



**ILLINOIS STATE
BAR ASSOCIATION**

ISBA Advisory Opinion on Professional Conduct

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This Opinion was AFFIRMED by the Board of Governors in January 2010. Please see the 2010 Illinois Rules of Professional Conduct 4.2 with its Comment [4]. This opinion was affirmed based on its general consistency with the 2010 Rules, although the specific standards referenced in it may be different from the 2010 Rules. Readers are encouraged to review and consider other applicable Rules and Comments, as well as any applicable case law or disciplinary decisions.

**Opinion No. 04-02
April 2005**

Topic: Communications with persons represented by counsel

Digest: During employment contract negotiations, General Counsel may not directly contact a party known to be represented by another lawyer without the prior consent of that lawyer. The General Counsel is communicating regarding “the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter” without the prior consent of the lawyer representing the other party thus violating the *no-contact* rule. Illinois Rule of Professional Conduct 4.2.

Ref: Illinois Rules of Professional Conduct (“IRPC”) 4.2, 1.2(i)

ISBA Advisory Opinions, Nos. 96-09, 92-03.

ABA Model Rule 4.2

ABA Formal Opinion 95-396

In re Segall, 117 Ill.2d 1, 509 N.E.2d 988, 109 Ill. Dec. 149 (1987).

In re Aircraft Disaster Near Roselawn, 909 F. Supp. 1116 (N.D.Ill. 1995).

Kole v. Loyola Univ., 1997 U.S. Dist. LEXIS 1071 (N.D. Ill. January 28, 1997).

People v. White, 209 Ill. App. 3d 844, 567 N.E.2d 1368 (5th Dist. 1991).

Herman v. Prudence Mut. Casualty Co., 41 Ill. 2d 468, 244 N.E.2d 809 (1969).

Heiden v. Ottinger, 245 Ill. App. 3d 612, 616 N.E.2d 1005 (2nd Dist. 1993).

ABA/BNA Lawyers' Manual on Professional Conduct, 71:306

Facts

General Counsel for a corporation and lawyer A are negotiating an employment contract between the corporation and lawyer A's client. While negotiations are being conducted, the corporation orders General Counsel to contact A's client about the employment contract without telling A or getting A's consent. General Counsel calls A and requests A's consent to do so. A confers with A's client who concurs with A's advice not to do so. A advises General Counsel that A's client wants A or an associate lawyer present at all personal contact between General Counsel and A's client concerning the employment contract and negotiations concerning it.

Questions

- (1) May General Counsel contact A's client about the employment contract without A's consent?
- (2) May General Counsel do so if ordered by the client?
- (3) May a non-lawyer managerial employee contact A's client concerning the employment contract without A's consent?

Opinion

1. During employment contract negotiations, General Counsel may not directly contact a party known to be represented by a lawyer without the prior consent of that lawyer. The General Counsel is communicating regarding "the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter" without the prior consent of the lawyer representing the other party, thus violating the *no-contact* rule. Illinois Rule of Professional Conduct 4.2.

Rule 4.2 provides:

During the course of representing a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented

by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party or as may otherwise be authorized by law.

The *no-contact* rule is designed to protect litigants represented by counsel from direct contacts by opposing counsel. *In re Segall*, 117 Ill.2d 1, 509 N.E.2d 988, 109 Ill. Dec. 149 (1987) (construing Rule 7-104(a) (1) predecessor to Rule 4.2). The bar on improper communications serves two inter-related purposes: (1) it preserves the integrity of the lawyer-client relationship and (2) it prevents the professionally trained lawyer from obtaining admissions from unwary laypersons. *In re Aircraft Disaster Near Roselawn*, 909 F. Supp. 1116, 1121 (N.D.Ill. 1995).

ABA Formal Opinion 95-396 states:

[T]he anti-contact rules provide protection of the represented person against overreaching by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests. (Footnote omitted.)

In Illinois, “party” should be read to include a client in a non-litigation setting. *Kole v. Loyola Univ.*, 1997 U.S. Dist. LEXIS 1071 (N.D. Ill. January 28, 1997) (construing the word “party” in Rule 4.2 to include contacts occurring before the commencement of litigation but refusing to impose sanctions); *People v. White*, 209 Ill. App. 3d 844, 875; 567 N.E.2d 1368, 1387 (5th Dist. 1991)(stating *in dicta* that the predecessor to Rule 4.2, DR 7-104(a)(1), “provides protection” before the filing of charges); ISBA Opinion 96-09 (lawyer contacting former client now represented by other counsel); *ABA/BNA Lawyers’ Manual on Professional Conduct*, 71:306 (which states that the 1995 amendment changing “party” to “person” in the Model Rules “represented a clarification rather than a change”); ABA Formal Opinion 95-396. Therefore, a lawyer who directly contacts a represented party to settle or conclude a matter in controversy violates Illinois Rule of Professional Conduct 4.2.

Conducting contract negotiations with a represented party without the consent of the party’s lawyer violates the *no-contact* rule. It poses the same danger of overreaching. It violates in the same way the integrity of the lawyer client relationship. Corporate counsel contacting the represented person to negotiate the contract directly without the lawyer’s consent represents precisely the conduct the *no-contact* rule attempts to prevent.

2. If the client orders the General Counsel to contact the potential employee directly or merely suggests that he or she do so, Rule 1.2 (i) controls. It provides:

- (i) When a lawyer knows that a client expects assistance not permitted by these Rules or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct.

Therefore, this conduct violates Rule 4.2 regardless of the General Counsel's good faith belief that the contact is a necessary part of his/her duties to the corporation.

3. While the General Counsel may not cause another corporate employee to communicate with the represented party, the clients independently may enter into negotiations.

A client's "absolute right" to negotiate and resolve her legal affairs will not be interfered with absent fraud and an attempt to keep her from consulting with her lawyer. See, *Herman v. Prudence Mut. Casualty Co.*, 41 Ill. 2d 468, 476-478; 244 N.E.2d 809, 813-815 (1969). The client has the absolute right to negotiate directly and sign agreements without her lawyer's presence or consent. *Heiden v. Ottinger*, 245 Ill. App. 3d 612, 616; 616 N.E.2d 1005, 1009 (2nd Dist. 1993). Therefore, a non-lawyer managerial employee may contact A's client concerning the employment contract without A's consent.

Lawyers, however, may not suggest the client contact the other party. Nor may they assist the client in contacting the represented party. Illinois Rule 4.2, unlike the ABA Model Rule 4.2, forbids lawyers from "caus[ing] another to communicate" with a represented party. ISBA Opinion 92-03.

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