CONTACTING REPRESENTED PARTIES:

ETHICAL CONSIDERATIONS

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Rule 4.2 of the Minnesota Rules of Professional Conduct looks like a very simple rule:

> 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.

In this case, looks are deceiving. This article will explore some of the complicated issues behind this seemingly simple rule.[Ftn 1]

Corporate Employees

What if the opposing party is a corporation? Can an opposing lawyer talk to employees without permission from corporate counsel? This depends on several factors, including the employee's role within the corporation and whether the employee is a current employee or a former employee.

If a lawyer wants to contact a current employee of the opposing corporation (without permission from corporate counsel), the lawyer must first know something about the employee's role within the corporate structure, and about the employee's role in the incident which gave rise to the dispute. The Comment to Rule 4.2 states in part:

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.[Ftn 2]

The New York Court of Appeals recently adopted a similar interpretation of the disciplinary rule equivalent to Rule 4.2.[Ftn 3] The court interpreted the disciplinary rule to prohibit communication with "corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's 'alter egos') or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel."[Ftn 4] At least one other court has adopted this interpretation of Rule 4.2.[Ftn 5]

A hypothetical example might be useful. Assume that your client Bob was injured when a corporation's truck hit Bob near the corporation's loading dock. The truck was driven by a corporate employee, and a number of other employees on the loading dock witnessed the accident. Bob has sued the corporation and its insurer. Can you talk to the truck driver or any of the employee-witnesses informally, without first obtaining permission from the corporation's attorney in the matter? Contacting the driver without permission from the corporate attorney would violate Rule 4.2, since the corporation may be liable for the driver's conduct on the basis of *respondeat superior*. However, you *may* contact employees who were merely witnesses, as long as none of them has the kind of managerial responsibilities which would enable them to bind the corporation in the matter.

As to *former* employees, the Director's Office has recently changed its position because of a new ABA opinion. Our Office previously applied the same test to former employees as to current employees in determining whether the employees could be contacted without the permission of corporate counsel.[Ftn 6] The ABA Standing Committee on Ethics and Professional Responsibility, however, has recently opined that Model Rule 4.2 (which is identical to the Minnesota rule) does not cover *any* former corporate employees:

> Accordingly, it is the opinion of the Committee that a lawyer representing a client in a matter adverse to a corporate party that is represented by another lawyer may, without violating Model Rule 4.2, communicate about the subject of the representation with an unrepresented former employee of the corporate party without the consent of the corporation's lawyer.[Ftn 7]

The Director's Office will follow this ABA opinion.

Of course, an employee or former employee of the corporation may have retained individual counsel in the matter. In this situation, an attorney must obtain this counsel's permission before contacting the employee directly. If the employee is individually represented, then regardless of the employee's position within the corporation, it is sufficient to obtain the permission of the employee's individual counsel.[Ftn 8]

Even if an attorney may contact a corporate employee or former employee without violating Rule 4.2, the attorney must be careful not to violate other rules, such as Rules 4.3 and 4.4 of the Rules of Professional Conduct. If the employee or former employee is personally unrepresented, Rule 4.3 applies. Rule 4.3 imposes three requirements in this situation: (1) the lawyer must "clearly disclose whether the client's interests are adverse to the interests of such person"; (2) the lawyer must make reasonable efforts to correct any misunderstandings which the employee has about the lawyer's role in the matter; and (3) the lawyer cannot give advice to the employee, other than the advice to secure counsel. For example, in the truck accident scenario described previously, assume that the truck driver is now a former employee who is personally unrepresented and has not yet been named as a defendant. When you contact the truck driver, you must clearly state that your client might sue the truck driver, and that the driver may be called as a witness adverse to the corporation.

A lawyer must also be careful not to violate Rule 4.4, which prohibits a lawyer from, among other things, using "methods of obtaining evidence that violate the legal rights of" a third person. For example, suppose that you wish to contact the former president of a corporation regarding changes in corporate policy. You must be careful not to induce the former president to violate the corporation's attorney-client privilege; you cannot ask the former president about his or her conversations with corporate counsel. The attorney-client privilege in this situation could be waived only by the corporation, not by a former employee.[Ftn 9] If you ask the former president about conversations with corporate counsel, this would violate Rule 4.4 because it

would violate the legal rights of the corporation. In light of both Rules 4.3 and 4.4, when you contact the former president you should tell him or her not to mention anything about conversations or correspondence with corporate counsel.

