ISBA Professional Conduct Advisory Opinion

Opinion 23 – 04

October 2023

SUBJECT: Communication with Represented Person.

DIGEST: Under Rule 4.2, a lawyer, even one who is acting *pro se*, is not permitted to have contact with a party who is represented in one aspect of a case and unrepresented in another aspect of the case, without the consent of that party's lawyer, or the authorization of law or court order.

REFERENCES: Illinois Rules of Professional Conduct, Scope at ¶14, Rule 4.2
Illinois Code of Professional Conduct, Rule 7-104(a)(1)
Illinois Supreme Court Rule 13(c)(6).
ABA Model Rules of Professional Conduct, Rule 4.2
ABA Formal Ethics Opinion 95-396 (1995)
ABA Formal Ethics Opinion 502 (2022)
ISBA Advisory Opinions on Professional Conduct No. 04-02, 13-06
Annotated Model Rules of Professional Conduct, 10th ed., 2023
Leibas v. Dart, Memorandum Op. and Order (N.D. Ill. August 13, 2020)
Kole v. Loyola Univ. of Chicago, 1997 WL 47454 (N.D. Ill. Jan. 30, 1997)
People v. Santiago, 236 Ill.2d 417, 925 N.E.2d 1122, 339 Ill.Dec. 1 (2010)
In re Segall, 117 Ill.2d 1, 509 N.E.2d 988, 109 Ill.Dec. 149 (1987)
Moore v. Club Exploria, LLC, Case No. 19-cv-2504, January 26, 2021, at 6 (N.D. Ill. 2021)
In re Air Crash Disaster Near Roselawn, Indiana on Oct. 31, 1994, 909 F. Supp. 1116, 1123 (N.D. Ill. 1995)
Weibrecht v. S. Ill. Transfer, Inc., 241 F.3d 875, 883 (7th Cir.2001)
Parker v. Pepsi-Cola General Bottlers, Inc., 249 F.Supp.2d 1006, 1010 (N.D. Ill 2003)

FACTS

Several parties are engaged in partition and damage claims litigation regarding jointly owned real property. One owner is a lawyer who represents himself in the litigation ("Pro Se Lawyer"). Another owner is a trustee of an irrevocable trust ("Trustee Owner") who is also on a corporate governance board related to the property. The Trustee Owner is represented by

counsel in his personal capacity and in his capacity as trustee, but is not represented by counsel in his corporate governance position.

The Pro Se Lawyer served a subpoena on the corporation for which the Trustee Owner is an officer/member of the board. The subpoena was for the partition matter currently being litigated, although the inquiring member does not indicate if the subpoena was for the production of documents or items, deposition of a witness, or trial testimony. The Pro Se Lawyer then began emailing the Trustee Owner, stating in the emails that the Pro Se Lawyer was only contacting the Trustee Owner in his capacity as an officer/member of the board for the subpoenaed corporation. The emails were to discuss the corporation's compliance with the subpoena.

QUESTION

Do the Pro Se Lawyer's contacts with the Trustee Owner violate Rule 4.2 if the represented party is being contacted in his unrepresented corporate capacity and not as a represented individual or trustee?

OPINION

Rule 4.2 of the Rules of Professional Conduct, sometimes known as the "No Contact" rule, relates to lawyer communications with persons represented by counsel, and states 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 to do so by law or a court order."

Comment 1[1] of Rule 4.2 makes clear that the rule is intended to protect the "person who has chosen to be represented by a lawyer." By preventing lawyer communications with represented persons, Rule 4.2 serves the functions of

(1) protecting against possible overreaching by lawyers who are participating in the matter who could exploit the disparity in legal skills between the lawyer and lay people,

(2) deterring interference by those lawyers with the integrity of the lawyer-client relationship,

[1] Although Comments to the Rules of Professional Conduct do not have the force of the Rules themselves, the Comments "provide guidance for practicing in compliance with the Rules." IRPC, Scope at ¶14.

(3) preventing the uncounseled disclosure of information relating to the representation, including the inadvertent disclosure of privileged information,

(4) facilitating settlement by channeling disputes through lawyers accustomed to the negotiation process

Cmt. 1 to R. 4.2, and *Kole v. Loyola Univ. of Chicago*, No. 95 C 1223, 1997 WL 47454, at 4 (N.D. Ill. Jan. 30, 1997) (citing *Polycast Technology v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y.1990)).

In serving these purposes, the central proposition on which the No Contact rule rests is: "The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel." ABA Formal Op. 95-396 at 4.

It should be noted that Rule 4.2 must be self-enforced by the lawyer as the No Contact rule is applicable "even though the represented person initiates or consents to the communication." Cmt. 3 to R. 4.2. An opponent litigant who is represented by counsel might not even understand the reasons why he or she should not communicate with the "other side's lawyer." So, it is incumbent on the lawyer to "immediately terminate communication" after the "lawyer learns that the person is one with whom communication is not permitted by this Rule." See Comment 3 to Rule 4.2.

