

Communication with Represented Parties

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As evidenced by its frequent appearance in this column, as demonstrated by how often it is the subject of requests for advisory opinions, and as illustrated by its being the source of attorney discipline, the question of communication with represented parties continues to be a hot topic for Minnesota lawyers.

The rule governing such communication is fairly straightforward. Rule 4.2 of the Minnesota Rules of Professional Conduct provides that in representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented, unless the other lawyer has consented to the communication or is authorized by law to do so.

Previous columns have addressed questions concerning when members or prospective members of a class become parties subject to the protection of the rule; obtaining information from a represented party's Web site; contacting government officials; and interviewing represented parties in criminal investigations. This column addresses the question of what constitutes communication for the purposes of Rule 4.2.

What constitutes communication is sometimes the subject of confusion by lawyers because of the different meanings the word "communicate" has in everyday parlance. To communicate can mean "to make known; impart, to communicate information." In other words, the type of communication that might take place in a presentation where the speaker addresses the audience, but members of the audience are merely passive recipients of the information. Or, communication can be used in the sense of "to have an interchange of ideas" – hopefully, the type of communication engaged in between the lawyer and the lawyer's client. Lawyers run afoul of Rule 4.2 when they mistakenly understand (or seek to interpret) the rule as only applying to the second type of communication. In fact, it encompasses both meanings.

For example, lawyer Jones represents the defendant homeowner in a personal injury case. In his dealings with plaintiff's lawyer Smith, Jones finds her to be both dilatory and nonresponsive. Jones has conveyed to Smith a very generous proposal to settle the case. Jones is convinced that a party in the plaintiff's position would be crazy to reject such an offer. Yet on those rare occasions when Jones is able to reach Smith, she tells him that the plaintiff is "still thinking about the offer." Given his past dealings with Smith, Jones is convinced that she is not relaying his settlement offer to her client. Jones is certain that if plaintiff were made aware of this offer, he would jump at the chance to settle his case. So, Jones writes to Smith, reiterating his settlement offer and sends a copy of his letter to the plaintiff. Jones does not attempt to hide this fact from Smith, in fact he clearly indicates at the bottom of the letter that a copy is going to the plaintiff.

Although he never talks to the plaintiff and the plaintiff never responds to his letter, Jones has violated Rule 4.2. By sending a copy of the letter, Jones has "made known or imparted information" to a represented party (i.e., communicated) about the subject of the representation without the consent of the other lawyer. The American Bar Association (ABA) Ethics Committee has opined that a lawyer may not copy the adverse

party on a settlement offer being communicated to opposing counsel, even where the lawyer believes opposing counsel is not relaying the settlement offer to the client. See ABA Informal Opinion 1348 (Aug. 19, 1975).

In such a situation the lawyer has other remedies available. For example, the lawyer may file an ethics complaint with the Office of Lawyers Professional Responsibility or the lawyer may bring the matter to the attention of the court. The lawyer cannot simply contact the represented party without permission to do so. Despite his good intentions, Jones' conduct is a violation of Rule 4.2.

In a Minnesota case involving a somewhat different fact situation, the plaintiff's lawyer represented his client in an employment discrimination matter. The plaintiff's lawyer received correspondence from another lawyer indicating that she represented the employer. The two attorneys then spent several months negotiating a possible settlement, without success. Two other plaintiffs later retained the plaintiff's lawyers to pursue discrimination claims against the same employer. The plaintiff's lawyer then wrote directly to the employer, ostensibly to inform it that he had been retained to represent the two new plaintiffs, but also discussing a possible settlement of the first case. The plaintiffs' lawyer never spoke to the employer and he sent a copy of his letter to the employer's counsel. However, the lawyer's conduct nonetheless violated Rule 4.2 and he received an admonition.

Communication with a represented party about the subject of the representation, without permission of the opposing counsel or authorization by law, is a violation of Rule 4.2. The fact that the communication is one-sided, or that the lawyer may actually believe that he or she is acting to assist the opposing party, does not take the lawyer's conduct outside the scope of Rule 4.2.