

KENTUCKY BAR ASSOCIATION
Ethics Opinion KBA E-365
Issued: March 1994

Question 1: Has a lawyer necessarily violated Rule 4.2 if his or her client talks to the opposing party?

Answer: No. But counsel should not deliberately circumvent a disciplinary Rule through another. See Rule 8.3.

Question 2: Must a divorce mediator attempt to ascertain that a participant is represented by counsel?

Answer: Yes.

OPINION

Regarding Question 1 see Rule 4.2 Comment [1]. The ABA has rescinded all opinions purporting to make such contacts per se violations of the Model Code or the Model Rules. However, such communications are usually unproductive if not counterproductive. Conventional wisdom suggests that the lawyer should discourage such contacts, but he or she cannot be responsible for a “violation” simply because his client makes such a contact. Furthermore, there are rare circumstances in which discussions between the parties can further the resolution of a controversy.

On the other hand, we must warn that a lawyer is not permitted to circumvent a disciplinary rule or attempt to do so through the acts of another. Rule 8.3(a). See also Comment [3] to Rule 4.2.

Regarding Questions 2, we refer the reader to KBA E-335 (1989). That Opinion refers to the ABA Standards of Practice for Divorce and Family Mediation. Those standards indicate that the mediator “shall” inform the participants of the need for independent legal counsel. It seems obvious that a mediator should make inquiry as to whether the participants already have legal counsel. It also seems to follow that such counsel should be notified of the mediation unless his or her client-participant has some objection.

The Committee has received a number of inquiries suggesting that some lawyers may be urging their divorce clients to obtain signatures on settlement agreements, or to rush the other spouse into mediation, behind the back of opposing counsel. Such conduct may violate Rules 4.2 and 8.3. Such conduct may also undermine the validity of any agreement or settlement, although that is a legal question.

Note to Reader

This ethics opinion has been formally adopted by the Board of Governors of the Kentucky Bar Association under the provisions of Kentucky Supreme Court Rule 3.530 (or its predecessor rule). Note that the Rule provides: “Both informal and formal opinions shall be advisory only; however, no attorney shall be disciplined for any professional act on his part performed in

compliance with an opinion furnished to him on his petition, provided his petition clearly, fairly, accurately and completely states his contemplated professional act.”