawyer has been effectively discharged. For example, the lawyer might ask the person to provide evidence that the lawyer has been dismissed. The communicating lawyer can also contact the representing lawyer directly to determine whether she has been informed of the discharge. The communicating lawyer may also choose to inform the person that she does not wish to communicate further until he gets another lawyer.

There are some circumstances where the communicating lawyer may need to go beyond determining that the person has discharged her lawyer. One is that in a criminal case where the Court has appointed a lawyer to represent the client, the lawyer is not relieved as counsel of record until the court grants her leave to withdraw. Consequently, even if the contacted person tells the communicating lawyer that she has fired her lawyer, the communicating lawyer may not proceed without reasonable assurance that the court has granted the lawyer leave to withdraw. Similarly, if retained counsel has entered an appearance in a matter, whether civil or criminal, and remains counsel of record, with corresponding responsibilities, the communicating lawyer may not communicate with the person until the lawyer has withdrawn her appearance. In addition, if a communicating lawyer knows that the represented person is incompetent, that person's statement regarding the status of her representation may not be sufficiently reliable to allow the communicating lawyer to assume that she is free to engage in communications with the person.

Scenario Five – target of opportunity

ADA is prosecuting husband and wife for contributing to the delinquency of a minor for failing to report a child as a runaway. Husband and wife are both appointed counsel. At preliminary hearing of Husband , prosecutor sees that Wife is sitting in gallery and calls Wife to the stand. Husband's lawyer objects but judge permits Wife to be compelled to testify.

Problem for Prosecutor?

OLR Private Reprimand 1999-17

The Board concluded that, by questioning the wife under oath without consent of the wife's attorney, and despite being aware that the wife was represented, the prosecutor communicated about the subject matter of a representation with a party that the prosecutor knew to be represented, without the consent of the party's attorney, in violation of SCR 20:4.2. The prosecutor had no prior discipline.

Scenario Six – just listening

Represented Defendant contacts detective and states that he wants to talk about his case. Detective says he would like to get prosecutor on line to listen to the call. Defendant agrees and prosecutor listens but does not ask questions.

Has prosecutor “communicated” with a represented person?

Matter of Howes, 123 N.M. 311 (1997)

To argue that one does not violate Rule 16-402 if one does not ask questions or impart information borders on sophistry. People do not compromise their positions or waive their defenses by listening to an attorney; they do so by talking while the attorney listens.

“Communication” and “interrogation” are not synonymous, and it is “communication” that is prohibited by Rule 16-402. One can communicate interest and concern simply by indicating a willingness to listen. Since criminal defendants who are in custody often attempt to seek out and explain themselves to persons in authority under the generally misguided notion that they can extricate themselves from an unfortunate situation, the apparent willingness of a detective and a prosecutor to consider a defendant's version of the facts can be a particularly compelling message. “The influence of the prosecutor's presence is immeasurable.” People v. Green, 405 Mich. 273, 274 N.W.2d 448, 456 (quoting Justice Moody, concurring in part and dissenting in part). Respondent and the detective were well aware that defendant was attempting to discuss the evidence in his own case in order to help himself and they used his false hope to their advantage. Even if they asked no questions of defendant, by granting him an audience they tacitly encouraged him to keep talking.

While a lack of overreaching by a prosecutor in this situation may be a mitigating factor, it does not excuse compliance with the standard prescribed by Rule 16-402. In People v. Green, the prosecutor merely listened to and took notes on the statement of a murder suspect (at the suspect's request) and, at the end of the statement, simply asked the man whether he had been telling the whole truth. Although the statement was found to be voluntary, the attorney's violation of Rule 7-104(A)(1) was recognized by the court.

Question – are prosecutors different?

ABA Formal 95-396

Although there have been holdings to the contrary, the Committee believes it is clear that Rule 4.2 applies to the conduct of lawyers in criminal as well as civil matters, including both federal and state prosecutors. It has been argued that, because the Rule applies to a lawyer only "[i]n representing a client," the Rule does not reach the conduct of a prosecutor since she does not represent a "client" in the ordinary sense. However, the history of the Rule and its predecessors offers no support for any assertion that it was intended to exempt prosecutors. Moreover, a majority of court decisions have concluded that Rule 4.2 and its predecessor anti-contact rules apply to both federal and state prosecutors; even though, as discussed in part III below, some decisions have also limited the Rule's application in the context of criminal investigations prior to arrest or indictment.

State v. Maloney, 2005 WI 74, 698 N.W.2d 583

¶ 19 The applicability of SCR 20:4.2 to the investigative stage of a criminal case is a matter of first impression for this court. Many courts examining the issue have held that pre-charging noncustodial contact with a represented person during a criminal investigation is permitted under the applicable rules of ethics. See, e.g., Grievance Comm. for the Southern Dist. of New York v. Simels, 48 F.3d 640, 647-49 (2d Cir.1995); In re Criminal Investigation of John Doe, Inc., 194 F.R.D. 375, 377 (D.Mass.2000) (and cases cited therein); United States v. Ward, 895 F.Supp. 1000, 1004-05 (N.D.Ill.1995). See also 2 Restatement (Third) of the Law: The Law Governing Lawyers, § 99 cmt. h at 75-76, and Reporter's Note to cmt. h at 83-86 (2000).

