

## Being Contacted for a Second Opinion?

Here's the scenario:

A prospect contacts you with a question. They have an attorney. They have NO intention of leaving their attorney. However, they have to come to you for one of two reasons.

1) REASON 1 - they just want to confirm what their attorney is telling them is true about their case

OR

2) REASON 2 - they are having problems communicating with their attorney (Problems include lack of response, or getting a short response)

So they come to you to get your opinion. I know that some states that allows a client to contact a subsequent attorney for a consultation or 2nd opinion. But, in practice, how do you treat those people who come to you for a second opinion??

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I will answer in the abstract, in comparison with a medical professional's second opinion. There, the doctor will need to see the file and possibly talk with the treating physician. The patient does not just go to a second doctor with their understanding and receive a second opinion.

Depending on the point of representation (e.g., pre-litigation, trial court, appellate court) the foundation factors may differ; however, the need to know the facts does not dissipate. I don't see how a person can be helped who is noncompliant in providing access to all the necessary facts required. For each fact that is unknown there are numerous potential answers to a question; the problem is explicitly worsened with the number of unknown facts.

I hope that answer is helpful to you.

Very truly yours,

Bill

William M. Driscoll, Massachusetts

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I'd treat them like any other client. I'd prepare an engagement letter that spelled out what you said - that they're hiring me for a second opinion on XYZ. I'd try to be as specific as I can about what question(s) they want me to answer, and what information they want me to consider. Will I be reviewing a lot of discovery? Will I be talking to their current lawyer? etc.

Then I'd do the work, and write a report/letter spelling out what I concluded.

You say that some states allow a client to contact a subsequent attorney for a consultation or 2d opinion -- I'm not aware that any state would limit that. A client can contact whatever, however many attorneys he wants (though a court might recognize only a single attorney of record).

I think, in general, everyone should approach this like a second medical opinion. There's no shame/harm in asking, and no one should be upset (Obviously, current attorney is going to want to confirm, after the process is over, that the client still wants him to continue on the case). This is far different than a client telling current lawyer that his sister-in-law says things should be done differently.

I don't think I really care why PC is seeking a second opinion. Though his reasons may impact the information I have available (like ability to talk to current lawyer), my engagement letter/report will spell out the limits of my opinion based on the limits on information I had access to.

Patrick W. Begos, Connecticut

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I have often wondered how one communicates the second opinion when the lawyer knows the person to be represented. How do you square this with Rule 4.2, "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."

David Masters, Colorado

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I believe that question would need to be answered by the local jurisdiction. For example, is the rule designed to preclude communicating with an adverse party or a person with adverse interests to the lawyer's client if that person is represented by counsel?

Very truly yours,  
William M. Driscoll

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Well, it seems to be addressed to communications with an adverse party; but it doesn't say that. And, none of the cases annotated in this jurisdiction address that specific question. I wonder if comments to the Model Rule address the issue.

David Masters

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That's why I believe it to be dependent upon the bar(s) the concerned attorney belongs. I offer for considerations some articles found in a Google search that may not be accurate at the time of this email; I cannot comment as I am not licensed in any of these jurisdictions. What I did find was that jurisdiction handle the situation differently. Some have opined on the issues while others have not. Those who have opined have placed different conditions or constraints on second opinion practice. It is perhaps good food for thought when advancing the question.

The North Carolina ([http://www.ncbar.com/ethics/eth\\_articles\\_16,3.asp](http://www.ncbar.com/ethics/eth_articles_16,3.asp) <[http://www.ncbar.com/ethics/eth\\_articles\\_16,3.asp](http://www.ncbar.com/ethics/eth_articles_16,3.asp)>) has already addresses the issue of the second opinion:

Second, the rule only applies if the communicating lawyer is also representing a client in the matter. Therefore, Rule 4.2 does not preclude communication with a represented person who is seeking a second opinion from an independent lawyer. Comment [2] to Rule 4.2 states that a lawyer from whom such a second opinion is sought should, but is not required to, inform the first lawyer of his or her participation and advice. However, if the person asks you not to disclose the request for a second opinion, this becomes confidential information that you may not disclose.

