

**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.<sup>1</sup>

Commentary to Rule 4.2 also makes clear that the rule does not prohibit communication "concerning matters outside the representation."<sup>2</sup> 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."<sup>3</sup> 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.

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<sup>1</sup> Alaska Professional Conduct Rule 4.2, Commentary Para. 1 (as adopted in 2009).

<sup>2</sup> See Commentary Para. 4.

<sup>3</sup> *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.<sup>4</sup>

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.

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<sup>4</sup> The Committee found the analysis from the Indiana Legal Ethics Committee particularly persuasive. See Indiana State Bar Ass'n, Legal Ethics Committee Op. 2003-01 (2003); see also Restatement (Third) of the Law Governing Lawyers § 99 cmt.g.