

Opinion 2 of 2008

Committee approval

This formal opinion is disseminated in accordance with the charge of the Indiana State Bar Association Legal Ethics Committee and is advisory in nature. It is intended to guide the membership of the Association and does not carry the weight of law.

Issue

When is it permissible to deal directly with potentially adverse parties in a business setting, not immediately involving litigation?

Conclusion

An attorney may directly contact a potentially adverse party on behalf of his clients unless he knows that another lawyer is advising the potentially adverse party in the matter at hand or generally as to such matters. But, if the information available to the attorney suggests that the potentially adverse party may have or recently had representation in the matter, he has an affirmative duty to reasonably investigate the possibility of a continuing attorney-client relationship involving the potentially adverse party and to respect any professional relationship thereby uncovered.

Hypothetical facts

An attorney is asked by a business client to contact a third party in regard to an issue arising under a contract (oral or written) in order to clarify and enforce the legal rights of the business client. No litigation is pending between the client and third party, and none has been threatened.

Analysis

This formal opinion results from a series of questions seeking guidance on when a business law attorney may communicate with a potentially adverse party on behalf

Ex parte communications in business law matters

of the attorney's client. Lawyers who represent and advise business owners and officers commonly deal with problems involving a wide variety of individuals or businesses who have dealings with the lawyer's clients. Some or all of these parties may be or have been represented by an attorney. When, if ever, may a business attorney communicate with such persons on behalf of his client? The answer to this question is developed mainly, but not exclusively, from Rule 4.2 of the Rules of Professional Conduct ("RPC"), which is as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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 or a court order.

History and purpose of the rule

The idea that lawyers should not communicate with represented adverse parties has been around for a long time. Even before Rule 4.2 was adopted in 1986, Disciplinary Rule 7-104(A) (1) of the Code of Professional Responsibility prohibited such direct communication. *See, e.g., Matter of Briggs*, 502 N.E.2d 890, 895 (Ind. 1987).

If a lawyer's work for a client involves a quarrel or negotiations of any kind with another represented party, lawyers understand that they may not communicate directly with the adverse party. But the scope of this prohibition has always been less clear when the lawyer's work does not involve such plainly

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adversarial matters, or when the degree to which another lawyer may be involved is unclear.

The current form of Rule 4.2 follows nearly identical language in the ABA's Model Rules of Professional Conduct ("Model Rules"). Interestingly, the Model Rules, as first adopted, prohibited direct contact with "parties" rather than "persons." *Annotated Model Rules of Professional Conduct*, Sixth Edition, 2007, p. 395. The same was true of Indiana's version of Rule 4.2. *In Re Anonymous*, 819 N.E.2d 376, 378 (Ind. 2004). The ABA changed the Model Rules version of Rule 4.2 in 1995 to clarify that the rule applied to anyone known to be represented and not just to named parties in a formally identified proceeding. *Annotated Rules*, *supra* at 395. Yet it is still helpful to realize that this rule was originally formed with litigation in mind.

Almost all of Indiana's reported disciplinary cases involving Rule 4.2 arise out of a litigation context. *See, e.g., In Re Anonymous, supra, In re Baker*, 758 N.E.2d 56 (Ind. 2001). But there is some case law to support the proposition that the rule applies outside of a litigation context. *In re Seyfert*, 550 N.E.2d 1306 (Ind. 1990) began as a real estate purchase dispute, and there is no clear indication in the Court's opinion that it ever ripened into an actual lawsuit. Rule 4.2 was applied nonetheless. *Id.* 1307. There is also support for this more expansive application of the rule outside of Indiana. *In re Iluzzi*, 616 A 2d 233 (Vt. 1992); N.Y. State Ethics Op. 656 (1991).

The official comments to Indiana's version of Rule 4.2 indicate that the purpose of the rule is to protect a represented person from (a) overreaching by lawyers

who are "participating in the matter"; (b) interference with the attorney-client relationship; and (c) the "uncounseled disclosure of information" by the nonlawyer. Rule 4.2 Comment [1]. *In re Baker*, 758 N.E.2d 56 (Ind. 2001), indicated the purpose of the rule was to protect the integrity of the attorney-client relationship and prevent lawyers from taking advantage of laypersons. *Id.* at 58.

Neither of these descriptions of the purpose of the rule says anything to indicate that it is limited to a litigation setting. All that seems to be required is the existence of circumstances in which a layman's misstep in dealing with an opposing lawyer could prove costly and an attorney-client relationship between the layman and another lawyer. But the language of the rule imposes additional considerations

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that limit the application of the rule.

Elements of the rule

Without some limitations, Rule 4.2 would constantly be violated by business lawyers who communicate with others on behalf of their clients. Landlords, tenants, customers, suppliers, bankers, insurance companies and the like normally have received advice or representation from an attorney at some point in the past. Such advice would typically create an attorney-client relationship. Fortunately, this fact alone does not preclude a lawyer from communicating with these individuals or organizations on behalf of his client.

If Rule 4.2 is broken down into its component parts, it becomes easier to apply. There are three elements to this rule. The prohibition on communication applies when:

- a lawyer is representing a client;
- the communication concerns the subject of the lawyer's representation; and
- a lawyer *knows* that the person receiving the communication is represented by another lawyer *in the matter*.

