EO–24–0002: ADVISING CLIENTS ABOUT COMMUNICATIONS WITH REPRESENTED OPPONENTS.

I. INTRODUCTION.

In 2023, the District of Columbia (D.C.) Bar issued an ethics opinion providing guidance on how D.C. lawyers may advise their clients regarding communications with represented opposing parties. D.C. Ethics Op. 385 (2023). Pursuant to Rule 42.1(b)(1)(E) of the Arizona Rules of the Supreme Court, the Arizona Supreme Court's Ethics Advisory Committee decided sua sponte to likewise address this topic to provide binding guidance to Arizona lawyers.[1] This opinion is limited to situations where the represented party opponents are private individuals or non-governmental organizations. This opinion does not address the situation where a party or represented individual in the matter is a governmental entity or governmental official, as other rules may apply that alter this analysis.

II. QUESTIONS PRESENTED.[2]

1. May a lawyer encourage her client to communicate directly with a represented opposing party, without opposing counsel's knowledge or participation? If yes, to what extent may a lawyer assist her client in preparing for such communications?
2. May a lawyer attend or observe party-to-party communications and assist his client during them?

[1] In this opinion, the term "lawyer" refers to all Arizona legal professionals who are required to follow the Arizona Rules of Professional Conduct, including lawyers, legal paraprofessionals, and Alternate Business Structures.

[2] The questions presented are taken verbatim from D.C. Ethics Opinion 385 for analysis here.

III. APPLICABLE RULES.[3]

ER 1.3: A lawyer shall act with reasonable diligence and promptness in representing a client.

ER 1.6(a): A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d). or ER 3.3(a)(3).

ER 3.2: A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

ER 4.2: In representing a client, a lawyer shall not 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 consent of the other lawyer or is authorized by law to do so.

ER 4.4(a): In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person.

ER 8.4: It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

Lawyer's and Legal Paraprofessional's Creed of Professionalism of the State Bar of Arizona:

(A)(2) I will endeavor to achieve my client's lawful objectives in business transactions and in litigation as expeditiously and economically as possible;

(A)(3) In appropriate cases, I will counsel my client with respect to alternative methods of resolving disputes;

[3] Arizona's ethical rules are codified in Rule 42 of the Arizona Rules of the Supreme Court. Citation to Rule 42 is omitted in this opinion to enhance readability.

> (A)(4) I will advise my client against pursuing litigation (or any other course of action) that is without merit and I will not engage in tactics that are intended to delay the resolution of a matter or to harass or drain the financial resources of the opposing party;
>
> (A)(5) I will advise my client that civility and courtesy are not to be equated with weakness;
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> (A)(6) While I must abide by my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with effective and honorable representation.
>
> (B)(5) I will not utilize litigation or any other course of conduct to harass the opposing party;
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> (B)(8) I will not delay resolution of a matter, unless the delay is incidental to an action reasonably necessary to ensure the fair and efficient resolution of that matter; . . . .

IV. ANALYSIS.

As noted above, Arizona lawyers may not communicate about the subject of the representation with a represented individual unless the lawyer has consent from the individual's lawyer. ER 4.2. Comment 3 to ER 4.2 further clarifies the rule that lawyers may not contact represented non-party in a matter, such as a noticed witness, absent the non-party's lawyer's consent. Additionally, a lawyer may not violate or attempt to violate the Rules of Professional Conduct through the acts of another in an effort to circumvent the rules. ER 8.4(a). This includes using another person to engage in impermissible contact with a represented individual.

However, clients are not subject to the ethical rules unless they are legal professionals. Generally speaking, represented clients may communicate among themselves. The question then becomes, what may a lawyer do or advise if a client expresses a desire to communicate with another represented party about the subject of the representation? The D.C. Bar opined a lawyer may advise a client on

communicating with a represented opposing party about the subject of the representation without violating ERs 4.2 and 8.4(a). D.C. Bar Ethics Op. 385. The Restatement of the Law Governing Lawyers also affirms that lawyers are not prohibited "from assisting the client in otherwise proper communication by the lawyer's client with a represented nonclient." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: A REPRESENTED NONCLIENT—THE GENERAL ANTI-CONTRACT RULE § 99(2) (Am. Law Inst. 2000). This opinion concurs with the D.C. Bar and the Restatement, but also limits what a lawyer may do in such circumstances.

Lawyers must make reasonable efforts to expedite litigation. ER 3.2. Further, provisions of the Lawyer's and Legal Paraprofessional's Creed of Professionalism also express a policy of resolving issues and matters in as prompt and courteous a manner as possible. To that end, if a client wishes to communicate with a represented opposing party, a lawyer may assist the client in preparing for such a communication. In such a situation, a lawyer may remind the client about the stated goals of the representation and other important aspects of the matter to prepare a client to communicate with the opposing party. For example, a lawyer should remind the client, when necessary and consistent with the Creed of Professionalism, that civility and courtesy do not show weakness, and clients should not lose their temper when meeting with an opposing party. Consistent with the D.C. Bar Opinion, a lawyer may also solicit and clarify the client's objectives for the contemplated communication, assist the client in drafting talking points or questions, and advise the client on how to respond should the opposing party ask questions or seek information. D.C. Bar Op. 385.

Lawyers, however, may not circumvent ERs 4.2 and 8.4(a) by using their clients to communicate with represented parties. For example, a lawyer may not write out verbatim the client's communication, be it a script for an in-person

meeting or a written communication like a letter or email. Doing so makes the client nothing more than a conduit for the lawyer's communication and would eviscerate ER 4.2's prohibitions. *See* D.C. Bar Op. 385 (concluding that lawyers go too far when their assistance turns the client into a "surrogate" for the lawyer); *see also* ABA Formal Op. 11–461, at 3 (the lawyer may not "script" or "mastermind" the client's communication with the represented opposing party). However, a legal professional may draft documents like a settlement agreement for the client to present and discuss at the in-person meeting, as drafting an agreement does not turn the client into a conduit to circumvent the rule.

Likewise, lawyers may not use their clients to do other things that the rules prohibit for lawyers, such as seeking confidential information from a represented opposing party, urging the opposing party to act without the advice of counsel, or otherwise harassing the opposing party. *See* ERs 1.6 (confidential information), 4.4(a) (prohibiting legal professionals from using means that have no substantial purpose other than to "embarrass, delay, or burden any other person, or use methods of obtaining evidence that violate the legal rights of such a person"); 8.4(d) (prohibiting legal professionals from engaging in conduct prejudicial to administration of justice).

The next question is, may a lawyer personally participate in such party-to-party communications? The answer is no. The D.C. Bar similarly concluded that a lawyer may not participate in or attend party-to-party communications. D.C. Bar Op. 385.

V. CONCLUSION.

To answer the first question presented, yes, a lawyer may encourage her client to communicate directly with a represented opposing party, without opposing counsel's knowledge or participation. However, a lawyer may not

encourage a client to communicate with the opposing party in an effort to turn the client into a mere conduit or surrogate for the lawyer. In answering the second question, no, a lawyer may not participate in or attend the party-to-party communication, including remote participation through real-time monitoring, text, chat, or other real-time communication. Apart from this emphatic no, this opinion does not issue strict guidelines regarding what a lawyer may or may not do to assist the client in preparing for party-to-party communication as there are innumerable variables that a lawyer may have to consider. As with most things in the practice of law, reason and commonsense should guide a lawyer in deciding on the best course of action.