



**BEFORE THE ATTORNEY ETHICS ADVISORY
COMMITTEE OF THE SUPREME COURT OF ARIZONA**

**IN THE MATTER OF FORMER STATE
BAR ETHICS COMMITTEE OPINION:**

Op. 02-02

**NOTICE OF -
REQUEST FOR ETHICS OPINION**

On November 19, 2020 the Attorney Ethics Advisory Committee of the Supreme Court of Arizona determined by a vote of 10-0-4¹, to review State Bar ethics opinion Op. 02-02. This motion is given for the purpose of docketing the opinion request.

DATED this 3rd day of December, 2020

/s/

Judge Paul McMurdie, Chair
Attorney Ethics Advisory
Committee of the Supreme Court of Arizona

¹ Committee members Hon. John Napper, Hon. Kim Ortiz, Sheena Chiang, and Geoffrey Trachtenberg did not participate in this matter.

EO-20-0011

Original of the foregoing filed this 3rd day of December, 2020 with:

Supreme Court of Arizona
Court Clerk's Office
1501 West Washington, Suite #402
Phoenix, AZ 85007-3231
Phone: (602) 452- 3396

Copy of the foregoing filed this 3rd day of December, 2020 with:

Attorney Ethics Advisory Committee
Of the Supreme Court of Arizona
1501 West Washington Street, Suite 104
Phoenix, Arizona 85007
E-mail: aea@courts.az.gov

By: B. Farmer

02-02: Communication with Adverse Parties

3/2002

Unless an administrative rule or statute requires such contact, a lawyer should not send copies of documents to a represented opposing party without opposing counsel's consent, even if copies are sent contemporaneously to opposing counsel.

FACTS[1]

The inquiring attorney represents parties in administrative proceedings where there is an opposing party and counsel. The inquiring attorney asks whether it is ethically permissible for an attorney to send copies of correspondence and pleadings to both the opposing counsel and party, concurrently.

QUESTION PRESENTED

May an attorney send copies of correspondence and pleadings to an opposing party if the documents are concurrently sent to opposing counsel?

RELEVANT ETHICAL RULES**ER 4.2. Communication with Person Represented by Counsel**

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.

OPINION

While there are no Arizona Opinions directly on point with respect to the specific facts of sending a copy of a letter to an opposing party, the plain language of ER 4.2 is clear; if a lawyer knows that another party is represented by counsel, the lawyer cannot communicate directly with that other party unless either a) the other lawyer consents; or b) the contact is authorized by law.

Other jurisdictions have confirmed that a lawyer cannot send a copy of a document directly to an opposing party that is known to be represented by counsel, even if a copy of the letter is sent to the opposing counsel contemporaneously. See D.C. Op. 120 (1983); P.A. Op. 94-167.

Certain administrative proceedings may require unique procedures that might erroneously lead an attorney to conclude that it is ethically permissible to copy an opposing party on pleadings or correspondence. However, unless there is a specific administrative rule or statute requiring such contact, counsel should not send copies of any documents directly to an opposing party without opposing counsel's consent. See, e.g., *Lee v. Fenwick*, 907 S.W.2d 88 (Tx. App. 1994)(official notice required by law to be sent directly to a defendant is a permissible contact).

Occasionally an attorney may be concerned that an opposing counsel is not communicating adequately with their client or is no longer representing the party. Even if the opposing party contacts a lawyer to state that they have discharged their attorney, counsel should make reasonable efforts to confirm this fact with opposing counsel, before engaging in any communications with an opposing party. ABA Op. 95-396; *In re News Am. Publ'g Corp., Inc.*, 974 S.W.2d 97 (Tx. App. 1998). Moreover, in most litigation contexts, an attorney is still counsel of record for a party until the lawyer's motion to withdraw is granted by a court or administrative law judge.

As a last resort, if an attorney is concerned that opposing counsel is not communicating information to the opposing party and the opposing counsel is failing to communicate with the attorney, the attorney should, after making reasonable efforts to contact opposing counsel, seek instructions from the court or ALJ prior to initiating any direct contact with an opposing party.

Ethical Rule 4.2 is intended to protect represented parties from undue influence and pressure from an opposing counsel. Even the receipt of a copy of a demand letter, notice of a deposition, or motion for sanctions could unreasonably intimidate an opposing party to make decisions without adequate advice from their attorney. Once a party has retained counsel, the Rule is clear that there shall be no contact with that represented party, regarding that representation, without their attorney's consent, unless the contact is required by law.

[1] Formal Opinions of the Committee on the Rules of Professional Conduct are advisory in nature only and are not binding in any disciplinary or other legal proceedings. Ó State Bar of Arizona 2002