However, Rule 4.2 emphasizes that it applies when the subject matters of the communication and the matter in which the person is represented must have a link between them. As ABA Formal Opinion 95-396[2] describes this relationship, the "matter" referred to in Rule 4.2 must be "within the compass of" the subject of the representation of the lawyer who would communicate with a represented person. Or, stated another way, the "Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation." Cmt. 4 to R.4.2.[3]

To address the issues raised here, courts have given some instructions to lawyers about how they should approach Rule 4.2 problems. First, a lawyer should "take a conservative, rather than aggressive approach, when interacting with ambiguities in the anti-contact rule." *Moore v. Club Exploria*, LLC, Case No. 19-cv-2504, January 26, 2021, at 6 (N.D. Ill. 2021). Second, courts have cautioned against blazing forward with contacts with represented persons in less clear circumstances. Instead, "[W]hen Rule 4.2 might be an issue, counsel must either: '(1) follow the more restrictive interpretation of the Rule; (2) contact opposing counsel; or (3) seek guidance from the Court'." *In re Air Crash Disaster Near Roselawn, Indiana on Oct. 31, 1994*, 909 F. Supp. 1116, 1123 (N.D. Ill. 1995).

---

[2] Rule 4.2 of the ABA Model Rules of Professional Conduct is identical to Rule 4.2 of the Illinois Rules of Professional Conduct, except for the Illinois rule's addition of Comment 8A as discussed is section (4) below.

[3] Comment 4 also makes clear, however, that the Rule does not "preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter."

To adequately address the posed fact scenario, this opinion will focus on four issues: (1) Does Rule 4.2's "No Contact" rule apply to pro se lawyers? (2) Is the Trustee Owner represented by counsel in the matter which is the subject of the Pro Se Lawyer's representation? (3) Is the Pro Se Lawyer authorized by law to have contact with the represented party? (4) Does the Limited Scope of Representation exception in Illinois Rule 4.2's Comment section allow contact with the represented party?

(1) A Lawyer Acting *Pro Se* May Not Communicate With Represented Persons (Unless Authorized By Law, Court Order or the Other Lawyer)

The No Contact rule applies when a lawyer is "representing a client". Further, Comment 4 of Rule 4.2 makes clear that a party may communicate directly with an opposing party. So, the question arises whether a pro se lawyer is merely a party who happens to be a lawyer who may then contact a represented party in a matter.

The issue of whether a pro se lawyer litigant may communicate with an opposing party who is represented by counsel has been answered differently depending on the jurisdiction addressing it. However, the overwhelming majority view, according to the *Annotated Model Rules of Professional Conduct*, 10th ed., 2023, and the view subscribed to by Illinois courts and the American Bar Association (see ABA Formal Opinion 502), is that a pro se lawyer represents herself, and thus is bound by the limits of Rule 4.2. Because a pro se lawyer represents a client (the lawyer litigant), the No Contact rule prevents the lawyer from having contact with a represented party.

This position has been confirmed by the Illinois Supreme Court. In *In re Segall*, 117 Ill.2d 1, 509 N.E.2d 988, 109 Ill.Dec. 149 (1987), the Court upheld the imposition of discipline against an Illinois lawyer who represented himself in litigation because of his contacts with represented parties. The Court was not persuaded by his argument that his attempts at settlement directly with the opposing parties, avoiding their lawyers, were made solely as a party litigant, not as a lawyer representing a litigant. The Court rejected the idea that a lawyer could so easily change hats between litigant and lawyer and ignore his or her professional responsibilities as a lawyer. Applying Rule 7-104(a)(1) of the Code of Professional Conduct[4], the version of Rule 4.2 which existed prior to adoption of the Rules of Professional Conduct and which is "nearly identical"[5] to Rule 4.2, the Court in *Segall* stated:

---

[4] Disciplinary Rule 7-104 of the Code of Professional Responsibility, applicable at the time of *Segall*, stated, in relevant part: "(a) During the course of his representation of a client a lawyer shall not (1) communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

[5] *Leibas v. Dart*, Memorandum Op. and Order (N.D. Ill. August 13, 2020).

> "A lawyer who is himself a party to the litigation represents himself when he contacts an opposing party. Rule 7-104(a)(1) 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. Consequently, a lawyer who is himself a litigant may be disciplined under Rule 7-104(a)(1) when, as in the case at bar, he directly contacts an opposing party without permission from that party's counsel."
> *In re Segall*, 117 Ill.2d 1, 6, 509 N.E.2d 988, 109 Ill.Dec. 149 (1987).

The American Bar Association also very recently issued its Formal Opinion 502 (2022) which similarly took the position that pro se lawyer litigants are subject to the No Contact rule.

