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Committee on Professional Ethics

Opinion 894 (12/1/11)

Topic: Communication with represented party; service of process

Digest: When authorized by statute, an attorney may personally serve process on a represented party and ask certain related questions, but may not go beyond service of process to communicate on the subject of the representation without the consent of such party's lawyer.

Rules: 1.0(l), 4.2

FACTS

1. An attorney for a landlord, to commence a summary eviction proceeding, serves a petition and notice of petition. The tenant appears by counsel and challenges the service. Landlord's attorney wishes to effect new service by personally serving the notice and petition directly upon the tenant.

QUESTION

2. May an attorney personally serve process on a party known to be represented?

OPINION

3. The New York Rules of Professional Conduct provide:

> "In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party that the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law."

Rule 4.2(a).

4. Clearly the tenant is represented by a lawyer in the matter. The validity of the original service of process is irrelevant to this issue. *See* Rule 1.0(l)(defining "matter" to include a claim or controversy as well as a proceeding). Landlord's attorney therefore may not "communicate or cause another to communicate" with the tenant about the subject of the representation without the prior consent of the tenant's lawyer unless landlord's attorney is authorized to do so by law.

5. The purpose of Rule 4.2 is to promote 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 over-reaching by other lawyers who represent clients in the matter. *See* Rule 4.2, Cmt. [1]. Although the rule is popularly known as the "no-contact" rule, by its terms the rule prohibits contact without the opposing lawyer's consent only if (a) such contact involves communication, (b) the communication is about the subject of the representation, and (c) the communication is not authorized by law.

6. Rule 4.2 is not limited to oral communication. A letter mailed or handed to the represented tenant by the lawyer or the lawyer's agent, if it argued the landlord's position or offered a settlement of the matter, clearly would constitute a prohibited communication. Whether legal process that commences a court action also constitutes "communication about the subject of the representation" is a question we need not decide, because another clause of the Rule is sufficient to answer the inquiry.

7. Rule 4.2 allows a lawyer to communicate with an unrepresented person when "authorized to do so by law." The Real Property Actions and Proceedings Law provides for process to be personally served upon the respondent in the proceeding, without reference to whether the respondent is represented. "Service of the notice of petition and petition shall be made by personally delivering them to the respondent," or alternatively, by specified forms of mail to the respondent in addition to either delivering the papers to a person of suitable age and discretion at the property sought to be recovered, or else leaving the papers in a specified manner at the property. RPAPL § 735(1).

8. Under the Civil Practice Law and Rules, authorization to serve process and other papers is very broad and does not exclude lawyers. "Except where otherwise prescribed by law or order of court, papers may be served by any person not a party of the age of eighteen years or over." CPLR 2103. Articles 8 and 8-A of the New York General Business Law contain requirements with respect to process servers. Both specifically exempt attorneys from the definition of process servers who are required to maintain records (which clearly would not be necessary if attorneys could not personally serve process). GBL §§ 89-t, 89-bb. Although many lawyers use professional process servers, the CPLR does not require them to do so.[1] And if it would violate the Rule for the lawyer personally to effect service, then it would be equally violative for the lawyer to "cause another," such as a process server, to do so. There is no violation in either

[1] In fact there can be legitimate reasons, not involving circumvention of Rule 4.2, for a lawyer personally to effect service. For example, the lawyer may wish to save the cost of a professional server or to be assured that service is timely and valid.

case, because service directly upon a respondent, even if represented, is authorized by law.

9. May a lawyer, when serving process on a represented person, engage in conversation with that person? It is permissible, whether or not advisable, to discuss matters wholly unrelated to the representation. Some more related communications are common in the course of serving process. For example, the server may have occasion to ask the prospective recipient whether he or she is the person named in the papers, or to ask the recipient to sign an acknowledgement of receipt of service.

10. We doubt that asking the tenant to confirm his or her identity, or to sign an acknowledgement of receipt, would be a communication "about the subject of the representation" within the meaning of Rule 4.2. In any event, we believe that communications such as these would fall within the legal authorization for making service directly upon the respondent. The CPLR anticipates that a person serving process may have occasion to engage in some such types of communication. *See* CPLR 306 (d) & (e) (allowing proof of service by means including "a signed acknowledgment of receipt of a summons and complaint" or a "writing admitting service by the person to be served").

11. However, a statute providing for service directly upon parties (including represented ones) does not constitute a general authorization of communication with such persons during the course of service. A lawyer serving process on a represented person must be careful not to exceed the scope of the authorization in any way that would violate the no-contact rule.[2] Conversation on the subject matter of the representation, if not included within the authorization for service of process, remains prohibited.

CONCLUSION

12. An attorney may personally serve process on a represented party as authorized by statute. In the course of making service, the attorney may ask the represented party

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[2] We note the approach to this issue that has been taken by another State. In Florida, the analogue to our Rule 4.2 states no exception for communications authorized by law, so there is reason for it to include an explicit but limited exception for service of process:

> "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. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney."

Fla. Rule 4-4.2(a).

if he or she is the person named in the papers, and may request the represented party to sign an acknowledgement of receipt of process. The attorney may not, however, without the consent of that person's lawyer, go beyond service of process to elicit or participate in communications with that person about the subject of the representation.

(36-11)