

**ALASKA BAR ASSOCIATION  
ETHICS OPINION 95-7**

**Communication With a Represented  
Party By An Attorney Acting Pro Se**

The Committee was asked to decide whether an attorney litigant who is acting pro se may properly communicate about the matter in litigation directly with a represented party without the consent of opposing counsel. The question was posed by family law practitioners who occasionally deal with attorneys who are, for example, handling their own divorce or child custody proceedings. The issue is raised, for example, where an unrepresented attorney who is party to a divorce proceeding communicates directly with his or her represented spouse about the divorce, without the consent of opposing counsel.

It is the opinion of the Committee that such an unauthorized, direct communication with a represented party would violate Alaska Rule of Professional Conduct 4.2, notwithstanding that the communicating attorney is a party to the litigation. Under the broad parameters of the rule, such unauthorized communication would also be improper if the matter were not in litigation.

Rule 4.2 provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party or 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 to do so.<sup>1</sup>

This rule prohibits certain kinds of unauthorized communications with a party or person who is represented by another lawyer. The rule specifically bars communications directed to another lawyer's client that concern the subject

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<sup>1</sup> Rule 4.2 is substantially identical to its predecessor, DR 7-104(A)(1), and some of the authorities discussed in this opinion relate to that disciplinary rule.

matter of the other lawyer's attorney-client relationship, unless the other lawyer consents or the communications are otherwise authorized by law.

At issue is whether Rule 4.2 prohibits such unauthorized communications by an attorney who is acting on his or her own behalf, rather than representing a client. In effect, we consider whether the general rule must yield when the communicating attorney is an interested party. This straightforward issue has produced conflicting rulings in state courts elsewhere. Compare Sandstrom v. Sandstrom, 880 P.2d 103 (Wyo. 1994) (applying Rule 4.2 to an attorney representing himself in litigation against his ex-wife) and In re Segall, 509 N.E.2d 988 (Ill. 1987) (ruling that an attorney who is a party to litigation represents himself in communications with other parties and thus is subject to the rule) with Pinsky v. Statewide Grievance Committee, 578 A.2d 1075 (Conn. 1990) (ruling the communications of an attorney litigant who is not representing a client are not governed by Rule 4.2).

In Sandstrom, the Supreme Court of Wyoming rejected a pro se attorney litigant's argument "that, because he was a party to the action, he had an absolute right to contact the wife, who was the opposing party." 880 P.2d at 108. The Court considered both the Segall and Pinsky rulings cited above. The Court rejected the Supreme Court of Connecticut's ruling in Pinsky, stating:

The Illinois Supreme Court reached the opposite conclusion and held: "An attorney who is himself a party to the litigation represents himself when he contacts an opposing party." In Re Segall, 509 N.E.2d 988, 990 (1987).

We agree with the Illinois Supreme Court's rationale. The rule is designed to protect litigants represented by counsel from direct contacts by opposing counsel. A party, having employed counsel to act as an intermediary between himself and opposing counsel, does not lose the

protection of the rule merely because opposing counsel is also a party to the litigation.

509 N.E.2d at 990.

Sandstrom, 880 P.2d at 108-09.

In the Committee's opinion, the Wyoming and Illinois courts have adopted the better rule.<sup>2</sup> Both Courts and the Committee construe Rule 4.2 to apply to pro se attorney litigants notwithstanding their status as parties. This resolution is indicated by examining the purposes of Rule 4.2. The Committee recently summarized the rule's policy bases as including:

preventing an attorney from taking unfair advantage of a represented party by application of the attorney's superior knowledge and skill [Complaint of Korea Shipping Corp., 621 F. Supp. 164, 167 (D. Alaska 1985)]; avoidance of disputes regarding conversations which could force an attorney to become a witness; protecting a client from making inadvertent disclosures of privileged information or from being subjected to unjust pressures; helping settle disputes by channelling them through dispassionate experts; preventing situations giving rise to the conflict between the lawyer's duty to advance a client's interests and the duty not to overreach an unprotected party; and providing parties with a rule that most of them would choose to follow in any event. Leubsdorf, Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests, 127 Pennsylvania Law Review 683, 686-87 (1978-79).

