



New York State Bar Association
Committee on Professional Ethics

Opinion 959 (2/21/2013)

Topic: Contacting formerly represented party to determine if he or she has new counsel.

Digest: A lawyer who knows that an adverse party’s lawyer has withdrawn from the representation or resigned from the bar may contact the adverse party to determine if he or she has retained new counsel or plans to represent himself or herself.

Rules: 4.2, 4.3

FACTS

1. The inquiring lawyer represents a client in a litigated matter. The inquirer states that he knows that an adverse party’s lawyer has withdrawn from the representation and has withdrawn from the bar as a result of a pending investigation.

QUESTION

2. May a lawyer who knows that an adverse party’s lawyer has withdrawn from the representation contact the adverse party to determine if he or she has retained new counsel or plans to act pro se?

OPINION

3. Rule 4.2 of the Rules of Professional Conduct, also known as the “no contact” rule, prohibits a lawyer from communicating about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, without the prior consent of the other lawyer. Rule 4.3, on the other hand, allows a lawyer to communicate on behalf of a client with a person who is not represented by counsel, as long as the lawyer does not state or imply that the lawyer is disinterested and, if the unrepresented person has interests that could reasonably be in conflict with the interests of the lawyer’s client, the lawyer does not give legal advice to the unrepresented person, other than the advice to secure counsel.

4. Rule 4.2 does not authorize contact with the opposing party if the lawyer “knows” that the opposing party is represented by counsel. In N.Y. State 663 (1994) we discussed when the lawyer “knows” that a client who previously was represented by counsel, or a client who states that he is represented by counsel, is no longer so represented. In that case, the actions of the opposing party and his putative counsel cast doubt on the existence of an attorney-client relationship. Consequently, we suggested that the lawyer must undertake a “complete and

thorough inquiry” to determine the ultimate fact of existing or continuing representation, which might include contacting the putative lawyer to determine the status of the representation. Where the lawyer knows that the opposing party’s counsel has resigned from the representation or is no longer a member of the bar, the lawyer has reason to believe that the opposing party is not represented by counsel. Rule 4.3 thus authorizes the lawyer to communicate with the opposing party to ascertain whether he or she has obtained new counsel, or plans to represent himself or herself. Consistent with Rule 4.3, in any such communication with the opposing party, the lawyer should take care not to give legal advice.

CONCLUSION

5. A lawyer who knows that an adverse party’s lawyer has withdrawn from the representation or resigned from the bar may contact the adverse party to determine if he or she has retained new counsel or plans to represent himself or herself.

(69-12)