

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 92-362

July 6, 1992

CONTACT WITH OPPOSING PARTY REGARDING SETTLEMENT OFFER

A party's lawyer who makes an offer of settlement to the lawyer for the opposing party may not under Model Rule 4.2 inquire of the offeree-party whether the offer has been communicated to the offeree, even if the offeror's lawyer entertains serious doubts that it has been so communicated.

The Model Rules do not, however, forbid the offeror's lawyer, in fulfilling the lawyer's duty to counsel the client, to advise the offeror-client about the latter's ability to communicate on the matter directly with the offeree-party or about the lawyer's views as to the most efficacious method of doing so.

The Committee has been asked its opinion on the following set of facts. The inquiring lawyer represents the plaintiff in a civil litigation matter, in which the defendant is also represented by counsel. Two months ago, plaintiff's lawyer made a settlement offer to opposing counsel. Plaintiff's lawyer has had no response, and the case is scheduled to go to trial in two weeks. Plaintiff's lawyer suspects that opposing counsel has not informed the defendant of the offer.

The question posed is under what circumstances, if any, plaintiff's lawyer may contact the defendant directly, without permission of defendant's lawyer, to inform the defendant of the settlement offer. This may implicate as well the question of what plaintiff's lawyer can say to his or her client about the client's ability to communicate directly with the defendant.

The first issue is clearly addressed by Model Rule 4.2:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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.

Since communication to the defendant of plaintiff's settlement offer would be a communication "about the subject of the representation," the Rule prohibits the communication unless defendant's lawyer consents or the communication is authorized by law. As to the latter exception to the Rule's prohibition, counsel must consult applicable law in the relevant jurisdiction; it is beyond the jurisdiction of this Committee to advise on matters of law. [FN1]

The Rule contains no exception for instances where offering counsel believes, or indeed even knows, that the offeree's counsel has not communicated a settlement offer to the offeree. While the offeree's lawyer has a duty to communicate offers to the offeree, [FN2] the absence of an exception to Rule 4.2 when the offeree's lawyer has not done so cannot be considered an oversight by the drafters. Neither the provision of the Model Code of Professional Responsibility that preceded Rule 4.2 nor its antecedent in the Canons of Professional Ethics provided an exception for the circumstances here under discussion. Disciplinary Rule 7-104(A)(1) provides, in terms almost identical to Rule 4.2:

(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.

Canon 9 stated as follows:

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

This Committee has addressed the present issue under each of these predecessor provisions. In 1967, in Informal Opinion 985, the Committee was asked whether it was ethically permissible for the lawyer for the defendant in a suit for money only to serve directly on the plaintiff in the action, at the same time serving a copy thereof on the plaintiff's lawyer in the action, a formal offer to allow judgment in a specified amount to be entered against the defendant. The inquiry was made in light of a state statute in the inquirer's jurisdiction permitting what are generally known as "offers of judgment." A majority of the Committee opined in Informal Opinion 985 that:

If applicable statutes or procedural rules or rules of law in a particular jurisdiction *expressly permit* an offer of judgment to be served directly upon an adverse party, a lawyer may ethically cause such direct service to be made, *provided that a copy is also served concurrently upon the attorney for the adverse party, and provided further that the attorney making such direct service does not do so with any improper motive or purpose.* (Emphasis in original)

A minority of the Committee believed that such direct communication would be permissible only if the applicable law expressly *required* direct service in order for the offer or acceptance to be legally effective or unless a specific court order entered after due notice to opposing counsel expressly so permitted.

In 1975, the Committee again visited the issue in Informal Opinion 1348. That opinion interpreted DR 7-104(A)(1) of the Model Code, which as has been pointed out was in material respects identical to Rule 4.2. The question posed in Informal Opinion 1348 was whether, under circumstances similar to those assumed in this Opinion, the offering party's lawyer could send to the opposing party a carbon copy of letters sent to the offeree's lawyer submitting settlement offers, as a way of ensuring that the opposing party learned of those offers.

The Committee opined that sending such a copy would be ethically impermissible under the Rules, "even though [offeror's lawyer] believes that [offeree's lawyer] is not relaying settlement offers submitted in connection with the litigation in question." The Committee suggested two alternative courses to the offeror's lawyer under these circumstances: (1) the course suggested by the Committee majority in Informal Opinion 985 (filing an offer of judgment, and serving a copy directly on the adverse party, if legally permitted in the jurisdiction, provided a copy is concurrently served on the adverse party's lawyer and the service on the adverse party is done without improper motive or purpose); and (2) sending to the court a communication similar to the one containing the settlement offer sent to counsel for the offeree.

