WHO DO I TALK TO WHEN MY OPPOSING COUNSEL IS INELIGIBLE TO PRACTICE?

Feb 27, 2019 **By Jonathan Grabb** **Assistant Bar Ethics Counsel** **Columns**

Whether it is due to a lawyer's suspension, disbarment, or simply the nonpayment of fees, you may occasionally find that your opposing counsel is now ineligible to practice. This raises the question: who do I talk to? Rule 4-4.2(a) of the Rules Regulating The Florida Bar prohibits a lawyer from communicating about the subject matter of a representation with a party that the lawyer knows is represented by another lawyer, but what if that second lawyer is suddenly unable to practice law?

First, if you learn that another lawyer is not eligible to practice, it is usually best to contact the ineligible lawyer and try to determine whether the lapse in eligibility is temporary and whether the ineligible lawyer expects to continue the representation.

Ideally, the end of the lawyer-client relationship will be clear in most situations where a lawyer has been sanctioned for unethical conduct. A suspended or disbarred lawyer is obligated to notify clients, co-counsel, opposing counsel, and all courts, tribunals, or adjudicative agencies before which the lawyer is counsel of record. *See R. 3-5.1(h)*.

However, it is also common that a lawyer is temporarily ineligible to practice law due to the lawyer's failure to complete continuing legal education requirements or to pay membership fees. If so, the ineligible lawyer may not be subject to sanctions for practicing law during the lapse in eligibility if their reinstatement is approved within 60 days from the date that the delinquency is effective. *See R. 1-3.7(f)*.

While it may be uncomfortable, reaching out to the ineligible lawyer as a first step is appropriate given the traditionally broad application of Rule 4-4.2(a). For example, Rule 4-4.2 forbids communications about the subject of the representation even if the represented person initiates or consents to the contact. Comment to R. 4-4.2; **ABA Formal Op. 95-396**. The prohibition on communications also does not end simply because a judgment has been entered and the time frame for an appeal has run. **Fla.**

Ethics Op. 65-3. A lawyer may not copy nonlawyer employees considered represented by an organization's lawyer nor may a lawyer communicate directly with a party even if the lawyer believes that the opposing lawyer isn't properly conveying settlement proposals to their client. *The Florida Bar v. Nunes*, 661 So. 2d 1202 (Fla. 1995); **Fla. Ethics Op. 76-21**.

Florida's courts have generally held that lawyers should contact opposing counsel to verify the lawyer has been discharged before communicating with the opposing party directly. *See The Florida Bar v. James*, 478 So. 2d 27 (Fla. 1985) (holding that a lawyer unethically communicated with an opposing party when the lawyer did not verify statements from his client that the opposing counsel had been discharged); *Hanley v. Hanley*, 426 So. 2d 1230 (Fla. 2d DCA 1983) ("However, when Mr. Ehrlich was told by his client that her husband had discharged his lawyer, he should have at least confirmed this with [the opposing lawyer] before preparing a property settlement agreement for execution by the husband."); *State v. Yatman*, 320 So.2d 401 (Fla. 4th DCA 1975) (state attorney should have made "some reasonable inquiry" to verify that the defendant was unrepresented before proceeding with a deposition); but *see Re Decker*, 212 So. 3d 291 (Fla. 2017) ("[A] lawyer. . . should not be required to further investigate the status of the representation once the party has stated unequivocally that he is not represented by counsel.") Similarly, the ABA recommends that the prudent course of action is to contact the purportedly discharged lawyer for verification even when a party expressly states that they are no longer represented by counsel. **ABA Formal Op. 95-396**. Further, it notes that a lawyer may not communicate with the client of an opposing lawyer who is counsel of record in a proceeding until the opposing lawyer is allowed to withdraw that lawyer's appearance in the matter. *Id*.

If you are unable to reach the ineligible lawyer and the ineligible lawyer does not withdraw from the representation, it may be appropriate to notify a court with jurisdiction over the matter and request additional guidance. *See Id*. This allows the court to determine whether the ineligible lawyer may remain as attorney of record and when and how any communications directly with the opposing party may be permitted. This approach also avoids confusion for the required service of court documents.

Ultimately, while Rule 4-4.2(a) prohibits communications with a represented party about the representation when you have actual knowledge of the fact of representation, that knowledge may be inferred and you cannot avoid the rule by "closing eyes to the obvious." *See* Comment to R. 4-4.2. As a result, it is recommended that you begin by

reaching out to the party's lawyer directly if you discover the lawyer is ineligible to practice law. If the ineligible lawyer fails to respond, it may be appropriate to notify the appropriate court or tribunal and request additional guidance.