



New York State Bar Association
Committee on Professional Ethics

Opinion 956 (1/14/13)

Topic: Communication with unrepresented party; taking deposition of unrepresented party; deceptive/and/or fraudulent conduct at client's request.

Digest: It would be misleading for a lawyer to depose an unrepresented party to a lawsuit, who is not aware of the lawsuit without disclosing that the lawyer's client's interests are adverse to the unrepresented party. The lawyer cannot provide advice to the unrepresented party but is required to tell the party to obtain counsel.

Rules: 1.0(i), 1.2(d), 1.4 (a), 1.16(c), 4.2, 4.3, 8.4(a)(c)(d)

FACTS

1. The inquirer is an attorney who commenced a lawsuit on behalf of his client. The lawsuit names two parties as defendants, Party A and Party B. Party A has been served with the lawsuit; Party B has not been served, nor is Party B aware of the pending lawsuit.

2. The client has asked the inquirer to depose Party B before serving the complaint. In order to facilitate this, the client will bring Party B to the inquirer's office. The inquirer believes that since Party B is unaware of the lawsuit Party B may testify to Party B's disadvantage.

3. The inquirer asks whether it is ethically permissible to take Party B's deposition when in fact Party B is not aware that Party B is a named defendant to the lawsuit.

4. The inquirer also asks whether taking the deposition under the circumstances suggested by his client would render Party B's testimony inadmissible.

QUESTION

5. Do the New York Rules of Professional Conduct (the "Rules") prohibit an attorney from deposing, at his client's request, a party who is unaware that the party is a named defendant in a pending lawsuit?

OPINION

6. The question of whether the lawyer is permitted to conduct a deposition under the above described circumstances requires a two-step analysis: 1) whether the communications between the inquirer and the party to be deposed could lead to a misunderstanding and 2) whether the

interests of Party B, the prospective deponent, are adverse to the client. As part of that analysis, the Rules' prohibition against a lawyer's engaging in conduct that involves "dishonesty, fraud, deceit or misrepresentation" must also be considered.

7. This Committee does not opine on questions of law, and therefore will not opine on whether any deposition testimony taken of Party B would be admissible in court.

8. Apparently, in order to gain some sort of advantage the client has asked the inquirer to depose Party B without disclosing to Party B the existence of a pending lawsuit against Party B. Clearly the conduct requested by the inquirer's client could lead to a misunderstanding on Party B's part about the purpose of the deposition.

9. The Rules contemplate the possibility that lawyers may have communications with persons with interests adverse to their clients, both those represented by counsel as well as unrepresented persons.

10. Rule 4.3 sets forth the rule for lawyers communicating with unrepresented persons and provides as follows:

"In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client."

11. Comment [1] of Rule 4.3 further states:

"An unrepresented person might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client, and where necessary, explain that the client has interests opposed to those of the unrepresented person."

12. In this instance, in accordance with Rule 4.3, the lawyer must explain the lawyer's role to the unrepresented person. Specifically, that the lawyer represents the client and that Party B's interests are adverse to the client's interests. Further, because the inquirer also knows that Party B's interests are adverse to the client the lawyer should advise the unrepresented Party B to obtain independent counsel.

13. This conclusion is consistent with prior ethics opinions concerning what information a lawyer may communicate to an unrepresented party. In some cases, in order to be sure that the unrepresented party understands the need for counsel, lawyers have been directed "to give non-controvertible information about the law to enable the other party to understand the need for

independent counsel.” N.Y. State 728 (2000). *See also* N.Y. State 477 (1977), N.Y. City Bar Op. 2009-02 (2009).

14. In the above analysis we have assumed that Party B is unrepresented. If in fact, Party B is represented by counsel, and the inquirer is aware of the representation, then Rule 4.2 would dictate the inquirer’s communications with her.

15. Rule 4.2(a) states:

“In representing a client, a lawyer shall not communicate or cause another to 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 prior consent of the other lawyer or is authorized to do so by law.”

16. As such, if the inquirer knows that Party B is represented by a lawyer, then the inquirer is prohibited from communicating with Party B, including taking her deposition, without her lawyer’s consent.

17. The inquiry, however, adds another dimension to the attorney’s obligation because the inquirer’s client seems to be asking the inquirer to depose Party B under false pretenses and the inquirer must also be mindful to avoid engaging in deceptive or fraudulent conduct.

18. The inquirer has indicated that the client will ask Party B to come to the inquirer lawyer’s office under the false pretense that Party B will be assisting the client when in fact such assistance will be provided at Party B’s expense as the client obtains information to build a case in support of the client and against Party B.

19. Pursuant to Rule 8.4(c) of the Rules of Professional Conduct, a lawyer is prohibited from engaging in conduct that involves “dishonesty, fraud, deceit or misrepresentation.” Accordingly, the proposed conduct without the above-mentioned disclosure would be prohibited by Rule 8.4(c) as it involves deceit and misrepresentation.

20. Further, the inquirer’s actions in conducting such a deposition under the suggested pretense would also violate Rule 8.4(a) if the lawyer knowingly aids or assists his client in violating or attempting to violate the Rules. Specifically Rule 8.4(a) provides that a lawyer shall not “violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through acts of another.”

21. Rule 1.4(a)(5) states: “A lawyer shall consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.”

22. We are not privy to what the client would tell Party B to bring Party B to the inquirer’s office to be deposed or even if the client would tell Party B about the proposed deposition. Whether or not the proposed conduct rises to the level of fraud is a question of fact beyond the scope of this committee; however, we believe it is prudent to alert the inquirer to the definition of

fraud in Rule 1.0(i) and the prohibition against assisting a client in conduct the lawyer knows is fraudulent.

23. Rule 1.2 (d) of the New York Rules of Professional Conduct (the “Rules”) states that:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.

24. The lawyer must advise his client that the proposed conduct, without the aforementioned disclosure, would be in violation of the Rules. The inquirer should advise the client that the inquirer will have to disclose to Party B, as stated above, the lawyer’s role in the matter and will need to advise Party B to retain counsel.

25. If the client persists in demanding that the lawyer proceed with a proposed course of conduct that is fraudulent, the inquirer must exercise his right to withdraw from representing the client pursuant to Rule 1.16(c)(13), which provides that “a lawyer may withdraw from representing a client when the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules.” *See also* Rule 1.16(b)(1) (requiring withdrawal when lawyer knows or reasonably should know that the representation will result in a violation of the Rules or of law).

CONCLUSION

26. It would be misleading for the inquirer to depose Party B, an unrepresented party, without disclosing that the lawyer is not neutral and that Party B’s interests are adverse to the inquirer’s client. In addition, because Party B’s interests are adverse to the interests of the inquirer’s client, the inquirer would be required to inform Party B of the right to obtain counsel. The Rules also require that the inquirer advise his client that taking the deposition without the above disclosures to Party B would be prohibited by the Rules.

(45-12)