ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS

FORMAL OPINION 2009-5

DISCOURAGING UNREPRESENTED WITNESSES FROM VOLUNTARILY COOPERATING WITH ADVERSARIES

TOPIC: Communicating with non-party witnesses, requesting that they refrain from voluntarily providing information to other parties and providing legal advice to unrepresented persons.

DIGEST: In civil litigation, a lawyer may ask unrepresented witnesses to refrain from voluntarily providing information to other parties to the dispute. A lawyer may not, however, advise an unrepresented witness to evade a subpoena or cause the witness to become unavailable. A lawyer also may not tamper with the witness (*e.g.*, bribe or intimidate a witness to obtain favorable testimony for the lawyer's client). And while lawyers generally are prohibited from rendering legal advice to unrepresented parties, they may inform unrepresented witnesses that they have no obligation to voluntarily communicate with others regarding a matter in dispute and may suggest retention of counsel.

RULES: 3.3, 3.4, 4.3, 8.4

QUESTION: May a lawyer ask a witness who has not been subpoenaed and not otherwise under court process to refrain from voluntarily providing information to other parties to the litigation?

OPINION

Introduction

In our adversary system, all parties to a litigated dispute are granted equal access to sources of proof. For this reason, among others, our courts allow liberal discovery into relevant topics, subject only to certain narrowly-drawn privileges.[1] Consistent with this process, witnesses do

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[1] *See Kara Holding Corp. v. Getty Petroleum Marketing, Inc.*, No. 99 Civ. 0275 (RWS), 2004 WL 1811427, at *24 (S.D.N.Y. Aug. 12, 2004) (observing that federal discovery rules are designed to avoid surprise or trial by ambush) (quoting *American Stock Exchange, LLC v. Mopex, Inc.*, 215 F.R.D. 87, 93 (S.D.N.Y. 2002)); *Dorros v. Dorros Bros. Inc.*, 274 A.D. 11, 13, 80 N.Y.S.2d 25, 28 (1st Dep't 1948) ("As the trial should be an open meeting on the merits, both sides should have a fair opportunity, in advance of trial, to garner evidence.").

not belong to a plaintiff or defendant,[2] just as there can be no "plaintiff's evidence" or "defendant's facts."[3]

It therefore has long been clear that a lawyer may not ethically assist a witness in evading a subpoena,[4] nor can she help her client hide documents or other tangible evidence.[5] But may a lawyer ask a witness to refrain from voluntarily providing information to an adversary? In making that request, the lawyer does not flout any court's authority. Moreover, absent an express rule prohibiting such conduct, lawyers may feel constrained to make such requests in furtherance of the interests of their clients.

We conclude that under the New York Rules of Professional Conduct (the "Rules"), a lawyer may ethically ask a witness to refrain from speaking voluntarily to other parties or their counsel. But the lawyer may not, under any circumstances, engage in conduct amounting to "bribing, intimidating or otherwise unlawfully communicating with a witness."[6] Lawyers should also remain wary of providing legal advice to unrepresented witnesses; while a lawyer may inform an unrepresented witness that she is under no obligation to speak with the lawyer's adversary, the lawyer should not provide any other legal advice aside from recommending that the witness obtain counsel.[7]

Relevant Rules

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2 *See United States ex rel. Trantino v. Hatrak*, 408 F. Supp. 476, 481 (D.N.J. 1976) ("Witnesses belong neither to the prosecution nor to the defense."), *aff'd*, 563 F.2d 86 (3d Cir. 1977).

3 *See* ABCNY Formal Op. 2001-3 (lawyer with engagement limited in scope to avoid a conflict with one client may seek discovery of facts potentially harmful to that client if the sole purpose of the discovery is to assist another client within the scope of the limited engagement, because facts are inherently neutral). This opinion does not address requests to unrepresented witnesses not to cooperate with prosecutors or defense counsel in criminal matters.