Especially in light of the fact that the drafters of Rule 4.2 and the House of Delegates that adopted it may be presumed to have been aware of both of these relatively recent opinions, the Committee believes it beyond question that the offering lawyer's communications under the circumstances here considered must continue to be with the offeree's lawyer alone except as otherwise provided by applicable law, or consented to by the offeree's lawyer, or as suggested in Informal Opinions 985 and 1348.

While Rule 4.2's prohibition on the lawyer is quite clear, however, it does not purport to govern communications by the lawyer's client. Indeed, the comment to Rule 4.2 expressly notes that "parties to a matter may communicate directly with each other...." [FN3] Moreover, Model Rule 1.1 mandates that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rule 1.2(a) provides in pertinent part that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be pursued." Rule 1.4(b) requires that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The Comment to Rule 1.4 states in pertinent part:

The client should have sufficient information to participate intelligently in decisions concerning the

objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, 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....

Adequacy of communication depends in part on the kind of advice or assistance involved.... The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult.

In the Committee's view, fulfillment of the duties imposed by these Rules requires that the lawyer for the offeror-party advise that party with respect to the lawyer's belief as to whether the offers are in fact being communicated to the offeree-party. Likewise, the offeror-party's lawyer has a duty to that party to discuss not only the limits on the lawyer's ability to communicate with the offeree-party, but also the freedom of the offeror-party to communicate with the opposing offeree-party.

We find support for this conclusion in the fact that Rule 4.2 omits the phrase "or cause another to communicate," which appeared in DR 7-104(A)(1), and in the fact that the House of Delegates in 1983 rejected an amendment that would have restored it. As reported in *The Legislative History of the Model Rules of Professional Conduct* (ABA Center for Professional Responsibility, 1987), at 148-49:

An amendment proposed by the New York State Bar Association, which would have added the phrase "or cause another to communicate," was defeated. The opponents objected to a possible interpretation of the amendment that would prevent lawyers from advising principals to speak directly with their counterparts. The Rule was not intended to prohibit such advice. To the extent the amendment would have precluded a lawyer from using an intermediary to carry a message from the lawyer to the opposing party, such conduct was prohibited by Rule 8.4(a) which prohibited a lawyer from violating a Rule "through the acts of another."

As this passage suggests, there is a tension between the lawyer's latitude to advise the offeror-client about the client's right to communicate directly with the offeree and about how that communication can most effectively advance the interests of the offeror, and Model Rule 8.4(a)'s prohibition on a lawyer's doing indirectly what the lawyer may not do directly.

Rule 8.4(a) provides that:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another....

The prohibition of this Rule against a lawyer's violating the Rules through the acts of another raises a number of questions about, *inter alia*, what a lawyer may or may not say to the lawyer's client, sufficiently broad and complex to require separate attention. Leaving for another day any opinion on that broader subject, the Committee concludes that in the factual setting of this Opinion, where the purpose of the communication is to ascertain whether a settlement offer has been communicated to the other party, Rule 8.4(a) should not be read to preclude the lawyer's fulfilling the lawyer's duty, reasonably expected by the client, fully and fairly to advise the client of the lawyer's best professional judgment as to the exercise of the client's rights in furtherance of the representation.

FN1. The Comment to Rule 4.2 offers as an example of a communication "authorized by law" the right of a party to a controversy with a government agency to speak to government officials about the matter. See also Informal Opinion 985 (1965), discussed below, where there was consideration of a possible local rule or law permitting or requiring service directly on a party of an offer of judgment.

FN2. Model Rule 1.4 provides as follows:

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The Comment to Rule 1.4 states:

A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable.... Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

Also pertinent is Model Rule 1.2(a), which provides in relevant part as follows: A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.

FN3. See also this Committee's Formal Opinion 84-350 (1984), withdrawing several prior opinions, including Formal Opinion 78 (1932), which had held that a lawyer must attempt to restrain the lawyer's client from contacting the opposing party.

© 1992 by the American Bar Association. All rights reserved