ALASKA BAR ASSOCIATION
ETHICS OPINION NO. 2018-2

DIRECT COMMUNICATIONS WITH REPRESENTED PARTY
WHEN SPECIFIC NOTICE IS REQUIRED TO BE SERVED
ON THE PARTY

ISSUE PRESENTED

May an attorney send a “notice” contemplated by a contract directly to one of the contracting parties when the attorney has reason to believe that the party to whom the notice is sent is represented by legal counsel?

SHORT ANSWER

The attorney for a party to a contract may initiate notice to another party to that contract even if the other party is represented by counsel so long as the notice is contemplated by the pre-existing agreement of the parties. Such a notice must not include arguments or inquiries and must be strictly limited to the purposes the notice provisions of the agreement were intended to fulfill. Though not required by the Rules of Professional Conduct, common professional courtesy suggests that, except in unusual circumstances, a copy of the notice should be sent to opposing counsel simultaneously with the sending of the notice to the designated nonclient party.

STATEMENT OF FACTS

In the situation presented to the Committee, Attorney A sent a notice of default with respect to a contract directly to a represented party. The contract at issue specifically required written notice of default. The contract was not specific as to the appropriate entity to receive such notice (i.e., the contract did not specify whether the notice should go to the party or to counsel for the party). Attorney B, counsel for the party, was copied contemporaneously with the notice of default.

Attorney B accused Attorney A of violating Alaska Rule of Professional Conduct 4.2 by sending the notice of default directly to a represented party.
ANALYSIS

Alaska Professional Conduct Rule 4.2 states in full:
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 to do so by law or a court order.

The commentary to this rule states that it contributes to the proper
functioning of the legal system by protecting a person who has chosen to
be represented by a lawyer in a matter against possible overreaching by
other lawyers who are participating in the matter, interference by those
lawyers with the client-lawyer relationship, and the uncounseled
disclosure of the person’s confidences and secrets.¹

Commentary to Rule 4.2 also makes clear that the rule does not
prohibit communication “concerning matters outside the representation.”²
In the context of discussing this issue, the commentary further states that
“a lawyer having independent justification or legal authorization for
communicating with a represented person is permitted to do so.”³ The
question presented thus appears to be whether the written notice of
default is an independently justified or legally authorized communication.
If it meets this standard there is no violation of Rule 4.2.

A notice from one party to a contract to another party to the same
contract, especially if contemplated by the very language of the contract,
seems independently justified. So long as the notice does no more than
announce the position, intention or prospective behavior of the party, as
contemplated by a preexisting contract, such a notice is not a
“communication” within the meaning of Rule 4.2. If the notice goes beyond
the requirements of the contract pursuant to which it is given, and
ventures into arguments or inquiries not required to fulfill its fundamental
purpose the notice may well become a “communication” subject to the
prohibitions of Rule 4.2.

¹ Alaska Professional Conduct Rule 4.2, Commentary Para. 1 (as
adopted in 2009).
² See Commentary Para. 4.
³ Id.
The Committee believes that this interpretation supports the purposes of Rule 4.2 without detracting from the policy of enforcing contracts as they are written. By limiting the notice, the sending attorney is unlikely to take advantage of an opposing party, or to interfere with an opposing party’s relationship with counsel. Care should be taken in the drafting of the notice and in abiding by the precise terms of the contract to ensure that the notice does not venture into classification as a communication. This is consistent with other authorities that have considered this issue.

The attorney for a party to a contract may initiate a notice to another party to that contract even if the other party is represented by counsel so long as the notice is contemplated by the preexisting agreement of the parties. The notice must not include arguments or inquiries and must be strictly limited to the purposes the notice provisions of the contract were intended to fulfill. Though not required by the Rules of Professional Conduct, common professional courtesy suggests that, except in unusual circumstances, a copy of the notice should be sent to opposing counsel simultaneously with the sending of the notice to the designated nonclient.

Approved by Alaska Bar Association Ethics Committee on October 4, 2018.

Adopted by the Board of Governors on October 9, 2018.