Opinion No. 3 of 2003

Editor's Note: The opinions of the Legal Ethics Committee of the Indiana State Bar Association are issued solely for the education of those requesting opinions and the general public. The Committee's opinions are based solely upon hypothetical facts related to the Committee. The opinions are advisory only. The opinions have no force of law.

An inquirer requested the ISBA's Legal Ethics Committee consider the problem of when an attorney's representation may be considered "withdrawn," pursuant to a local rule, without the need for an attorney to file a formal motion to withdraw. Specifically, what length of time must pass, after settlement of the original issues, before the opposing counsel has the ability to contact the other party directly, without the need to obtain the permission of their counsel?

For example, a written agreement is approved by the court in a dissolution action. Several years later, one of the parties requests the party's counsel file a motion to modify the original agreement.

In checking with the court, the parties' counsel learns that the opposing counsel never filed a Motion to Withdraw, yet the case is now four years old.

Can the opposing counsel contact the other party directly after a sufficient time has lapsed since the last court order? If so, what is the passage of time required?

Several counties, including Marion County, have passed a local rule, to deal with this situation in family law cases, such as Marion County Family Law Rule No. 14, "Termination of Representative Capacity," which states:

A. Upon the entry of a final Decree of Dissolution of Marriage [Legal Separation] [Paternity], or as an order of permanent modification of any custody, visitation and/or child support order, the representative capacity of all attorneys appearing on behalf of the party shall be deemed terminated upon:

1. An order of withdrawal granted pursuant to Marion County Local Rule 2; or

2. The expiration of time within which an appeal or the Order may be preserved or perfected pursuant to the Indiana Rules of Trial Procedure and/or the Indiana Rules of Appellate Procedure; or

3. The conclusion of any appeal of the Order commenced pursuant to Indiana Rules of Trial Procedure and/or the Indiana Rules of Appellate Procedure.

B. The service of any post-dissolution pleadings upon any party not represented by counsel pursuant to paragraph A above shall be made upon that person pursuant to the Indiana Rules of Trial Procedure.

C. Any copy served upon original counsel will be deemed to be a matter of professional courtesy only.

A concern of the Ethics Committee was whether an attorney may violate Rule 4.2 of the Indiana Rule of Professional Conduct by relying on the provisions of a local rule, such as the Marion County Local Family Law rule cited above. For example, an attorney may contact the opposing party directly, without the permission of the opposing party's previous counsel, based on the good faith belief that the opposing party's appearance was deemed "terminated" under a local rule.

Rule 4.2, of the Indiana Rules of Professional Conduct, addresses the issue of communication with a person represented by another attorney.

Rule 4.2 Communication with Person Represented by Counsel.

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."

(Emphasis added.)

The Preamble to the Indiana Rules of Professional Conduct, in the definition section, defines the words, "Knowingly", "Known" or "Knows" as follows: "... denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

In one disciplinary case, *In Re: Capper,* 757 N.E.2d 138 (Ind. 2001), an attorney received a public reprimand for violating Indiana's Rule 4.2 by knowledge, or imputed knowledge, that an opposing party was still represented by counsel despite the opposing party's statements to the contrary.

In *Capper*, the respondent attorney represented husband in a dissolution action. Wife had obtained her own counsel. While the case was ongoing, and the parties were in the process of exchanging discovery, the respondent attorney's client, Husband, and the client's wife appeared in the attorney's office and advised the respondent attorney that they wished to settle their case. The respondent attorney knew the wife had been previously represented by counsel, and had spoke with opposing counsel on a regular basis. However, on that particular day, the wife told respondent attorney of her dissatisfaction with her own lawyer, and that wife had "... terminated his services."

Without contacting opposing counsel to verify wife's statement, the respondent attorney then communicated directly with wife about a settlement proposal, then gave the proposal to his client, who later returned it to the respondent attorney, with the signatures of both parties. The respondent attorney then submitted the signed settlement agreement directly to the court without notifying opposing counsel of the existence of the agreement or that wife had signed such a document.

The Supreme Court's concern in *Capper* appeared to be the "special vulnerability" of parties in dissolution and post-dissolution matters.

In addition, the Court expressly discussed the attorney's duty to confirm statements from opposing parties, with the opposing party's counsel, particularly when both counsel had been communicating on a regular basis regarding the case.

Such contact by an attorney, directly with an opposing party, without approval by the opposing party's counsel, may also be a violation of Rule 8.4(d), of the Indiana Rules of Professional Conduct by "engaging in conduct that is prejudicial to the administration of justice." Such was the case in *Capper*.