Given the stringency of the No Contact rule, the Committee recognizes that its application to pro se lawyers can sometimes be challenging in more personal legal matters such as family estate conflicts, domestic relations issues and closely held business transactions. However, lawyers need to consider such issues at the outset to decide whether proceeding pro se is the best course. If a lawyer chooses to move forward on a pro se basis, and finds there to be an interest in making contact with an opposing party who is represented by counsel, Rule 4.2 presents a path to move forward. First is to seek the consent of the lawyer representing the other party for the contact with his/her client. However, it should be noted that it is solely within the discretion of the lawyer of the represented party whether to consent to the contact with the pro se lawyer litigant, and such consent may be withheld for any reason or no reason at all. ABA Formal Opinion 502. If the other lawyer refuses to consent, the pro se lawyer needs to consider whether there is a legal basis permitting the contact with the represented party (such as a constitutional right to redress grievances). Without the other lawyer's consent or a justification in law, the pro se lawyer may then ask that the court enter an order permitting the contact with the represented party.

Rule 4.2 has other notable limitations.

1. ISBA Opinion 04-02 made clear that a lawyer still violates Rule 4.2 by asking the client, or someone else, to make the contact with a represented opposing party without notice to and consent of the opposing lawyer (or without other applicable exception). Comment 4 of Rule 4.2 states "[a] lawyer may not make a communication prohibited by this Rule through the acts of another." However, a client may independently choose to make contact with the other party, in which case the lawyer may provide legal advice to the client about the client's intended communication.

2. The content of the lawyer's communication with the represented person is irrelevant under Rule 4.2 as even *de minimis* communications violate the no contact rule, as noted: "Courts have expansively construed the parameters of the anti-contact rule, finding violations for even the most minimal contacts with the represented party. *See, e.g.*, *Weibrecht*

v. S. Ill. Transfer, Inc., 241 F.3d 875, 883 (7th Cir.2001) (violation of Rule 4.2 occurred when plaintiff's lawyer contacted defendant directly about a time change for his deposition)." *Parker v. Pepsi-Cola General Bottlers, Inc.*, 249 F.Supp.2d 1006, 1010 (N.D. E.D. Ill 2003). See also, ISBA Advisory Opinion 13-06 (rejecting the assertion that a lawyer's communication with represented persons which was of *de minimis* substance, scheduling only, did not violate Rule 4.2, instead finding that Rule 4.2's prohibition applies even if the communication with a represented party is not substantive).

3. The No Contact rule applies "even though the represented person initiates or consents to the communication", and a lawyer must immediately terminate contact upon making contact with the represented party. Cmt. 3 to R. 4.2. The prohibition on contact with a represented person depends on whether the lawyer knows the person is represented, which can be inferred from the circumstances, and the lawyer cannot close her eyes to the obvious. Cmt. 8 to R. 4.2. The Rule directs that the only way to continue with such a contact is with "the consent of the other lawyer" or it is authorized by law or a court order. R. 4.2.

(2) Is the Trustee Owner represented by counsel in the matter which is the subject of representation?

No cases, ethics opinions or other helpful authoritative references speak directly to the issue presented in this fact scenario in which there is communication with a person in a matter in which the person is represented by counsel on a subject of the same relevant matter, but only for that person's role for which he is not represented by counsel. Here the Trustee-Owner has two "roles": The Trustee-Owner of the property, and the executive of the corporate governance board.

There are two possible answers and arguments to the question of whether the Trustee-Owner is represented by counsel in the matter which is the subject of the representation:

(a) Rule 4.2 prohibits communications with the represented person because he is represented in the same matter as the lawyer attempting to make contact; or

(b) Rule 4.2 does not prohibit communications with the represented person because the subpoena to the corporation and the remainder of the matters which are subject to the litigation are each separate "matters" within the litigation.

In the Committee's view, only (a) above is the logical answer. A common sense interpretation of Rule 4.2 would indicate that the Trustee Owner of the fact scenario is represented by counsel for the entirety of the litigation, and Rule 4.2 makes no exception for the "roles" played by people in the litigation. Whether a party is represented solely for his "role" as a corporate officer is irrelevant because the same dangers can exist from the lawyer contact for any role in the single litigation matter.

In *People v. Santiago*, 236 Ill.2d 417, 925 N.E.2d 1122, 339 Ill.Dec. 1 (2010), the Court determined that Rule 4.2's prohibition against contact with represented persons applies only when the persons are represented by counsel in the specific matter in which the contact has been made, not generally a substantially related matter. In particular, the Court held that in order for the "No Contact" rule to apply, there must be a lawyer-client relationship for the other party in the specific matter in which the communication has occurred. *People v. Santiago*, 925 N.E.2d at 1130. *Santiago* involved two separate "matters," one a civil case and the other a criminal investigation. This differs from the fact situation presented to us, which involves one "matter" but two separate parts of the matter in which a party would fulfill differing roles.