A 2003 Florida opinion (<http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+02-5?opendocument> <<http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+02-5?opendocument>>).

A lawyer may give a second opinion to a person who is represented by counsel on how the person's current lawyer is handling the case or give information on the services the lawyer may provide. The lawyer should not solicit the person who is represented.

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The prohibition is limited to those circumstances where the lawyer is representing a client. Therefore, the ban on contact does not extend to a lawyer who is approached by a represented person who merely wants a second opinion, or who may be interested in hiring the lawyer in the matter, because the lawyer does not represent anyone in the matter other than the person seeking the second opinion.

Other states analyzing this issue have reached the same conclusion. Kentucky Ethics Opinion E-325 (lawyer may give second opinion to person represented by counsel, but should not interfere with the existing attorney-client relationship or solicit the represented person during the consultation); Michigan Ethics Opinion CI-883 (lawyer may give second opinion to represented person, is not required to determine the identity of the person's current counsel except to discover if a conflict exists, and should not disclose the consultation with the current counsel unless the represented person consents); Oregon Formal Ethics Opinion 1991-81 (lawyer can give second opinion to represented person at the person's request, and may not disclose to the person's current counsel that the request was made without the person's consent); Philadelphia Ethics Opinion 91-32 (lawyer does not violate any rule by consulting with prospective client who is already represented by counsel); South Carolina Ethics Opinion 97-07 (lawyer may discuss a case with a person represented by counsel, but should advise the person whether the attorney will be able to give a competent second opinion without discussing the matter with the

person's current counsel); Utah Ethics Opinion 110 (lawyer may give a second opinion to a person represented by counsel, but should not interfere in the existing attorney-client relationship and should not solicit the represented person).

A 2015 Utah Ethics Advisory has issued (<https://www.utahbar.org/ethics-advisory-opinions/eaoc-07-02/#more-4820> <<https://www.utahbar.org/category/ethics-advisory-opinions/4-2-communication-with-persons-represented-by-counsel/>>>).

Rule 4.2 of the Rules of Professional Conduct prohibits a lawyer, [i]n representing a client, from communicat[ing] about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter. A lawyer does not violate the letter or purposes of this rule by rendering a second opinion on a legal matter, when the lawyer is not representing a client on the same subject. However, the lawyer should make every effort neither to impair the first attorney-client relationship nor to use the consultation as a means of soliciting the represented party.

Very truly yours,  
William M. Driscoll

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Most of them don't tell me up front that it's for a second opinion. I find that out during the consult.

That being said, I treat them just like a normal potential client. This is your case. These are your options. If you want to hire me, this is what I need, and this is how much it will cost. If you want anything more than that, like a concrete "YOU MUST DO THIS OR PERISH" letter, you are going to need to pay me for my time.

Also, I won't give a second opinion if the person refuses to tell me who their attorney is. That forms the foundation of my "what am I working

with" pile of info. A known to me good attorney will likely, though not always, give the same advice I will. An unknown or a bad attorney is liable to have me scratching my head.

Corrine Bielejeski, California

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It is generally understood that the lawyer will not speak with and \*adverse\* party known to be represented. A party may speak with as many attorneys on "his own side" as he wishes.

-Rick

Richard J. Rutledge, Jr., North Carolina

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I would note (since others noted as I did that it refers to an adverse party) that Section 4 is headed (in the Model Rules, at least) "Transactions with Persons Other Than Clients". Thus, you can safely assume that if the party is willing to engage you as his attorney, and thus become your client, Rule 4.2 does not apply.

-Rick

Richard J. Rutledge, Jr.

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And, just to close the circle, one of the model rules makes clear that conversations with potential clients are, for the most part, treated the same as conversations with actual clients.

