Ethics Advisory Opinion Committee
Opinion No. 19-04
Issued: October 4, 2019

ISSUE

1. When does a representation of appointed criminal defense counsel end for purposes of Rule 4.2's prohibition on a lawyer speaking with a represented party about the subject of the representation?

BACKGROUND

2. Client A is appointed counsel (Attorney A) to represent Client A in a criminal case brought by the state. Client B is charged in the same matter and is appointed a different lawyer (Attorney B) from a different law firm. The request provides no information on the terms of the appointment from the court as to either client, but, consistent with the Sixth Amendment right, we assume that neither the appointing court nor Lawyer B ever limited the scope of representation.

3. Client B eventually agrees to plead and cooperate and is eventually sentenced on Client B's charges. Client A does not plead and is proceeding to trial. After Client B has pled, but before the trial of Client A, Lawyer A wishes to contact Client B. It is apparent from the request – though not clearly stated in the request – that Lawyer A wants to bypass Lawyer B and speak with Client B without counsel.

OPINION

4. For purposes of Rule 4.2, a lawyer should assume, absent actual knowledge of contrary information, that a criminal defendant's representation encompasses all aspects of the criminal process, including any cooperation the defendant commits to in a plea agreement. Lawyer A may not ethically contact Client B about any aspect of Client B's criminal charges, plea agreement, or cooperation without the consent of Lawyer B.

ANALYSIS

5. Rule 4.2 provides that "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by a legal professional in the matter, unless the lawyer has the consent of the legal professional." Thus, a straightforward application of the Rule would ask merely whether the matter about which Client B is set to testify is the subject of the representation; if it is, the lawyer may not contact Client B without permission of Client B's counsel. The request provides no basis to conclude that the matter about which Lawyer A wishes to talk to Client B is not within the scope of Lawyer B's representation of Client B. Thus, under Rule 4.2 Lawyer A must seek Lawyer B's permission.

6. Although Utah has recently amended Rule 4.2 and now has a unique version of Rule 4.2 that applies in cases of limited scope representations and unbundled legal services, the question posed does not implicate those provisions. Rule 4.2(b)—the section dealing with unbundled legal services—provides that "A lawyer may consider a person **whose representation by a legal professional in a matter does not encompass all aspects of the matter** to be unrepresented for purposes of this Rule and Rule 4.3." However, the question posed to this Committee does not suggest that Lawyer A has any reason to believe that the scope of representation is limited and indeed any competent criminal defense attorney would have to know that a representation must encompass all critical aspects of the criminal process—i.e. all aspects of the matter—to pass Constitutional muster.

7. Although we do not opine on the law, since the Sixth Amendment law in this area is well settled and since there is some interplay between the Constitution and the Rules we address it briefly here. Representation, to be adequate under the Sixth Amendment of the United States Constitution (incorporated as to the states through the Fourteenth Amendment, *see Gideon v.*

Wainwright, 372 U.S. 335, 83 S. Ct. 792, (1963)) must encompass "all critical stages of the criminal process." *Iowa v. Tovar*, 541 U.S. 77, 80-81, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004). Thus, the scope of representation of appointed counsel in a criminal case is necessarily broad and must encompass all aspects of the criminal matter.

8. Further, the Sixth Amendment right also extends beyond a plea and through the resolution of a direct appeal. *Douglas v. California*, 372 U.S. 353, 357–58, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). Courts that have addressed the issue also find that the Sixth Amendment right includes the right to representation between the resolution of trial and sentencing and the beginning of any appeal. *See, e.g. United States v. Williamson*, 706 F.3d 405, 416 (4th Cir. 2013) (collecting cases).

9. In other words, given the limited facts presented to us, a reasonable attorney in Lawyer A's position would have no basis to believe that the testimony Client B would give at Client A's trial was not within the scope of Lawyer B's representation, nor that the representation of Client B had ended.

10. Further, the Sixth Amendment sets only the floor, and not the ceiling of a representation. And, as the commentary to Rule 4.2 acknowledges, the scope of a representation is defined by the agreement between client and counsel, to which there is no reason to believe that Lawyer A would be privy. As such, Lawyer A has no basis that we can see to believe that Lawyer B's representation of Client B is limited in scope or time in any way that would implicate Lawyer A's requirement to obtain Lawyer B's consent in these facts. We further note that if there is any doubt about the scope of representation, the doubt can be resolved by simply calling Client B's lawyer and asking if Lawyer B still represents Client B.

11. Under the limited facts presented to the Committee, Lawyer A may not ethically contact Client B without Lawyer B's consent.