Legal Ethics Committee
Formal Opinion Number 1 of 2003

The Committee has been asked to provide advice concerning Rule 4.2 of the Rules of Professional Conduct ("the Rules"). The issue presented is whether an attorney may send a "notice" contemplated by a contract directly to one of the contracting parties when the attorney has reason to believe that the party to whom the notice is to sent is represented by legal counsel. This issue appears to be one of first impression in Indiana and may arise frequently. Consequently the Legal Ethics Committee believes that a formal opinion on this question may provide helpful guidance to the members of the bar of this state.

In a multitude of circumstances parties make agreements or commitments which contemplate the need for communications from one party to another in the course of carrying out a commercial transaction or venture. Leases, corporate by-laws, real estate purchase agreements, sales contracts, insurance policies, and many other legal documents include notice provisions which call for communications from one party to another in order to trigger or forestall specific behavior by other parties to the arrangement. The exercise or foreclosure of legal rights is also often tied to notice requirements. Frequently the parties agree upon a specific manner of notice, including the addressee of the notice. A failure to comply with such notice provisions can lead to the loss of valuable legal rights on the basis of such legal theories as failure of performance, waiver, laches, and estoppel. Where a party's legal rights are dependent upon strict compliance with notice provisions it is understandable that legal counsel may become involved in the process.

Rule 4.2 provides as follows:

> **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.

At first glance the practical answer to the question presented would seem to be obvious. Why not simply have the attorney's client send whatever notice is required and not involve any communication from an attorney to an opposing party? The problem with this solution is that the Indiana Supreme Court has little tolerance an the indirect violation of the Rules. *In re Capper,* 757 N.E.2d 138 (Ind. 2001) (by using client to communicate with represented opposing party respondent attorney violated Rule 4.2); *accord Matter of Briggs,* 502 N.E.2d 890 (Ind. 1987) *see also Trumbull County Bar Ass'n v. Makridis,* 671 N.E.2d 31 (Ohio 1996). If the notice is drafted by the lawyer it is difficult to imagine that using his client as an intermediary to deliver the notice will somehow insulate the attorney from the force of Rule 4.2. Consequently the Committee is forced to look at the substance of Rule 4.2 to determine whether some other feature of the rule permits an attorney to send a contractually contemplated notice directly to an opposing party, even though that party is represented by legal counsel.

It is worth mentioning that the easiest way to dissolve this problem is for the attorney who seeks to send a notice to ask opposing counsel for permission to send it directly to such counsel's client. That solution may not always be available though, since the intended recipient may want to avoid receipt of the notice. It is also conceivable that for other reasons a party may not want to forewarn the opposing party of an intention to send notice. Without the prior consent of opposing counsel an attorney must be able to determine whether he may directly or indirectly send notice to an opposing party.

The Committee here emphasizes that Rule 4.2 is not limited to circumstances in which a lawsuit has been filed. Neither the language of the rule or the case law supports any such limitation. Rule 4.2 is a response to the "need to prevent lawyers from taking advantage of lay-persons and to preserve the integrity of the lawyer-client relationship ..." *In re Baker,* 758 N.E.2d 56, 58 (Ind. 2001). Reasons such as the need to protect privileged information, and to protect opposing parties from manipulation by an adverse attorney have also been cited to support this rule. *see e.g. Michaels v. Woodland,* 988 Fed. Supp 468, (D. N.J. 1997); *Polycast Tech Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621 (S.D.N.Y. 1990). These justifications apply across the spectrum of legal activity and not just in the context of lawsuits. For immediate purposes the Committee is satisfied that Rule 4.2 applies in the context of a matter involving parties to a contract who may have opposing interests in regard to the performance or administration of that contract.

The language of Rule 4.2 specifically recognizes an exception to the general "anti-contact" rule when the communication is "authorized by law." So, for example, serving a complaint on an opposing, represented party is not a violation of Rule 4.2 because it is authorized by law. *Smith v. Johnson,* 711 N.E.2d 1259, 1263 (Ind. 1999). More generally the ABA's Committee on Ethics and Professional Responsibility has indicated that the exception is satisfied by

> a constitutional provision, statute or court rule, having the force or effect of law; that expressly allows a particular communication to occur in the absence of counsel — such as court rules providing for service of process on a party, or a statute authorizing a government agency to inspect certain regulated premises. Further, in appropriate circumstances, a court order could provide the necessary authorization. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995).

As a result, a notice given pursuant to a statutory provision such as I.C. 26-1-2-608 (dealing with the revocation of acceptance of goods under the Uniform Commercial Code) would presumably fall within the exception to Rule 4.2. However in many cases notice arrangements are the offspring of parties' negotiations rather than of statutes. If this exception to the "no contact" rule is to include contract notices the phrase "authorized by law" must be read to include authorized by contract.