Patrick W. Begos

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Â First point; though he doesn't mention it in his email, Anthony's in Florida and Florida rules would (likely) apply; our rule says:

(a) In representing a client, a lawyer must 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. Notwithstanding the foregoing, a lawyer may, without such prior consent, communicate with another's client to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on a person, in which event the communication is strictly restricted to that required by the court rule, statute or contract, and a copy must be provided to the person's lawyer.

But: the comment to the rule says (in part):

Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.

So, IF someone who is represented comes to a second lawyer who is not otherwise involved in the case asking for a second opinion as it were, then that's permitted; because the second lawyer is NOT 'otherwise representing a client in the matter'.

Second: as to how I treat it, it depends. Is it an area of law that I handle; if it's not, then I simply say I don't do family law, or whatever, I'm sorry but I don't know enough to answer.

IF it's a fairly discrete question; that I know about, I will answer it to the best of my ability; frequently clients will be told something about "Florida Homestead" and it can be confusing; if what the lawyer is telling them is accurate, based on the facts, I'll tell them that. Yes, you're going to have to bring homestead petition, and this is likely result.

IF it's more general question, they're deep in litigation, and it's like "is my lawyer doing it right" I'm usually going to give a non-committal answer; unless client is willing to fire one lawyer and hire me, then I'm not going to nitpick; there's all sort of decisions made in litigation and there isn't necessarily one 'right' way. If, on the other hand, it is apparent that the other lawyer is WAY off base then I might say something; it depends.

Ronald Jones, Florida

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I finally had an opportunity to dig into this further. Comment 4, to Rule 4.2 of the Colorado Rules of Professional Conduct, which I believe a very close to the Model Rules, provides the following, "Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter."

I think this is the piece that allows for second opinions.

David Masters

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Shouldn't this be a red flag for a bad client?

Because we do free consultations here, as a rule, I have gotten some of these calls. As soon as I know they have an attorney they are (or are not) working with, I tell them that they have to choose. If they hire me, fine. But there are issues they need to work out with first counsel that I am not going to wade into.



Lisa Babcock, Michigan

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I've also had the opposite: a client, often court appointed, will say "another attorney told me blah blah blah," to which my answer is, "Excellent. He/she can be your attorney. I will send them a substitution of counsel form right now."

I don't play well with second-guessers.

Lisa Babcock

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Seeking a second opinion through a free consultation is bad. That seems indicative of someone continuing to ask until he finds someone who says what he wants to hear (as long as the asking doesn't cost him anything).

The kind of second opinion we have been discussing is much more akin to going to a second surgeon after the first one recommends surgery. You pay him and everything. You don't necessarily want to leave the first lawyer, and you're not looking for the second lawyer to tell you what you want to hear, but you want a reality check on the advice you're getting. I think it's a pretty sensible way to proceed if you, as client, are not positive you're getting the best possible advice (but you might be)

Patrick W. Begos, Connecticut

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| Seeking a second opinion through a free consultation is bad.

Indeed. Consults were at my regular rate, and paid before the consult began, by Money Order or cash.

If the person already has an attorney, I'd want to know what's going on that the person feels it's necessary to get a second opinion. Sometimes I could handle it in the initial phone call. For instance, the caller can't make sense of a phrase.

"Did you ask Attorney what that means? 'kay, do that first. Have pad and pencil in hand when you call. Don't be afraid to ask Attorney to explain phrases and terms you don't understand...."

CJ Stevens, Montana

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And to add to this, to me, "consultation" means "I want to decide if I want to hire you." So we could discuss whether I'd be willing to give a second opinion, but not actually give one. "Consultation" does not mean "I want to ask you about/complain about what my current lawyer is saying/doing/not doing, and get from you ammunition I can use to complain to my lawyer"

"Second opinion" is "I want to hire you and pay you to give me a reality check on the advice and representation I'm getting.

Patrick W. Begos

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\*"Consultation" does not mean "I want to ask you about/complain about what my current lawyer is saying/doing/not doing, and get from you ammunition I can use to complain to my lawyer"\*

I like your point, Patrick!

Anthony Reeves, Florida