

COMMUNICATION WITH REPRESENTED PARTIES

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Rule 4.2 of the Minnesota Rules of Professional Conduct (MRPC) governs communication with persons represented by counsel:[Ftn1](#)

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.

The general purpose of the rule is to prevent a lawyer from exploiting represented but unadvised parties. If an attorney were permitted to deal directly with a represented party, this might breach the party's attorney-client relationship, deny the party the assistance of available counsel, and cause the party to make inadvisable settlements or admissions.[Ftn2](#)

Detailed Review of Rule

Litigation Need Not Have Started: The prohibition against communication with a "party" is not limited to adverse parties in litigation. The comment to the rule states that the rule "covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." That person's interests need not even be adverse. The rationale for such a broad interpretation of "party" is that it may not be entirely clear whether the person's interests are or might become adverse.[Ftn3](#)

Communications Regarding Another Matter Are Not Prohibited: If a lawyer knows that a party is represented on subject matter A but not on subject matter B, the prohibition against communication extends only to communication about subject matter A. The lawyer may still communicate with the party about subject matter B. In some circumstances, however, a party represented in one case may be deemed represented in another related case.[Ftn4](#)

Consent Exception: After an attorney requests the party's attorney to consent to the proposed contact, the party's attorney must unequivocally state any lack of consent; otherwise, consent may be implied.[Ftn5](#)

Law or Rule Exception: There is an exception to the prohibition of communication when a law or rule allows the attorney to communicate directly with the party.[Ftn6](#) Examples of permitted direct contact include service of papers personally on a party where required by rule of court. For example, Rule 4.03(a), Rules of Civil Procedure, generally requires personal service of the summons on the defendant, even if the defendant is represented. Similarly, Rule 8.01, Rules of Family Court Procedure, requires personal service of an order to show cause to initiate contempt proceedings. When an attorney is permitted by law or rule to serve a legal notice personally on a represented party, the lawyer should concurrently serve a copy of the notice on the party's attorney.[Ftn7](#)

When a law or rule permits direct communication between a lawyer and a represented party, the

communication must be restricted to that permitted by law. For example, if an attorney serves a summons or an order to show cause on the opposing party, the attorney cannot take that opportunity to discuss the case with the party. The attorney may only state the general nature of the legal notice, without summarizing the contents. Even if the party insists on talking to the lawyer about the case, the lawyer should refuse to listen, and should immediately say “that it would be improper and unethical for him to communicate” with the party about the matter. [Ftn8](#)

Prospective Client “Exception”: An implicit exception to Rule 4.2 may exist for certain contact between an attorney and a prospective client. Attorney B should be able to communicate with a prospective client who is currently represented by attorney A if the prospective client approaches attorney B about substituting for attorney A. Although this exception is not stated in the rule, it should be implied. A prohibition of communication between a lawyer with no involvement whatsoever in a matter and a prospective client who initiates the contact does not serve the purpose of the rule. [Ftn9](#)

Frequently Asked Questions

The three questions most frequently asked concerning Rule 4.2 are:

1. If I (an attorney) believe that the opposing party’s lawyer is not conveying settlement offers to the opposing party, may I carbon copy the opposing party on correspondence expressing settlement offers?
2. May I direct my client to communicate directly with the opposing party about the subject matter of the lawsuit?
3. If my client is contemplating or has commenced a lawsuit against a corporation, may I directly contact employees or former employees of the corporation as part of my investigation?

Copies to Opposing Parties are Impermissible: An attorney (Attorney A) may not send copies of correspondence to a represented party without the consent of the party’s lawyer (Attorney B) – even if Attorney A believes that Attorney B is not conveying settlement offers to the client. An attorney may request a court order permitting the mailing of the copies or an order requiring opposing counsel to inform his or her client of the settlement offers. [Ftn10](#)

Attorney Cannot Use Client as Intermediary to Communicate Directly With Opposing Party: An attorney representing one party may wish to advise the client to deal directly with the other (represented) party in working out a settlement agreement – particularly in a family law matter. Rule 4.2 has loosened the constraints on such contact between represented parties.

DR 7-104(A)(1), which was in effect prior to September 1, 1985, provided that a lawyer shall not:

Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

Under this old rule, not only was it impermissible for attorneys to advise their clients to deal directly with a represented party, but attorneys had an affirmative duty to discourage such direct communication. [Ftn11](#)

Rule 4.2 eliminated the words “or cause another to communicate.” In fact, a proposed amendment to the rule which would have restored that language was defeated, for two reasons. First, the rule was not intended to prohibit lawyers from advising their clients that they may speak directly with opposing parties. Second, to the extent that the language was intended to prevent a lawyer from using the client as “an intermediary to carry a message from the lawyer to the opposing party,” this is prohibited by Rule 8.4(a).^{Ftn12} Rule 8.4(a) prohibits a lawyer from violating or attempting to violate the Rules of Professional Conduct through the acts of another.