The reference to the Trustee Owner's "roles" in the litigation is a red herring. Once a person is represented by counsel in a matter, a lawyer may not communicate with that person about anything involving that matter.

(3) Is the Pro Se Lawyer authorized by law to have contact with the represented party because it is based on a subpoena?

Rule 4.2 permits a lawyer's communication with a represented person if that person's lawyer consents to the contact or if the contact is otherwise authorized by law or court order. In the fact scenario presented to us, there is no evidence that the Trustee Owner's lawyer consented to the communication; nor is there any indication that a court order exists permitting such a contact. The question then becomes whether the Pro Se Lawyer's communications with the Trustee Owner in following up on a subpoena issued to the Trustee Owner's corporation were "authorized by law".

ABA Formal Ethics Opinion 95-396 (1995) discussed this aspect of Rule 4.2 indicating that the "authorized by law" exception to the "No Contact" rule is satisfied by "a constitutional provision, statute, or court rule, having the force and effect of law, that *expressly* allows a particular communication to occur in the absence of counsel." (emphasis added).

Merely because a **subpoena** is authorized by law does not mean that the **contact** (by issuing a subpoena to the represented party or discussing scheduling of the deposition) is authorized by law. The phrase "authorized by law" has been interpreted to require that the law expressly authorize the contact, not general actions. *Parker v. Pepsi-Cola General Bottlers, Inc.*, 249 F.Supp.2d 1006, 1010-11 (N.D. E.D. Ill 2003). Thus, follow-up emails on compliance with the subpoena are not "authorized by law" merely because a statute grants the power to issue a subpoena.

The fact situation posed to us indicates only that the email communications to the Trustee Owner were to discuss compliance with the subpoena, although that could embrace a wide range of topics, including everything from a single sentence noting that the subpoena compliance is overdue, to a lengthy missive threatening contempt and citing extreme case law in an attempt to impress the Trustee Owner with the litigation battle he can expect from the Pro Se Lawyer

(4) Does the Limited Scope of Representation Exception allow contact with the party?

Rule 4.2 of the Illinois Rules of Professional Conduct was amended to include a Comment which is not a part of the ABA Model Rules of Professional Conduct. Comment 8A of the Illinois Rules states:

> For purposes of this Rule, when a person is being represented on a limited basis under Rule 1.2(c), a lawyer is only deemed to know that the person is represented by another lawyer, and the subject of that representation, upon receipt of (i) a proper Notice of Limited Scope Appearance under Supreme Court Rule 13(c)(6), or (ii) with respect to a matter not involving court proceedings, written notice advising that the client is being represented by specified counsel with respect to an identified subject matter and time frame. A lawyer is permitted to communicate with a person represented under Rule 1.2(c) outside the subject matter or time frame of the limited scope representation.

Comment 8A would seem to suggest that a party can have different parts of a lawsuit in which it is represented and other parts not represented, and the No Contact rule would not apply to those parts in which it is not represented. However, the Comment 8A exception applies only if the lawyer representing a party in litigation has filed a Limited Scope of Appearance under Supreme Court Rule 13(c)(6).

In this fact scenario, there is no Limited Scope Appearance, and there is no indication that the Trustee Owner and his lawyer have signed a written agreement which specifies the areas of the representation. Thus, the exception does not apply.

However, if the proper written agreement specifying the limitation of the representation of the Trustee Owner's lawyer were signed, and that lawyer then prepared and filed a proper Notice of Limited Scope Appearance in the lawsuit, then the Comment 8A exception to Rule 4.2 would become effective. In such an instance, if responding to subpoenas to the corporate governance board is excluded from the scope of representation of the lawyer for Trustee Owner (and no other lawyer exists), then the Pro Se Lawyer would not be barred by Rule 4.2 from communicating directly with the Trustee Owner.

CONCLUSION

A pro se lawyer represents him/herself as a client, therefore Rule 4.2's No Contact rule applies to prevent the pro se lawyer litigant from making contact with a represented party about the subject of the representation. In approaching potential Rule 4.2 issues, lawyers should exercise caution and be conservative in deciding whether to contact potentially represented parties. In the fact scenario presented, the No Contact rule applies to the pro se

lawyer litigant who undertook to communicate with a party represented in the litigation, albeit in a different "role," by emailing to obtain subpoena compliance. Rule 4.2 speaks to making contact with the parties, not with their "roles" in the litigation. Further, permitting the type of communication which the pro se litigant lawyer initiated leaves too many opportunities for overreaching and damage to the party's relationship with his lawyer to occur. Instead of making such communications, the pro se lawyer should have directed the contacts through the party's lawyer, and perhaps even asked that lawyer whether it was his/her preference that the pro se lawyer send the emails directly to the party.