4 *See, e.g., In re Lamb*, 105 A.D. 462, 94 N.Y.S. 331 (1st Dep't 1905) (disbarring lawyer for advising client to flout subpoena); *In re Newell*, 157 A.D. 907, 142 N.Y.S. 185 (1st Dep't 1913) (disbarring lawyer for dissuading subpoenaed witness from attending criminal proceedings); *In re Rouss*, 169 A.D. 629, 155 N.Y.S. 557 (1st Dep't 1915) (disbarring lawyer for participating in scheme to bribe a witness to evade subpoena).

5 *See, e.g.*, *In re Joseph*, 135 A.D. 589, 120 N.Y.S. 793 (1st Dep't 1909) (disbarring lawyer for assisting client in scheme to hide property); *In re Osofsky*, 259 A.D. 718, 18 N.Y.S.2d 8 (2d Dep't 1940) (disbarring lawyer who destroyed files to thwart court investigation); *In re Maguire*, 275 A.D.2d 28, 713 N.Y.S.2d 63 (2d Dep't 2000) (disbarring lawyer for concealing subpoenaed documents); *see also* Rule 3.4, Comment [1] ("Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructionist tactics in discovery procedure, and the like.").

6 Rule 3.3, Comment [12].

7 Rule 4.3.

Neither the former New York Code of Professional Responsibility (the "Code") nor the current Rules, effective April 1, 2009, specifically address the question of whether a lawyer may ask a witness to refrain from communicating voluntarily with another party. Although a proposal to prohibit such requests was considered in connection with promulgation of the new Rules, it ultimately was rejected.

Proposed Rule 3.4(f)

The proposed Rules of Professional Conduct recommended by the New York State Bar Association included a proposed Rule 3.4(f) that would have prohibited lawyers from asking "a person other than a client to refrain from voluntarily giving relevant information to another party."[8] In explaining the background of the Proposed Rule, the Reporter's Notes state as follows:

> Rule 3.4(f) has no equivalent in the existing Disciplinary Rules but deserves a place in the mandatory rules because it provides clear guidance on a question lawyers for entities face on a daily basis. The Rule strikes an appropriate balance between the justice system's search for the truth through the presentation of evidence and an organization's right to control the disclosure of trade secrets or other proprietary information to the organization's adversaries.[9]

Sources for Proposed Rule 3.4(f)

Proposed Rule 3.4(f) closely tracked the ABA's Model Rule 3.4(f). That rule provides that:

> A lawyer shall not . . . request a person other than a client refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

The Restatement (Third) of the Law Governing Lawyers adopts a similar tack.[10] Subject to the foregoing exceptions of the ABA Rule, the Restatement would prohibit lawyers from asking a witness to refrain from communicating with an adversary. Nevertheless, the Restatement would permit lawyers to inform *any person* of the right *not* to be interviewed by any other party."[11] The comments to the Restatement acknowledge, however, that it can be difficult to distinguish between advising a witness that she need not speak with others, and requesting that she refrain from communicating with adversaries: "The line between informing a witness of the right not to

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[8] New York State Bar Association, Proposed Rules of Professional Conduct 3.4(f).

[9] *Id.*, Reporter's Notes at 142.

[10] *See Restatement (Third) of the Law Governing Lawyers*, § 116 (A.L.I. 2008).

[11] *Id.* (emphasis added).

cooperate or to cooperate only under restrictive conditions and attempting to induce non-cooperation may be a fine one."[12]

The Appellate Divisions' Decision to Omit the Rule

Proposed Rule 3.4(f) has been omitted from the Rules approved by the Appellate Divisions of the Supreme Court of the State of New York. Moreover, there is no rulemaking history shedding any light on the omission. We therefore must be guided by the provisions of Rule 3.4 approved by the Appellate Divisions.

Like former Disciplinary Rule 7-109, Rule 3.4(a) prohibits a lawyer from "suppress[ing] any evidence that the lawyer or client has an obligation to reveal or produce,"[13] or "advis[ing] or caus[ing] a person to hide or to leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein."[14] But neither the Rule nor its predecessor in the Code forbids lawyers from asking unrepresented witnesses to refrain from speaking voluntarily to adversaries.

