

When Clients Want to Talk to Opposing Parties

Hello:

Curious to know how you all deal with the issue of clients wanting to talk to opposing parties directly. Both in a litigation context and in a non-litigation context (say, negotiating an agreement).

It's not something I encourage my clients to do, but I have had clients who wish to do that and I wonder what the best way to counsel them on that topic would be.

Thanks all, have a wonderful rest of the week.

If I'm not going to be present, I presume the client is going to do or say something that is less than helpful. I had a similar dilemma recently with a potential client.

I told PC that it should be assumed that the conversation is being recorded, and that the PC should not say something the PC will believe will hurt PC's case, and it is best to keep the conversation limited. Also, so long as it is legal to do so in the jurisdiction, I suggest covertly recording the interaction (at least in audio), to ensure that there are no false allegations of harassment, battery, threatening behavior, and the like - keeps everyone honest.

Hope that helps.

Best regards,

Joseph D. Kamenshchik, New York

It's really a case by case situation. I am just now trying to wrap up a settlement that the clients negotiated (part of) for themselves, while both had lawyers. If clients are intelligent people, it's pretty hard to say they can't talk between themselves.

If the issue is negotiating an agreement that is part of the client's core business, then client is probably in a better position than lawyer to negotiate the business terms. Lawyer can then add things as necessary (not suggesting client be told to go off and sign a binding deal, or commit to anything, but clients can come to lawyers with something like a term sheet

On the other hand, if you're not dealing with business people, or the parties are emotional, or 1 side occupies a significantly advantaged position relative to the other, there's a lot of potential issues with discussions. I'd probably tell client in that situation that what they say can definitely be used against them, and that safest course is to let communications be lawyer to lawyer.

Patrick W. Begos, Connecticut

Be careful with your state ethics rules. Under the ABA Model Rules, you cannot counsel your client to speak to a represented party -- unless the communication is also authorized by the opposing party's attorney. So, if you think it is a good idea (and there are pluses and minuses as others have noted), then set it up through/get approval from your opposing counsel.

Andy Simpson, U. S. Virgin Islands

If you are referring to Model Rule 4.2, it seems an overly broad reading of the prohibition --

Transactions With Persons Other Than Clients

Rule 4.2 Communication With Person Represented By Counsel

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.

http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_2_communication_with_person_represented_by_counsel.html

A client may speak to whomever s/he wants, wisely or unwisely. It is the attorney who is restricted, and then only in a matter in which the attorney is already representing a party in the matter.

Nonetheless, it may be wise to coordinate between counsel if the parties want to communicate directly, but that has little to do with the Model Rules.

Best regards,

Yee Wah Chin

I think you will find that the rule has been interpreted to include counseling the client as to what to say to the represented opposing party.

According to official comment 4, "A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a).

Parties 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."

That's a fine line to walk. Seems to me that you can tell your client that she can speak to the other side. But if you tell her, "this is what you should say to the other side . . .," you are sailing perilously close to the edge.

And all it takes is an irritated OC to file a grievance. I advise the cautious approach and make sure that OC is aware that the communication may occur.

Andy Simpson

I find talking directly can be helpful in business matters. Most business people are fairly skilled negotiators. In litigation, obviously one counsels a circumspect attitude about statements. Couching everything in terms of a settlement and avoiding factual discussions is generally a decent approach in business litigation.

All of it is fact specific, but many business people desire future business. I have settled quite a few cases because the other side wanted to do business again and no business would occur while a dispute was pending.

Darrell G. Stewart, Texas

I agree with that approach. It's spot on. It is the reason you want the people "who make the decisions" in every mediation. Surprising what occurs in chance meetings in the hall. Particularly if the executive is brought up to speed and the mediator is asked to let the execs "just happen to have a conversation."

There is one thing for sure, the people in that position really hate losing money -- and not being at their business is just that.

It is in their interest to keep the customer, provider, or other connection, and they know that person better than anyone else in the room.

Joseph Melino, California

In my mind the bottom line is that only one person should do the talking for a party. When two people try to represent a position, especially if they do it separately, you run a huge risk that they will send conflicting messages and undercut each other. Even a person's tone can send a signal.

I run a negotiations firm (mostly vendor contracts, software, telecom, etc.) and the first thing we do with new clients is ask them to agree that we will do the talking with the other party. Clients are almost always fine with that but, when they're not, we typically decline the case since

we work on a contingent basis and want to succeed. Hope that helps.

Marcel Bryar
