

PRELIMINARY ISSUES OUTLINE
FOR POTENTIAL COPRAC OPINION RE: ATTORNEY AS ADVOCATE
[21-0002]

I. Question Prompting Potential Opinion

Is it proper for an active attorney to identify themselves as an advocate (as opposed to an attorney) in certain circumstances?

This question comes from an anonymous comment submitted to COPRAC:

We are seeking COPRAC's advisory opinion on whether it would be ethical for an attorney to identify themselves as an advocate in situations when the term "advocate" is separate and distinct from that of "attorney." Following a 2017 Attorney General Opinion (No. 14-101), a clear distinction was made between advocates and attorneys—the former could no longer represent families in certain Office of Administrative Hearings disputes, usually concerning special education. Prior to this Opinion, advocates would routinely represent families at administrative proceedings involving special education disputes. The advocates were not attorneys, and they were allowed to represent families in these matters up until the 2017 Opinion.

Given this distinction between attorneys and advocates, identifying oneself as an advocate, when they are actually an active attorney, could easily deceive the opposing party. An unrepresented party that shows up to a meeting or dispute with an "advocate", not knowing that the advocate is also an active attorney, could result in them sharing information that would not have been disclosed in the presence of an opposing attorney.¹ This scenario appears to be akin to an ethical violation of Rules of Professional Conduct 8.4(c):

"It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit, or reckless or intentional misrepresentation."

Therefore, based on this distinction described above, is it ethical for an active attorney to identify themselves as an advocate, as opposed to an attorney in these circumstances?

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¹ Side note: I am a little confused by this... I don't think this implicates Rule 4.2; instead it is kind of like the opposite?

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47 **II. Issues/Hypotheticals**
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49 A. Attorney represents clients at administrative proceedings regarding special education
50 disputes. During the proceedings and in communication with the opposing parties, Attorney does not
51 identify themselves as an active attorney, but instead refers to themselves as an “advocate.”²
52

53 B. Attorney refers to themselves as an “advocate” because they prefer that term as
54 opposed to “lawyer” or “attorney.” Attorney advertises to the community at large as being an advocate
55 [with experience in [situation where could either be an attorney or a layperson]?] for hire for \$X/hr (the
56 amount being substantially lower than a typical hourly rate for an attorney).
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58 **III. Authorities/Issues**
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60 A. 2017 Attorney General Opinion (No. 14-101) (available at:
61 https://oag.ca.gov/system/files/opinions/pdfs/14-101_2.pdf)
62

63 From the opinion:
64

65 The Office of Administrative Hearings (OAH) is an entity within the
66 Department of General Services. (Gov. Code, § 11370.2.) It is a “quasi-
67 judicial tribunal that hears administrative disputes.” OAH provides
68 administrative law judges to conduct hearings for more than 1,500 state
69 and local government agencies. Among its adjudicative responsibilities
70 under the Administrative Procedure Act,⁴ the OAH provides mediators and
71 administrative law judges from its Special Education Division to conduct
72 proceedings related to special education disputes under contract with the
73 Department of Education.

74 [...]

75 The focus of our analysis is on the “administrative adjudication” provisions
76 of the APA, which are in chapters 4.5 and 5 of the Act. For purposes of the
77 APA, an “adjudicative proceeding” is “an evidentiary hearing for
78 determination of facts pursuant to which an agency formulates and issues
79 a decision.” Whenever an adjudicative proceeding is required by the
80 federal or state constitution, or by federal or state statute, the proceeding
81 is governed by the APA. Chapter 4.5 of the APA sets out an overarching
82 scheme that applies to all administrative proceedings governed by the
83 APA, including the “Administrative Adjudication Bill of Rights.” Certain
84 proceedings are, by statute, expressly made subject to the “formal”
85 procedures of chapter 5 of the APA. In general, each agency that affords
86 administrative hearings may determine its own hearing procedures, with
87 reference to both the APA and to statutes applicable to that agency.

88 [...]

² Is this just a straw man hypo? Not very nuanced? Maybe could have a hypo where in one case the other side is unrepresented, whereas in another case they are represented by an attorney? Does that level the playing field or make the attorney’s duty different?

Chapter 5 proceedings bear many of the attributes of a civil trial, including discovery, prehearing conferences, motions, settlement conferences, and amicus briefs. Except when expressly provided otherwise, a formal proceeding under Chapter 5 is conducted by an Administrative Law Judge from the OAH.

[...]

We are advised that parties to proceedings conducted by the OAH sometimes seek to be represented by a person who is not a member of the California State Bar, giving rise to the question whether representation by a nonlawyer is authorized by the APA.

The opinion concludes that the APA does not authorize a party to be represented by a non-lawyer in a Chapter 5 proceeding, reasoning that the language of Chapter 5 does not permit lay representation (which is not surprising, given how similar the proceedings are to civil trials), and it should not be construed as an exception to the prohibition against unlicensed practice of law. The opinion notes that the legislature allows each administrative agency to decide whether lay representation is permitted, so in non-Chapter 5 administrative proceedings public policy reasons for allowing lay representation may be present.

