

**THE PROFESSIONAL ETHICS COMMITTEE  
FOR THE STATE BAR OF TEXAS  
Opinion No. 653**

**January 2016**

**QUESTION PRESENTED**

May a lawyer who is a party in a legal matter but who does not represent any other party in the matter communicate concerning the matter directly with a represented adverse party without the consent of the adverse party's lawyer?

**STATEMENT OF FACTS**

A lawyer who is a party to a lawsuit desires to discuss settlement with the opposing party without seeking the consent of the lawyer for the opposing party. The lawyer does not represent any other party in the lawsuit.

**DISCUSSION**

Rule 4.02(a) of the Texas Disciplinary Rules of Professional Conduct states:

“In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”

Rule 4.02(a), which is based on Rule 4.2 of the American Bar Association Model Rules of Professional Conduct, generally prohibits a lawyer who is representing a client from communicating concerning the subject of the representation with another party who is also represented by counsel unless the other party's counsel consents. However, Rule 4.02(a) does not prohibit communications between the parties as long as a party's lawyer “does not cause or encourage the communication without the consent of the lawyer for the other party.” Comment 2 to Rule 4.02.

In the opinion of the Committee, Rule 4.02(a) of the Texas Disciplinary Rules does not apply to a lawyer who is a party to a lawsuit or transaction but does not represent any other party in the matter. Thus the lawyer/party who does not represent any other party in the legal matter is not prohibited by Rule 4.02(a) from communicating directly with an adverse party in the matter without the consent of the adverse party's lawyer. The Texas Disciplinary Rules of Professional Conduct are based in part on treating clients as separate persons with whom lawyers, also as

separate persons, may establish representation relationships. In the opinion of the Committee, to say that, in applying Rule 4.02(a), a lawyer who is a party in a matter is to be viewed as part lawyer and part client with the lawyer part representing the client part in the matter is to strain the language of the Rule beyond its intended meaning. The Committee notes that some court decisions have taken the contrary interpretation and ruled that a lawyer who is a party in a matter is at least in some circumstances to be viewed as a lawyer representing a client (himself) for purposes of making Rule 4.02(a) applicable. With this interpretation, the lawyer/party who communicates concerning the legal matter with an adverse party who is represented by another lawyer will violate Rule 4.02(a) if the communication is without the consent of the adverse party's lawyer. See *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241 (Tex. App. – Houston (14<sup>th</sup> Dist.) 1999, pet. denied); see also American Bar Association Committee on Professional Ethics, Informal Opinion 982 (1967). This interpretation, however, is rejected in Restatement (Third) of the Law Governing Lawyers (2000) Section 99(1)(b), which takes a position consistent with the position of the Committee in this opinion (the prohibition on communications with another represented party without consent of the party's lawyer does not apply in the case of a lawyer who is a party in a legal matter and who represents no other party in the matter).

Although in the opinion of the Committee the requirements of Rule 4.02(a) will not apply to a lawyer's communications with an adverse party concerning a legal matter if the lawyer is a party in the matter but represents no other party in the matter, such communications will be subject to other requirements of the Texas Disciplinary Rules. Because of the risk that a lawyer's direct communication with a party who is not a lawyer could in some cases be a means of misrepresentation or intimidation by the lawyer, a lawyer/party who chooses to communicate directly with another party without consent of that party's lawyer must exercise particular care to avoid any communication with the adverse party that in the circumstances would constitute "conduct involving dishonesty, fraud, deceit or misrepresentation" in violation of Rule 8.04(a)(3).

## **CONCLUSION**

Under the Texas Disciplinary Rules of Professional Conduct, a lawyer who is a party in a legal matter but who does not represent any other party in the matter may communicate concerning the matter directly with a represented adverse party without the consent of the adverse party's lawyer. However, a lawyer will violate the Texas Disciplinary Rules if the lawyer's communication with the adverse party involves dishonesty, fraud, deceit or misrepresentation.