¶ 20 Consistent with these interpretations, the commentary to the ABA Model Rules recognizes that pre-charging investigative conduct of the type that occurred here is "authorized by law" and, therefore, is not prohibited by the rules of ethics.

Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused.

American Bar Association, Model Rules of Professional Conduct, Rule 4.2 cmt. at 91 (2003).

State v. Maloney, 2005 WI 74, 698 N.W.2d 583

¶ 23 The split of authorities described above is important in considering whether Maloney's trial counsel was ineffective in failing to challenge the admissibility of the videotape evidence based on an alleged violation of SCR 20:4.2. Ignorance of well-defined legal principles, of course, is nearly inexcusable. Smith v. Singletary, 170 F.3d 1051, 1054 (11th Cir.1999). However, because the law is not an exact science and may shift over time, " 'the rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is universally recognized....' " Id. (quoting 2 Ronald E. Mallen **590 & Jeffrey M. Smith, Legal Malpractice § 17.4, at 497 (4th ed.1996) (citing cases));11 United States v. De La Pava, 268 F.3d 157, 166 (2d Cir.2001); Johnson v. Carroll, 327 F.Supp.2d 386, 398 (D.Del.2004).

8 ¶ 24 In the end, we need not determine which line of cases Wisconsin will ultimately follow regarding the applicability of SCR 20:4.2 to the pre-charging criminal investigative setting.12 Here, we are called upon to decide the narrower question of whether Maloney's trial counsel was ineffective for failing to make this argument.

US v. Taylor, 17 F.Supp.3d 162 (E.D.N.Y. 2014)

Even assuming, arguendo, that Pinkney was represented by counsel for the purposes of Rule 4.2, this case does not involve the type of egregious misconduct present in Hammad. The narrow rule announced in Hammad has been "applied repeatedly by courts in this circuit to confirm the propriety of undercover recordings of represented but unindicted targets, and to deny motions to suppress the resulting statements." United States v. Binday, *174 908 F.Supp.2d 485, 496 (S.D.N.Y.2012) (collecting cases) (noting that Hammad is the only case in this Circuit finding misconduct sufficiently egregious to constitute a violation of Rule 4.2). Here, the government's use of the CI was a legitimate investigative technique authorized by law under Rule 4.2, and Pinkney has not alleged any facts that persuade the Court otherwise. Even if there were a potential violation of the Rule, the Court would find that suppression of the evidence at issue is not warranted under the circumstances of this case.

Scenario Seven - GALs

Lawyer is representing a father in a CHIPs proceeding and related criminal charges stemming from allegations of child abuse. GAL is appointed to represent best interests of child, who is temporarily placed with grandparents. Lawyer sends investigator to grandparents house, who then permit investigator to interview child.

Did Lawyer need consent of GAL for investigator to speak with the child?

OLR Private Reprimand 1994-15

The Board found that the private investigator's direct communication with a child regarding alleged sexual abuse by her father, when the child was represented by a Guardian ad Litem in a CHIPS proceeding regarding allegations of sexual abuse by the child's father, had it been engaged in by a lawyer, would have been a violation of SCR 20:4.2, which provides that "in representing a client, a lawyer shall not communicate about the subject of the representation with a party 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." The Board determined that since the attorney hired the investigator and without obtaining the permission of the Guardian ad Litem, directed the investigator to interview the child directly about the sexual abuse allegations that were the subject of both the CHIPS proceeding and the criminal matter, the attorney was responsible for the conduct of the investigator and, therefore, violated SCR 20:5.3(c)(1), which provides that "a lawyer shall be responsible for conduct of [a nonlawyer retained by the lawyer] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if . . . the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved." The attorney had no prior disciplinary record.

Disciplinary Proceedings against Kinast, 192 Wis. 2d 36, 530 N.W.2d 387 (1995)

The referee's conclusion that there was no violation of SCR 20:4.2 was also based on his determination that the children themselves were not parties to the divorce proceeding but that the "party" represented by the guardian was the children's best interests. Therefore, the referee concluded, because the children were not "parties," SCR 20:4.2 did not require Attorney Kinast to obtain the guardian's consent to interview them. The referee acknowledged, however, that there was substantial uncertainty whether the prohibition of SCR 20:4.2 applied to children involved in divorce actions and suggested that such doubtful application of the disciplinary rule ought not constitute a basis for the imposition of discipline on an attorney for its violation under those circumstances.