The opinion also concludes that the CA Education Code/Individuals with Disabilities Act does not authorize a party to a special education “due process hearing” to be represented by a person who is not an active member of the CA State Bar, because California has not adopted any rule or statute to enable lay representation in special education proceedings. Due process hearings are conducted according to regulations adopted by the state Board of Education, and parties have a right to be “accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities.” (Note “accompanied and advised,” not “represented.”.) Congress has left the issue of lay representation to the states. (See 34 C.F.R. § 300.512(a)(1) (2017); 73 Fed.Reg. 73027 (Dec. 1, 2008) “[W]hether parties have the right to be represented by non-attorneys at due process hearings is determined under State law.”.)

B. ABA Rules of Professional Conduct 8.4(c)

“It is professional misconduct for a lawyer to: ... (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” ABA Rule 8.4.

C. Rules of Professional Conduct re: communications about lawyer’s services

Rule 7.1(a): A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading.

Rule 7.4 [Communication of Fields of Practice and Specialization]: [...](b) Notwithstanding paragraph (a), a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may also communicate that his or her practice specializes in, is limited to, or is concentrated in a particular field of law, subject to the requirements of rule 7.1.

D. Instances where an attorney and advocate are different in a potentially meaningful way

1. Instances listed in the Atty General Opinion

“From time to time, the Legislature has determined that, in selected administrative proceedings, a party may choose to be represented by a nonlawyer. [FN 27:] See Lab. Code, §§ 1151.3 (Agricultural Labor Relations Board), 5700 (Workers Compensation Appeals Board); Unemp. Ins. Code, § 1957 (Unemployment Insurance Appeals Board); Welf. & Inst., Code, § 4701, subd. (f)(3) (Dept. of Development Services); Welf. & Inst. Code, § 10950, subd. (a) (Dept. of Social Welfare); see also Ed. Code, § 48918, subd. (b)(5) (school expulsion); Rev. & Tax Code, § 19084, subd. (a)(4) (Franchise Tax Board).” 100 Ops. Cal. Atty. Gen. 19.

Justin raised the interesting question of why the Legislature decided that lay people can “represent” a party in these contexts (but not, specifically, special education due process hearings), noting that maybe the logic/rationale will inform when/how a lawyer can act as an “advocate” and what type of disclosures are necessary (and to whom). I did not have time to look into the legislative history, but this could be the next step.

Likewise, several administrative agencies have chosen to give parties the option of lay representation. [FN 28:] See Cal. Code Regs., tit. 2, §§ 52.9 (State Personnel Board), 617.3, subd. (a) (Victim Compensation and Government Claims Board), 1187.8 (Commission on State Mandates); tit. 4, § 12060, subd. (j) (Gambling Control Commission); tit. 8, §§ 232.09, subd. (a) (California Apprenticeship Council), 378 (Occupational Safety & Health Appeals Board), 424.3, subd. (a) (Occupational Safety and Health Standards Board), 17209 (Dept. of Industrial Relations prevailing wage cases); tit. 10, § 2661.1, subd. (a) (Insurance Commissioner rate proceedings); tit. 17, §§ 60055.3, subd. (a), 60060.3, 60065.3 (Air Resources Board); tit. 22, §§ 2051-8, subd. (c)(3)(A) (Employment Development Department), 120222, subd. (a) (Dept. of Child Support Services); tit. 25, § 7637 (Office of Migrant Services).” 100 Ops. Cal. Atty. Gen. 19.

2. Court-appointed special advocate (CASA) -- may be an attorney, but need not be

See: *In re Marriage of Redmond* (Colo.App. 2005) 131 P.3d 1167, 1168. “Redmond and Bezdek stipulated to the appointment of Smith for recommendations regarding the best interests of their minor child, who was born with life-threatening heart conditions. Smith spent fifty-one hours working on the case, which included five home visits and six hours preparing her special advocate report. Smith is an attorney and a former nurse.” ... “The former statute, applicable in this case, provided: “The special advocate may be, but need not be, an attorney.” Colo. Sess. Laws 1997, ch. 14, § 14-10-116(2)(b) at 32.”

[Is there a CA equivalent to this?]

3. Special interest/cause advocate (i.e., gun reform advocate).

[Able to do things that attorneys would not be able to do, in terms of fundraising, donating, etc.?

4. Health care advocate

[Substantially the same as CASA?]

E. Confusion re: interchangeability of “attorney” and “advocate”

1. Example: Advocate-Witness Rule

The “advocate-witness rule,” which prohibits an attorney from acting both as an advocate and a witness in the same proceeding, has long been a tenet of ethics in the American legal system, and traces its roots back to Roman Law. (Luna, Avoiding a “Carnival Atmosphere”: Trial Court Discretion and the Advocate-witness Rule (1997) 18 Whittier L.Rev. 447, 452-453.) (Kennedy v. Eldridge (2011) 201 Cal.App.4th 1197, 1208-1209 [135 Cal.Rptr.3d 545].)

ABA Model Rule 3.7 provides, in relevant part: (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: “(1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.

Here, “act as advocate” means act as a licensed, active attorney.

IV. Questions for COPRAC

A. Is this too narrow for an opinion? It seems to be really specific to a situation (negotiations prior to OAH formal proceedings where an attorney calls themselves an advocate), and in my attempts to broaden it, I think the lesson is just “don’t be sketchy when you characterize yourself.”

B. Particular duty/burden to be clear in those specific situations where parties are allowed to be represented by a non-attorney?