Rule 4.2 and 8.4(a), read together, prohibit a lawyer from giving specific directions to a client regarding what to say to a represented party. The attorney may, however, advise the client that if the client wishes to communicate directly with a represented party, that is permissible.

Contact With Certain Corporate Employees is Prohibited: An attorney may wish to contact employees or former employees of a corporate party represented by counsel. Who in the corporation is “represented” for purposes of Rule 4.2?^{Ftn13}

The attorney should first determine whether the employee or former employee is personally represented by an attorney in the matter. If so, Rule 4.2 prohibits direct contact unless that person’s lawyer consents.^{Ftn14}

If the individual whom the attorney wishes to contact is a current employee who is not personally represented, the lawyer must obtain corporate counsel’s consent only if: 1) the employee has “the legal power to bind the corporation in the matter”; or 2) the employee is “responsible for implementing the advice of the corporation’s lawyer”; or 3) the employee’s “own interests are directly at stake in a representation,” such as an employee who is a member of the class in a class action suit.^{Ftn15} If an attorney determines that a current employee of the corporation does not fit into one of these three categories and is not personally represented, the attorney may deal directly with that person.^{Ftn16}

The lawyer must obtain corporate counsel’s consent to contact a former employee (not personally represented) only if, at the time in question, the former employee had the legal power to bind the corporation in the matter.^{Ftn17} If not, and if the former employee is not personally represented, the attorney may contact the former employee directly.^{Ftn18}

The Office of Lawyers Professional Responsibility is happy to provide telephone advisory opinions to Minnesota attorneys who have questions about their own contemplated contact with persons in relation to Rule 4.2.

NOTES

¹ A different rule applies to dealings with unrepresented persons. See Rule 4.3 MRPC.

² See ABA Annotated Model Rules of Professional Conduct 268 (1984) ABA Center for Professional Responsibility; The Legislative History of the Model Rules of Professional Conduct 148 (1987) [hereinafter cited as *Legislative History*]; C. Wolfram Modern Legal Ethics 611, 613 (1986) [hereinafter cited as *Wolfram*]. For case law on Rule 4.2 generally see Annot. 26 A.L.R. 4th 102 (1983).

³ Wolfram, supra note 1. at 611.

⁴ See State v. Yatman, 320 So. 2d 401 (Fla. App. 1975).

⁵ See *In re Mauch*, 107 Wis.2d 557, 319 N.W.2d 877 (1982) (no violation of disciplinary rule where opposing counsel said he neither object to nor condoned the proposed meeting with his client).

⁶ The comment to Rule 4.2 states: "Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter." It is unclear exactly what this means. The rationale appears to be "[c]onstitutional guarantees of access to government and statutory policies encouraging government in the sunshine." Wolfram, *supra* note 1. at 614 (footnote omitted). Although this policy and the language of the comment suggest that anyone should have access to a government official who is not a lawyer, the Legislative History of Rule 4.2 suggests that the rule permits contact with the government lawyer: "The typical situation where the law authorized a lawyer to communicate with a person represented by counsel was that of the government lawyer." Legislative History, *supra* note 1. at 148. Despite the legislative history, Rule 4.2 should be interpreted as permitting an attorney for a non-government party to contact any government official other than a represented official "who has the authority to bind the government in a matter that could be litigated." Note. DR 7-104 of the Code of Professional Responsibility Applied to the Government "Party," 61 Minn. L. Rev. 1007, 1034 (1977). Such contact should be permissible regardless of whether it is specifically authorized by local law. See Wolfram, *supra* note 1. at 615 n.59.

⁷ See ABA Com., on Professional Ethics, *Informal Opinion*, No. 985 (1967).

⁸ *Id.*, No. C-426 (1961).

⁹ See Wolfram, *supra* note 1. at 612.

¹⁰ See ABA Comm. on Professional Ethics. *Informal Opinions*, No. 1348 (1975).

¹¹ See ABA Comm. on Professional Ethics, *Formal Opinions*, No. 75 (1932) (withdrawn by Formal Opinion No. 84-350 (1984)).

¹² Legislative History, *supra* note 1. at 148.

¹³ This issue is different from the issue of who is the "client" for attorney-client privilege purposes. See Wolfram, *supra* note 1. at 613.

¹⁴ It is sufficient to obtain the consent of the individual's lawyer: the corporation's lawyer need not consent. See Comment to Rule 4.2.

¹⁵ Wolfram. *supra* note 1. at 613; see Rule 4.2 Comment. For further discussion of an attorney's right to contact nonmanagement employees of the corporation, see Annot., 50 A.L.R.4th 652(1986).

¹⁶ The attorney must abide by Rule 4.3, however, which governs contact with unrepresented persons.

¹⁷ See Rule 4.2, Comment.

¹⁸ See note 16 *supra*.