The Restatement of the Law, Third, The Law Governing Lawyers, § 99, comment g addresses the "authorized by law" exception to the anti-contact rule contained in Rule 4.2.

Among other instructive remarks, the comment provides:

> Contractual notice provisions may explicitly provide for notice to be sent to a designated individual. A lawyer's dispatch of such notice directly to the designated nonclient, even if represented in the matter, is authorized to comply with legal requirements of the contract.

The Code of Virginia, Legal Ethics Opinion No. 1375 (2002) addressed a situation in which an attorney sent a default notice required under a lease directly to party who was represented by counsel. In concluding that the communication was permitted, the committee addressing the issue stated:

> Since the parties were each represented by counsel during the drafting of the original lease agreement, the pertinent provision of which permits the required notices to be sent directly to the parties, the Committee is of the opinion that Attorney A's implied consent to Y's or Attorney B's direct communication with X eliminates any potential impropriety. The Committee is of the further opinion that the provision of legal notices does not constitute the communication envisioned by the proscriptions of DR 7-103.

Thus, some contractually required communications may be considered "authorized by law" or the subject of "implicit consent" by the current opposing counsel or any prior counsel who assisted in drafting the instrument that requires communication.

Whether the basis for allowing the inquiry is "implied consent" or "legal justification," the Committee believes that the focus of inquiry should be on the content of the communication. The Comment to Rule 4.2 notes that the rule does not prohibit communication "concerning matters outside the representation." Furthermore a lawyer "having independent justification for communication with the other party is permitted to do so." Comment, Rule 4.2. For purposes of the question posed by the present inquiry the issue appears to be whether the contract notice is an independently justified communication. If it meets this standard there is no violation of Rule 4.2. A notice from one party to a contract to another party to the same contract, especially if contemplated by the very language of the contract, seems to have an independent justification. Unfortunately, if "independent" means that the communication must be *unrelated to the matter in issue* the communication is not likely to escape Rule 4.2 when the matter in issue is the contract with respect to which the communication is made. Nevertheless a notice given strictly under the terms of a contract or other agreement existing prior to the dispute at hand may avoid criticism under Rule 4.2 if it does not amount to a "communication."

In respect to Rule 4.2 the Committee believes that so long as a written or oral notice does no more than announce the position, intention or prospective behavior of a party, as clearly contemplated by an agreement which predated the matter in dispute, such a notice is not a "communication" within the meaning of Rule 4.2. If the notice goes beyond the requirements of the contract or arrangement pursuant to which it is given, and ventures into arguments or inquiries not required to fulfill its fundamental purpose the notice may well become a "communication" subject to the prohibitions of Rule 4.2. The Committee believes that this interpretation supports the purposes of Rule 4.2 without detracting from the policy of enforcing contracts as they are written. By limiting the notice the sending attorney is unlikely to take advantage of an opposing party, or to interfere with an opposing party's relationship with counsel. An attorney who drafts a notice going beyond these limitations does so at his peril.

At this point it is important to emphasize that it is not the one-way nature of a notice that saves it from becoming a Rule 4.2 communication. Letters alone, sent to an opposing party without response have been held to be communications within the purview of Rule 4.2. *In re Baker, supra.* Rather it is the content of the notice that allows it to avoid classification as a communication.

The Committee also cautions that the importance of Rule 4.2 is such that attorneys must give a broad interpretation to its language. The Indiana Supreme Court has placed the burden squarely on the backs of attorneys to inquire into circumstances which may suggest the existence of an attorney client relationship. "[L]awyers should independently verify that opposing parties wishing to communicate directly with them are in fact not represented by counsel, especially where the lawyer knows that the party had previously been represented in the matter." *In re Capper, supra,* at 140. This statement is all the more powerful given the fact that the attorney in *Capper* had been told by the opposing party that she had fired her attorney. The Supreme Court did not find this sufficient excuse to allow counsel to avoid Rule 4.2.

Ultimately the answer to the inquiry presented is, in the view of the Committee, as follows. The attorney for a party to a contract, or other arrangement may initiate a notice to another party to that contract or arrangement, even if the other party is represented by counsel so long as the notice is contemplated by the pre-existing agreement of the parties. Such a notice must not include arguments or inquiries and must be strictly limited to the purposes the notice provisions of the agreement were intended to fulfill. Though not required by the Rules of Professional Conduct, common professional courtesy requires that except in unusual circumstances a copy of the notice should be sent to opposing counsel simultaneously with the sending of the notice to the designated nonclient.