Enduring Opinion #136
Direct Communication with Adverse Party After Litigation is Complete.
Issued December 1, 1993 by the Professional Ethics Commission

ISSUE: Communicating Directly with the Opposing Party
Controlling Authority: Rule 3.6(f), Maine Bar Rules; now Rule 4.2(a),
Maine Rules of Professional Conduct

CURRENT STATUS

Ethics Opinion #136 lives on. An attorney may not directly communicate about the subject
of representation with a person the attorney knows or should know is represented by another
attorney without the prior consent of the person's lawyer.

HISTORY AND CONSEQUENT RULE DEVELOPMENT

Ethics Opinion #136 was issued on December 1, 1993 by the Professional Ethics
Commission under Maine Bar Rule 3.6(f). On August 1, 2009, the ethics provisions of the Bar Rules
were repealed and replaced by Maine Rules of Professional Conduct. A revised version of former
Rule 3.6(f) became new Rule 4.2 (a) of the Maine Rules of Professional Conduct. The old (3.6(f))
and new (4.2(a)) Rules read as follows:

During the course of a client's representation, a lawyer, shall not communicate or cause
another to communicate on the subject of the representation with a party the lawyer
knows to be represented by another lawyer in that matter unless the lawyer has the prior
consent of the lawyer representing such other party or is authorized by law to do so.

Rule 3.6(f), Maine Bar Rules.

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 or is authorized to do so by
law or a court order. Specific limitations on recommendations by a prosecutor are
contained in (c).

Rule 4.2(a), Maine Rules of Professional Conduct.

The question in issue, as before, is: “Would Attorney X violate the Maine Bar Rules (now the
Maine Rules of Professional Conduct), particularly Rule 3.6(f) (now Rule 4.2(a)), by
communicating directly with the opposing party?

The underlying facts are not changed. They remain:

“Attorney X represents a defendant in divorce litigation for over two years. Various post-
judgment matters are subsequently litigated and resolved over an additional period lasting
several years. Attorney X continues to represent the defendant. Plaintiff is represented throughout
by Attorney Y.
Some ten months after concluding the last piece of litigation, Attorney X intends to write the plaintiff directly instructing plaintiff to follow new arrangements for the payment of child support, with a copy of the letter to Attorney Y, still plaintiff's last counsel of record.”

Opinion #136 focused on the words “know” and “matter” when answering the question presented, that is, was the duration of the relationship between Attorney Y and the plaintiff long enough to enable Attorney X to “know” that the plaintiff was still represented by Attorney Y? In addition, was the “new arrangement for payment of child support “a new or different “matter??” These choices were easy for the Commission to resolve given the facts presented, and under most scenarios, continue to be easy answers.

COMPARISON BETWEEN THEN AND NOW
(Opinion #136 Lives On)

The new Rule is little changed, but what little changes exist are subtle enough to cause confusion and to be misconstrued by the wary attorney. For example: Communication with a Party vs. with a Person; having prior consent vs. consent; or, authorized by law to do so vs. by law or by a court order. The pivotal inquiry under the little changed language of Rule 4.2(a) is not marred by the differences between “a Party” and “a Person”; “prior consent” and “consent”; and/or authorized “by law” and “by law or by court order.” In fact, the Task Force saw no discernible differences considering the context of the activity the Rule seeks to prevent: Overreaching by other lawyers and disclosure of confidential or damaging information without an opposing party receiving advice of their counsel. “Because the Task Force thought Rule 4.2(a) was an accurate and concise exposition of the rule currently in force in Maine, it recommended its adoption.” West’s Maine Rules of Court Annotated 2013, Vol. 2, Page 947, and in so doing, extended the life of Professional Ethics Commission Opinion # 136.