This issue also implicates a lawyer's ethical obligations in communicating with unrepresented persons. Rule 4.3 states: "The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[15] And Rule 8.4(d) prohibits lawyers from engaging in "conduct that is prejudicial to the administration of justice."[16]

Analysis

Lawyers May Ask an Unrepresented Witness to Refrain from Voluntarily Providing Information to Another Party.

The Committee concludes that a lawyer may ask an unrepresented witness to refrain from providing information voluntarily to other parties. We are persuaded in part by the absence of any explicit rule to the contrary in the Code, and the absence of any specific prohibition in the new Rules, even though the New York State Bar Association recommended Proposed Rule 3.4(f), which specifically would have prohibited such conduct. We do not know why the Appellate Divisions declined to adopt Proposed Rule 3.4(f), but we view the omission as a factor

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[12] *Id.*

[13] Rule 3.4(a)(1); *see also* DR 7-109(A).

[14] New York Rules of Professional Conduct, Rule 3.4(a)(2); *see also* DR 7-109(B).

[15] *See also* DR 7-104(B).

[16] *See also* DR 1-102(A)(5).

reinforcing our conclusion that it would be inappropriate to imply a restriction nowhere found on the face of the Rule, as approved.[17]

We recognize that New York courts—including the Court of Appeals—have endorsed the practice of informal discovery through voluntary interviews of non-party witnesses.[18] As the Court of Appeals concluded in *Niesig v. Team I*, where it declined to flatly prohibit lawyers from interviewing the employees of a corporate adversary, "informal discovery of information" serves "both the litigants and the entire justice system by uncovering relevant facts, thus promoting the expeditious resolution of disputes."[19] The Court recently reiterated this view in *Arons v. Jutkowitz*, in which it concluded that defendant's counsel could informally interview plaintiff's treating physician.[20] But authorization of informal discovery under specified circumstances through witness interviews is not tantamount to an ethical rule prohibiting lawyers from asking unrepresented witnesses to voluntarily decline to provide information to an adversary. Judicial sanction of informal discovery does not, by itself, overcome the express language and history of the Rule.

Nor do we believe that the administration of justice would be prejudiced by a lawyer's request that a non-party witness refrain from communicating voluntarily with the lawyer's adversary. Even when a witness complies with such a request, the adverse party still may subpoena the witness to compel testimony or production of documents. And, a lawyer, of course, is prohibited from assisting a witness in evading a subpoena.[21] Thus, an adverse party may compel the unrepresented witness to provide information through available discovery procedures even if that witness refuses to voluntarily speak with that party's lawyer.

While a forthright request to refrain from cooperating is permitted, misleading or deceptive conduct is not. To avoid confusion and any potential misunderstanding, the lawyer should

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[17] *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 558, 579-580 (2006) ("Congress' rejection of the very language that would have achieved the result the Government urges weighs heavily against the Government's interpretation."); *Doe v. Chao*, 540 U.S. 614, 622 (2004) ("drafting history show[s] that Congress cut out the very language in the bill that would have authorized any presumed damages").

[18] *See, e.g.*, *Arons v. Jutkowitz*, 9 N.Y.3d 393, 850 N.Y.S.2d 345, 880 N.E.2d 831 (2007); *Niesig v. Team I*, 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (1990).

[19] *Niesig*, 76 N.Y.2d at 372.

[20] *Arons*, 9 N.Y.3d at 406 ("We have written before about the importance of informal discovery practices in litigation—in particular, private interviews of fact witnesses.") (citing *Niesig*, 76 N.Y.2d 363).