What kind of communication is it?

To apply this rule, a lawyer should first decide if the communication might create some advantage for a client the lawyer represents. If a business lawyer asks his neighbor about the neighbor's divorce case, there can be no violation of Rule 4.2 unless the inquiry is made on behalf of one of the lawyer's clients even if the lawyer knows his neighbor is represented in the proceeding. This is so because the communication is not made by the lawyer "in representing a client." And when a lawyer speaks to an adverse party outside the presence

of that party's attorney, there can be no violation of Rule 4.2 if the discussion does not concern the matter in which the lawyer is representing his client. The Comment to Rule 4.2 specifically indicates that the rule "does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation." (Official Rule 4.2 [4]). Thus, for example, talking about a recent sporting event, or the weather, or a vacation experience with an adverse party would not create a violation of Rule 4.2 if those subjects had no bearing on the matter with respect to which the adverse party was represented.

Is other party represented?

The more indefinite but important part of Rule 4.2 involves the requirement that the communicating lawyer *knows* that the person is represented by another lawyer *in the matter*. It is not enough for a lawyer to know that the person with whom he is communicating has a professional relationship with a lawyer. The plain language of the rule indicates that a violation arises only if the communicating lawyer knows that the person is represented in the matter under discussion. In a business context, this suggests that hard and fast interpretive rules are unavailable because each situation must be evaluated on its own facts. For example, it may be permissible to contact directly a seller's in-house agent about a product failure, even if the lawyer knows that the seller had legal counsel when the buyer and seller worked out the terms of their ongoing business relationship many years earlier. But this result could easily change if the buyer's lawyer had discussed other issues concerning the seller with the seller's lawyer in the months immediately before the current problem arose. Likewise,

a developer's attorney would not be prevented from speaking to a property owner by the knowledge that another attorney handled an auto accident case for that property owner.

If there is any indication that the third party whom the lawyer proposes to contact is or has been represented in the matter, extreme caution is required. The definition of the word "knows," found in Rule 1.0(f), states that "[a] person's knowledge may be inferred from the circumstances." And when circumstances suggest that the third party may have a lawyer, a duty to investigate that possibility arises. *In re Capper*, 757 N.E. 2d 138 (Ind. 2001), held that a lawyer was guilty of misconduct under Rule 4.2 (as well as Rule 8.4) even though the opposing party stated that her lawyer no longer represented her. As the Court noted, the violating attorney could have easily confirmed the facts "with a simple phone call to opposing counsel." *Id.* at 140. And the Court went even further, by stating "that lawyers 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." *Id.*

What is a 'matter'?

Another aspect of the "knowledge" part of the rule is the requirement of a "matter." A California case suggests that knowledge that a corporation had in-house counsel does not prevent an attorney from interviewing the corporation's employees in a pre-suit investigation because at that point no "matter" exists yet. *Jorgensen v. Taco Bell Corp.*, 58 Cal. Rptr. 2d 178 (Ct. App. 1996). *Black's Law Dictionary* defines "matter" as "[a] subject under consideration, esp. involving

a dispute or litigation.” *Black’s Law Dictionary*, Seventh Edition, 1999. But a narrow view of the word “matter” is probably a mistake. All of the problems which motivated this rule (overreaching by lawyers, interference with attorney-client relationships, and uncounseled disclosure of information) can occur outside the context of litigation. And the language shift from “parties” to “persons” is plainly intended to expand the reach of Rule 4.2 beyond a litigation context. So it makes more sense to use a broader view that defines “matter” to include any circumstances in which a person’s legal rights may be affected by what he or she does or says in the course of a communication with another person’s attorney.

Required communications

Rule 4.2 includes an important exception, allowing direct communication with an adverse, represented party about the subject of the representation when the lawyer “is

authorized by law or a court order.” *Smith v. Johnson*, 711 N.E.2d 1259 (Ind. 1999), held that service of a complaint on a represented party did not violate Rule 4.2 because it was required to secure jurisdiction and was thus “authorized by law.” *Id.*, at 1263, note 6. But it remains to be seen how far this exception stretches. It seems safe enough to presume that requirements found in constitutions, statutes, government regulations and the like will create an exception to the general prohibitions of Rule 4.2. *See* ABA Formal Ethics Opinion 95-396 (1995). When the requirement for communication to an adverse party arises in a purchase agreement, lease, employee handbook or other document, there is no clear rule based on current Indiana case law. The Committee would hope that such contract requirements, if developed at arms-length, would be enough to permit direct contact for the purposes envisioned by the contract, but until the issue is

addressed in a reported decision, uncertainty will remain, and caution will be required.

Guided by the foregoing, the Committee concludes that attorneys may communicate directly with opposing parties on behalf of their clients unless they have actual knowledge that another lawyer is advising or has been engaged to advise the opposing party in respect to such matters generally or the specific matter at hand. But any such contact must be informed by Rule 4.3, Dealing with Unrepresented Persons. And the lawyer must also recognize that actual knowledge that a party is represented may be inferred from the circumstances (*see* Official Comment [8], Rule 4.2). Though nothing in Rule 4.2 requires an attorney to investigate the possible existence of opposing counsel, such a duty may arise if the attorney has reason to believe that the opposing party might be represented in the matter. ⚖️