However, the Comment to Rule 4.2 reminds us that under this rule, "... parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so."

While attorney Capper received a public reprimand for this action, which was filed under Count III of the multiple counts against him, the *Capper* opinion states, "Boehm and Rucker, JJ., dissent from the finding of misconduct under Count III."

Other states may also follow similar rules. For example, in Michigan, an attorney violated state's version of Rule 4.2 when he relied on a represented party's assertion his lawyer had consented to direct contact between the represented party and the opposing counsel, without confirming this assertion with the opposing counsel. *See Matter of Searer,* 9 F.Supp 811 (W.D. Mich. 1996).

One of the purposes of Rule 4.2 is to prevent lawyers from taking advantage of laypersons without counsel. *See Matter of Baker,* 758 N.E.2d 56, 58 (Ind. 2001) ("recognition of the need to prevent lawyers from taking advantage of laypersons and to preserve the integrity of the lawyer-client relationship"); *Matter of Syfert,* 550 N.E.2d 1036, 1037 (Ind. 1990) (lawyer taking unfair advantage of opposing party).

Even when there is little risk that the respondent attorney's contact with an opposing party would unfairly manipulate the opposing party, the Indiana Supreme Court has still found a violation of Rule 4.2.

See, In the Matter of Uttermohlen, 768 N.E.2d 449 (Ind. 2002), which addressed a violation of Rule 4.2 by an attorney who wrote directly to an opposing party, criticizing the opposing party's counsel's motion for change of

venue to another court. The respondent attorney wrote a letter to two executives of the opposing party, a finance company, in which the respondent attorney asserted that the executives' counsel had been acting "... in a wasteful manner by seeking transfer ... because such change of venue would not benefit the finance company." The respondent attorney then sent a copy of the letter to the opposing party's counsel.

The Indiana Supreme Court stated, in *Uttermohlen*, "We assume [respondent attorney's] motive for the communication was to advise the finance company of what she perceived as purely dilatory or burdensome action by opposing counsel."

Regardless of her motives, the Indiana Supreme Court found the respondent attorney violated the letter of Rule 4.2, "even though the risk that the communication would unfairly manipulate the adverse party was not great given that the letter was copied to opposing counsel and because it merely referred to an event in the case that had already taken place."

In another situation, *Smith v. Johnson,* 711 N.E.2d 1259 (Ind. 1999), the Indiana Supreme Court set aside a default judgment in a medical malpractice case due to the plaintiff's attorney's failure to serve the summons and complaint upon the counsel for the defendant, who had represented the defendant in front of a medical malpractice panel, though the doctor was adequately served. The Supreme Court did not find a violation of Rule 4.2 because service of a complaint is not a "communication" within the meaning of Rule 4.2. Nonetheless, the plaintiff's attorney should have followed common sense and contacted the defendant's counsel before seeking a default judgment.

Indiana Trial Rule 5(B) states:

> Whenever a party is represented by an attorney of record, service shall be made upon such attorney unless service upon the party himself is ordered by the Court.

If any contact with the opposing party is a violation of Rule 4.2 of the Indiana Rules of Professional Conduct, regardless of the opposing party's statements, or actions, so long as the opposing party's counsel has not consented, or has not withdrawn his or her representation, then a local rule "terminating" representation by an attorney, in a family law setting, may not, by itself, overcome the attorney's duty to follow the requirements of Rule 4.2.

The Committee recommends that unless a previous attorney of record has "withdrawn" or "terminated" his or her representation, *by court order*, then, regardless of the amount of time that has passed since the last court ruling, that attorney must send all communication to the opposing party through the opposing party's counsel, absent consent from opposing counsel to contact the opposing side directly. However, note that service of a complaint may not fall under this provision since the *Smith v. Johnson* case found that service of a complaint is not a "communication" pursuant to Rule 4.2.

The Committee acknowledges that there are sometimes situations of an "emergency" nature, particularly in a family law case, which situations require an attorney to move quickly to filing a motion or other pleading with the court. In that event – an opposing party will not respond, within a reasonable period of time, to a written request, from another attorney, regarding the issue of whether the opposing attorney still represents the opposing party, (or whether the opposing attorney will accept "service" on behalf of his or her former client) – an attorney may have no choice but to contact the opposing party directly by service of new pleadings or motions. However, the attorney should carefully document each and every attempt to contact the opposing counsel and note the response in the motion or pleading filed with the court.