

SCRIPTING CONTACTS WITH REPRESENTED PERSONS

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Ray Bradbury made the number 451 famous.Ftn 1 The number 461, however, is not particularly remarkable, just an odd number with little previous significance attached to it. I'm old enough to remember that Eric Clapton recorded an album entitled *461 Ocean Boulevard*, but that was just the address of a house he lived in while making the record; it wasn't even the name of one of the tracks on the album. Other than that, up until now it's been pretty anonymous. So what's changed?

In September 2011, the American Bar Association (ABA) issued Formal Opinion 11-461, entitled "Advising Clients Regarding Direct Contacts with Represented Persons," interpreting the requirements of Model Rule of Professional Conduct 4.2.Ftn 2 Since then, the number 461 has taken on new importance in the professional responsibility world and become the source of considerable comment and debate.

What 461 Says

Rule 4.2 prohibits a lawyer, in representing a client, from communicating about the subject of the representation with a person the lawyer knows is represented by counsel in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order. The parties to such a matter, even though represented by counsel, may communicate directly with each other without their respective attorneys' permission. But the extent to which an attorney for one of the parties may advise her client about such a direct contact, or further assist in preparing for such a contact—up to and including "scripting" the communication—has long been an issue. ABA 11-461 attempts to tackle this issue.

The ABA initially notes that Comment [4]Ftn 3 to Rule 4.2 states that "a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make." Since clients, as noted, may legally talk to a represented opposing party directly, the lawyer may advise the client about such a communication.

From this determination, the ABA opines that it follows that it doesn't matter who initiates the idea of the communication, be it either the client seeking the attorney's advice or the lawyer first suggesting the communication. The opinion goes on to state the attorney may also draft a document (such as a settlement agreement) for the client to deliver to the represented adversary, again either in response to a request for such assistance or upon the lawyer's own initiative.Ftn 4

The opinion does identify some limitation on the lawyer's ability to advise and assist the client with a communication with a represented adversary. "The line must be drawn on the basis of whether the lawyer's assistance is an attempt to circumvent the basic purpose of Rule 4.2, to prevent a client from making uninformed or otherwise irrational decisions as a result of undue pressure from opposing counsel." The lawyer's client is not seen as an agent of the lawyer making a contact that the lawyer could not make directly, but rather as a filter that most often will eliminate the potential for undue pressure. Perhaps recognizing that this limitation may be seen as somewhat aspirational, the ABA concludes by determining that the lawyer who assists a client with a communication with a represented person "must, at a minimum, advise her client to encourage the other party to consult with counsel before entering into obligations, making admissions or disclosing confidential information."

Why the Fuss?

The ABA's new opinion conflicts with the advice and enforcement position historically taken by the Director's Office and Minnesota's Lawyers Professional Responsibility Board. Although ABA Opinions are not binding on the Minnesota disciplinary system, they are considered authorities to which some weight is afforded and usually are safe to follow. The issue of a lawyer's participation in a client's contact with a represented adverse party has arisen primarily in advisory opinion inquiries to our office from Minnesota attorneys.Ftn 5 It has long been the position of the Director's Office and its interpretation of Rule 4.2 that an attorney *may* initiate the idea of the client contacting the adverse party directly but *may not* script any such communication or draft an agreement to be presented to the adverse person, even at the client's request. The latter level of involvement is perceived as an "end run" on the protections of Rule 4.2 and thus has been found to violate the rule and can subject the attorney to discipline. Therefore, with the approval of the Lawyers Board, the Director's Office intends to not follow ABA Formal Opinion 461, at least to the extent it authorizes an attorney to script a communication or draft an agreement for the client to present to a represented adversary. Recommending that the client encourage the adversary to consult with their lawyer is not an adequate safeguard for possible overreaching.

It is the rare instance when this office will take a position contrary to a formal ABA Opinion. The ABA Standing Committee on Ethics and Professional Responsibility is composed of experienced individuals who take their task very seriously, issuing a small number of thoroughly researched and annotated formal opinions annually. Most such opinions are on topics of timely interest and provide reasoned guidance on interpreting the applicable rules.^{Ftn 6} Since Minnesota's version of the majority of the ABA Model Rules is identical to or only slightly modified from the Model Rule language, ABA Opinions are useful for Minnesota practitioners to read and feel safe in following.

Few ABA Opinions take positions that are not already in the mainstream of state ethics opinions or disciplinary decisions, and those that are more on the leading edge often serve to clarify and ultimately unify issues where the several states may hold conflicting views.^{Ftn 7} In those instances where the ABA's formal opinion takes a position on a topic that has not been the subject of inquiry or complaint in Minnesota to date, the Board and Director's Office are unlikely to take any position on it, more likely allowing the opinion to remain a possible safe haven interpretation for conduct that does not clearly violate a disciplinary rule.

Thus, in the rare instance where the Board and the Director's Office clearly disagree with an ABA Opinion and do not recommend that Minnesota lawyers follow the ABA's advice, we take pains to put Minnesota lawyers on notice of that fact, at least regarding issues that may arise frequently and can cause harm to some portion of the public. There is some reason to suspect that the ABA may at least reconsider Opinion 11-461 in response to calls that it do so. Until the ABA reconsiders, however, and until it amends Formal Opinion 11-461 in some way, Minnesota's Lawyers Board and the Director's Office will remain in respectful disagreement with this ABA Opinion.

Notes

1 *Fahrenheit 451* is a 1953 novel by Ray Bradbury, the title being derived from the temperature—actually 450 degrees Celsius—at which paper burns.

2 ABA Model Rule 4.2 and Rule 4.2, Minnesota Rules of Professional Conduct (MRPC) are identical. Prior to 2005, Minnesota's rule contained additional language, which was eliminated with the amendments to the MRPC adopted by the Supreme Court in 2005.

3 Comments to the Model Rules are considered an integral part of the related rule and its interpretation. The Minnesota Supreme Court has never adopted the Comments to the MRPC, but includes them strictly as unofficial guidance.

4 The ABA opines that to limit assistance to instances where the client requests it simply favors sophisticated clients over those not sufficiently sophisticated to seek help.

5 Informal advisory opinions may be obtained by calling the Director's Office at (651) 296-3952, or electronically through a link on the office's website: <http://lprb.mncourts.gov/LawyerResources/Pages/AdvisoryOpinionRequestForm.aspx>.

There are some limitations on what questions can be answered.

6 Opinion 11-461 is the fourth Formal Opinion issued in 2011. The others have dealt with confidentiality of email communications and changing fee agreements during representation.

7 An example is ABA Formal Opinion 06-442 (2006) concerning metadata. Issued somewhat early in the discussion of how best to deal with embedded electronic information, the ABA Opinion has not been unanimously followed, but nevertheless has shaped the majority position, such as Minnesota's Opinion No. 22:

<http://lprb.mncourts.gov/rules/LPRBOpinions/Opinion%2022.pdf>.