Alaska Bar Association Ethics Opinion 94-1. *See also*, 2. G. Hazard & W. Hodes, The Law of Lawyering § 4.2:101 (2d ed. 1991). We further noted the rule's additional purpose of protecting the other party's attorney-client

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<sup>2</sup> *See also*, In re Mettler, 748 P.2d 1010, 1010-11 n. 2 (Or. 1988) (indicating that Oregon has amended DR 7-104(A)(1), effective June 1, 1986, by adding the sentence: "This prohibition includes a lawyer representing the lawyer's own interests.")

relationship, and preventing one attorney from impairing opposing counsel's performance. Ethics Opinion 94-1, citing Obeles v. State Bar, 108 Cal. Rptr. 359, 510 P.2d 719, 722-23 (1973).

In light of these reasons, Rule 4.2 can be seen to protect the interests of the communicating attorney and his or her client, the opposing party, and the opposing counsel.<sup>3</sup> The rule protects the communicating attorney (who may be acting on his or her own behalf, or on behalf of a client) from potential conflicts of interest and ethical dilemmas. The rule protects the opposing party from overreaching by a skilled or knowledgeable lawyer. (Realistically, of course, the opposing party may be more highly skilled or knowledgeable than the communicating attorney. It is equally plausible that the other party is an attorney. Even so, these possibilities do not eliminate the prophylactic value of Rule 4.2.)

The rule also protects both the opposing party and opposing counsel from the risk of inadvertent disclosures of confidential or privileged information, and from interference with their attorney-client relationship. And by prohibiting only *unauthorized* communications, the rule guards against such interference without unduly burdening the communicating attorney. That is, attorneys who want to communicate with represented parties may freely seek authorization to do so from opposing counsel.<sup>4</sup>

On balance, in the Committee's view, these reasons also support applying Rule 4.2 to attorneys acting on their own behalf. The communicating attorney's status as a party does not diminish the interests of opposing parties and opposing counsel. To the contrary, the need to protect opposing parties from undue pressure and overreaching is stronger when the communicating lawyer is an interested party.

To be sure, the Comment to the rule observes that "parties to a matter may communicate directly with each other and a lawyer having independent justification for communication with the other party is permitted to do so." This Comment applies generally. But in the special situation where the

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<sup>3</sup> Of course, the rules are also generally intended to safeguard the courts and society's interests in the legal system.

<sup>4</sup> Under the rules, a lawyer representing a client should "inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party." Rule 1.4, Comment.

communicating party is a lawyer acting as such on his or her own behalf, different concerns govern. In the Committee's opinion, in such circumstances the communicating attorney's personal interest in communicating directly with an opposing party without the opposing counsel's consent cannot override the interests of the opposing party and his or her counsel.<sup>5</sup>

Approved by the Alaska Bar Association Ethics Committee on September 7, 1995.

Adopted by the Board of Governors on October 20, 1995.

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<sup>5</sup> Ethics Opinion 94-1 addresses the application of Rule 4.2 to attorney communications with government agencies. In the discussing this Comment in that context, we stated:

With regard to attorneys, it is the committee's opinion that the Comment interprets Rule 4.2 to authorize direct contact regarding a matter in controversy with a government officer or agency, without consent from the agency's attorney, when the contacting attorney is a "party" to the controversy, *and is not acting in a representative capacity.*

Opinion 94-1 (emphasis added). The Committee draws the same distinction here, interpreting Rule 4.2 to bar unauthorized communications by party-attorneys only when they are acting as attorneys in a pro se or other representative capacity. (In other words, in the Committee's opinion, an attorney who retains independent counsel and who does not act as an attorney in a given matter would not be subject to Rule 4.2 with respect to communications concerning that matter.)

In the final summary of Opinion 94-1, we also stated that "An attorney who is a party to litigation has the same rights as any other party . . ." To the extent that this remark is inconsistent with the present Opinion, it is hereby revoked. An attorney who acts as an attorney and who is a party to litigation remains subject to the ethical constraints applicable to all attorneys acting as such.