[21] *See, e.g., In re Lamb*, 105 A.D. 462, 94 N.Y.S. 331 (1st Dep't 1905) (disbarring lawyer for advising client to flout subpoena); *In re Newell*, 157 A.D. 907, 142 N.Y.S. 185 (1st Dep't 1913) (disbarring lawyer for dissuading subpoenaed witness from attending criminal proceedings); *In re Rouss*, 169 A.D. 629, 155 N.Y.S. 557 (1st Dep't 1915) (disbarring lawyer for participating in scheme to bribe a witness to evade subpoena).

identify herself and make clear whom she represents. She should also disclose that her client's interests may differ from those of the unrepresented witness.[22]

Lawyers also still must comply with Rule 3.4(a)(2), which prohibits lawyers from "advis[ing] or caus[ing] a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein." Rule 3.4(b) prohibits lawyers from "offer[ing] an inducement to a witness that is prohibited by law or pay, offer[ing] to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter." And lawyers may not, under any circumstances, engage in conduct that involves "bribing, intimidating or otherwise unlawfully communicating with a witness."[23]

Lawyers Also May Advise Witnesses that They Have No Obligation to Voluntarily Provide Information to Others.

Lawyers should also observe Rule 4.3, which prohibits lawyers from providing legal advice to unrepresented persons: "The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

We conclude, however, that this rule does not prohibit a lawyer from advising an unrepresented witness that she has no obligation to speak voluntarily with the lawyer's adversary. Laypersons may feel obligated to speak with a lawyer who requests information and to volunteer information even when they do not wish to do so. To address this issue, a lawyer may (i) ask a witness whether she has been served with a subpoena and, if she has not, (ii) advise her that she need not speak with the lawyer's adversary. To ensure that lawyers do not abuse this latitude, we conclude that they should also explain that the witness can and should make her own decision whether to speak with an adversary, and suggest that she consider consulting her own lawyer to assist with that decision.

We believe this type of communication does not violate the prohibition against legal advice to unrepresented parties found in Rule 4.3. While Rule 4.3 (previously DR 7-104(A)(2)) prohibits a lawyer from rendering legal advice to unrepresented parties adverse to the lawyer's client, the rule allows lawyers "to give certain non-controvertible information about the law to enable the other party to understand the need for independent counsel."[24] Advising an unrepresented party

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[22] *See* ABCNY Formal Op. 2009-2 (requiring lawyer to identify her client and make clear adversity between her client and a self-represented adversary where it appeared that the self-represented party misunderstood the lawyer's role); *see also Arons v. Jutkowitz*, 9 N.Y.3d at 410 ("[W]e assume that attorneys would make their identity and interest known to interviewees and comport themselves ethically.")(quotations, alterations and citations omitted).

[23] Rule 3.3, Comment [12].

[24] N.Y. State 728 (2000) (concluding that DR 7-104 (A)(2) did not prohibit municipality's lawyer from advising pro se civil claimant of risk of self-incrimination); *accord* N.Y. State 477 (1977)(executor's lawyer ethically permitted to advise surviving spouse of right of

that she has no obligation to speak with an adversary and should consider consulting her own counsel falls squarely within this exception. It informs the unrepresented witness of an indisputable legal conclusion that can assist her in determining whether to consult a lawyer.[25]

The Rules also do not prohibit a lawyer from asking an unrepresented witness to notify her in the event the witness is contacted by the lawyer's adversary. So long as the lawyer does not suggest that the witness must comply with this request, we believe it does not unduly pressure the witness, especially when accompanied by the suggestion that the witness consider retaining her own counsel.

CONCLUSION

Our adversary system provides equal access to evidence and liberal discovery for all parties. But these rules do not prohibit lawyers from asking unrepresented witnesses to refrain from voluntarily providing information to an adversary. The Rules *do* prohibit lawyers from assisting witnesses in avoiding court process, intimidating witnesses or bribing them. These protections are sufficient to ensure that a lawyer's adversary will have adequate access to sources of proof through formal discovery procedures. Consequently, permitting lawyers to ask witnesses to refrain from cooperating with the lawyer's adversary does not prejudice the administration of justice. Lawyers may also ethically inform unrepresented witnesses that they have no obligation to cooperate with a lawyer's adversary, and suggest that witnesses consider retaining their own counsel.

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election); N.Y. County 708 (1995) (defendant's lawyer could identify for plaintiff legal issues as to which independent lawyer could provide advice).

[25] *See* ABCNY Formal Op. 2009-2 (a lawyer "may, but need not, provide certain incontrovertible factual or legal information to the self-represented party.").