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Moreover, the rule prohibiting a party's lawyer from communicating with another party without the consent of that party's attorney is intended to protect litigants from being intimidated, confused or otherwise imposed upon by counsel for an adverse party. Children involved in divorce litigation are no less entitled to the protection that rule affords than are adult parties to the litigation. Any confusion that may exist among lawyers in Rock county or elsewhere in the state regarding the application of SCR 20:4.2 to children represented by a guardian ad litem is hereby resolved.

While we conclude that Attorney Kinast's interview with the children was in violation of SCR 20:4.2, we determine that because of the prevailing erroneous practice of attorneys in Rock county and the uncertainty whether the rule applied to children in divorce proceedings, no discipline is warranted for that violation.

Scenario Seven – represented organization

Lawyer is representing a client who has been charged with theft from a company. Lawyer knows that company has in-house counsel and has been cooperating with the prosecutors in this matter. Lawyer would like to speak to several current employees of the company.

Does lawyer need permission of in-house counsel to speak to the employees?

Wisconsin Ethics Op. E-07-01

Finally, the Committee wishes to comment upon the status of organizations with permanent in-house counsel. The fact in itself that an organization has in-house counsel, or regularly retains outside counsel, does not render the organization represented with respect to a specific matter. "Similarly, retaining counsel for all matters that might arise would not be sufficiently specific to bring the rule into play. In order for the prohibition to apply, the subject matter of the representation needs to have crystallized between the client and the lawyer."

A lawyer does not violate SCR 20:4.2 by contacting in-house counsel for an organization that is represented by outside counsel in a matter. The retention of outside counsel does not normally transform counsel for an organization into a represented constituent and contact with a lawyer does not raise the same policy concerns as contact with a lay person.

Scenario Seven cont’d

Same facts, except now company’s lawyer has let defense counsel know in no uncertain terms that in-house counsel is representing company with respect to the criminal charges.

May Lawyer employees without consent of the company’s lawyer?

Wisconsin Ethics Op. E-07-01 – who is protected by SCR 20:4.2 within a represented organization?

1) Constituents who supervise, direct or regularly consult with the organization's lawyer concerning the matter or who have authority to obligate the organization with respect to the matter.

2) Constituents whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

What about constituents who might make an admission against the corporate employer?

Wisconsin Ethics Op. E-07-01

However, if the chief financial officer was a witness to the alleged act of discrimination, but has no involvement in the direction or control of the organization's lawyer handling the defense of the discrimination claim, the officer would not be protected by SCR 20:4.2. The mere fact that a constituent holds a management position does not trigger the protections of the Rule.

Scenario Eight– contacting co-defendant

Lawyer is representing client who is out on bond. Co defendant, who is represented, and client are friends regularly encounter each other. Client tells lawyer, that based on conversations with co-defendant, Client believes that co-defendant would sign a statement that would be exculpatory for client and asks lawyer to draft up statement. Client is quite specific and states that he will take the statement to co-defendant and obtain the signature

May lawyer draft the statement?

Restatement (Third) of The Law Governing Lawyers §99 cmt (k) (2000).

The lawyer for a client intending to make such a communication may advise the client regarding legal aspects of the communication, such as whether an intended communication is libelous or would otherwise create risk for the client. Prohibiting such advice would unduly restrict the client's autonomy, the client's interest in obtaining important legal advice, and the client's ability to communicate fully with the lawyer. The lawyer may suggest that the client make such a communication but must not assist the client inappropriately to seek confidential information, to invite the nonclient to take action without the advice of counsel, or otherwise to overreach the nonclient.

ABA Formal Op. 11- 461 Advising Clients Regarding Direct Contacts with Represented Persons

This Committee believes that, without violating Rules 4.2 or 8.4(a), a lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who—the lawyer or the client—conceives of the idea of having the communication.

This Committee favors the approach taken by Restatement §99 Comment (k). Under that approach, the lawyer may advise the client about the content of the communications that the client proposes to have with the represented person. For example, the lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary. Such advice enables the client to communicate her points more articulately and accurately or to prevent the client from disadvantaging herself. The client also could request that the lawyer draft the basic terms of a proposed settlement agreement that she wishes to have with her adverse spouse, or to draft a formal agreement ready for execution. Rules 4.2 and 8.4(a) may permit the lawyer to fulfill the client's request without violating the lawyer's ethical obligations. However, in advising the client, counsel must be careful not to violate the underlying purpose of Rule 4.2, as explained in Rule 4.2 Comment [1]:

This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation

Prime examples of overreaching include assisting the client in securing from the represented person an enforceable obligation, disclosure of confidential information, or admissions against interest without the opportunity to seek the advice of counsel. To prevent such overreaching, a lawyer must, at a minimum, advise her client to encourage the other party to consult with counsel before entering into obligations, making admissions or disclosing confidential information. If counsel has drafted a proposed agreement for the client to deliver to her represented adversary for execution, counsel should include in such agreement conspicuous language on the signature page that warns the other party to consult with his lawyer before signing the agreement.