



**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 Rule of Professional Conduct 4.2. 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. 92-3
October 23, 1992**

Topic: Communicating with one of adverse interest.

Digest: Where an attorney's client has been sued by a city, the attorney would violate Rule 4.2 by communicating directly with elected officials of the city about the subject matter of the litigation, when those officials are represented by counsel.

Ref.: Illinois Rules of Professional Conduct, Rule 4.2
ABA Annotated Model Rules of Professional Conduct, Rule 4.2
ABA Formal Opinion 92-362
ISBA Opinion 675

FACTS

An attorney corresponding with a city attorney about pending litigation brought by the city against his client is considering sending copies of the correspondence to the mayor, city manager, a department head, and a city council member.

QUESTION

Does sending copies of correspondence with the city attorney to officials of the city government violate the provisions of Rule 4.2 prohibiting an attorney from communicating with a person who is

represented by counsel regarding the subject matter of the pending dispute?

OPINION

Rule 4.2 of the Illinois Rules of Professional Conduct provides:

During the course of representing a client a lawyer shall not communicate or cause another to communicate on the subject matter 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 be otherwise authorized by law.

We will assume that the inquiring attorney does not have the prior consent of the city's attorney to communicate directly with the city officials. It would therefore be improper for the inquiring attorney to communicate directly with represented employees of the city regarding the litigation.

Generally, communications directly between represented parties are not governed by the Rules of Professional Conduct; in rare circumstances the client may be assisted by counsel. For example, the comments to ABA Rule 4.2 point out that, "Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter." The reasoning for this exception seems to be that government officials are elected public servants, and, therefore, the public has a right of access to them in their governmental capacities. However, the term "party" does not refer to the attorney, but rather it refers to the client. Therefore, the client as a "party" could make direct contact with an elected official. The attorney, on the other hand, should not communicate directly with opposing politicians on behalf of a client where the politicians are represented by counsel.

An ISBA opinion which advances the theory of public access is Opinion No. 675 (1980) which opined that it was not improper for an attorney appealing an administrative ruling to obtain public records from the public body involved in the appeal without going through the attorney representing the public body. The reasoning here was that the records were accessible to the public, and the attorney should not have the extra burden of having to go through counsel to obtain them.

As indicated previously, the client could send copies of correspondence about pending litigation directly to the government officials. Caution, however, should be urged. The attorney must carefully consider the requirements of Rule 4.2 which restricts an attorney from even assisting in the communication with one of adverse interest. The prominent viewpoint is that neither this attorney nor any other attorney should assist the client in directly communicating with a represented public official.

However, there is some contrary thought that the "petitioning of an elected official" is a separate issue and, therefore, the attorney could separately assist the client in petitioning elected officials while acting as counsel in the litigation. As this is an unclear area, counsel should tread carefully. See, ABA Formal Opinion 92-362 (1992)

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