Contact With Government Agencies

What if the opposing party is a government agency? May a lawyer contact any of the agency employees without first obtaining permission from the government's counsel?

The Director's Office has interpreted Rule 4.2 to treat government agencies like any other organization in this regard. In other words, although Rule 4.2 prohibits contact with certain government employees having managerial responsibilities or whose conduct is imputed to the agency for purposes of liability, the opposing lawyer would not violate Rule 4.2 by contacting other agency employees.

Rule 4.2 permits a lawyer to contact a represented party directly if the lawyer "is authorized by law to do so." The Comment to the rule 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." The Director's Office has *not* interpreted this Comment to allow contact with all employees of a government agency. This Office has interpreted the authorized-by-law comment to mean that, if there is a specific statute, rule, case, or other source of law which allows contact with represented parties that would otherwise be prohibited by Rule 4.2, then such contact is permitted. This is true in any context, including the context of a controversy with a government agency.

For example, suppose that you represent a landowner in condemnation proceedings brought by a government agency. You have corresponded with the government's attorney on this matter. Can you contact the government agency directly for the purpose of obtaining certain documents? The answer depends on whom you wish to contact. Ordinarily, you may contact a clerical employee of the agency for the purpose of obtaining copies of documents generally available to the public. You cannot, however, contact a government employee with managerial authority, such as the person at the agency with settlement authority in condemnation matters. Although there is a statute which requires the agency to provide your client with certain documents (Minn. Stat. § 117.055), such a statute would not trigger the "authorized by law" exception, because it does not authorize a landowner's attorney to by-pass the government counsel's office in obtaining the documents. By contrast, an example of a court rule which authorizes direct contact with an adverse party is Rule 8.01 of the Rules of Family Court Procedures. This requires orders to show cause and moving papers to be served upon the opposing party personally. Thus, even if the opposing party is represented by counsel, the rule requires personal service.

Prosecutorial Investigations

Does Rule 4.2 prohibit prosecutors from contacting represented persons in connection with criminal investigations?

The leading case in this area is *U.S. v. Hammad*, 858 F.2d 834 (2d Cir. 1988). Hammad was under investigation for medicaid fraud and arson. The Assistant United States Attorney (AUSA) investigating the matter obtained information through an informant who had previously provided Hammad with false invoices to bolster fraudulent medicaid claims. The AUSA provided the informant with a sham subpoena which purported to require the informant to appear before the grand jury and produce certain records. The informant then met with Hammad and showed him the sham subpoena. The meeting was recorded and

videotaped. Hammad spent much of the meeting devising strategies for the informant to avoid compliance with the subpoena. The AUSA knew that Hammad was at the time represented by counsel in the matter. The trial court suppressed the recordings and videotapes on the ground that the AUSA violated the applicable disciplinary rule (equivalent to Rule 4.2).

On appeal, the Second Circuit held that the disciplinary rule prohibiting contact with represented parties applies to the investigatory stage of a criminal prosecution. The court limited the effect of this holding, however, in its analysis of the "authorized by law" exception to the rule:

> As we see it, under DR 7-104(A)(1) [the equivalent of Rule 4.2], a prosecutor is 'authorized by law' to employ legitimate investigative techniques in conducting or supervising criminal investigations, and the use of informants to gather evidence against a suspect will frequently fall within the ambit of such authorization.

Id. at 839. The court held, however, that the AUSA in *Hammad* did violate the rule. Specifically, by issuing the sham subpoena, the prosecutor went beyond legitimate investigative techniques, and the use of this sham subpoena "contributed to the informant's becoming the alter ego of the prosecutor." Despite the rule violation, the Second Circuit held that the district court had abused its discretion in suppressing the recordings and videotapes, since prior to this decision the applicability of the rule to criminal investigations had been unclear.[Ftn 10]

In response to *Hammad*, United States Attorney General Thornburgh issued a memorandum dated June 8, 1989, which takes the position that criminal and civil law enforcement officers, including Justice Department attorneys, are exempt from the requirements of Rule 4.2. There has been considerable negative reaction to this memorandum. For example, the ABA adopted a resolution opposing any attempt by the Department of Justice to exempt its lawyers from Model Rule 4.2.[Ftn 11]. The United States District Court for the Northern District of California recently rejected Attorney General Thornburgh's position in *U.S. v. Lopez.*[Ftn 12] Lopez had been indicted on several federal charges including distribution of cocaine and heroin. An AUSA twice met with Lopez about cooperating with the prosecution. The meetings were arranged by counsel for a codefendant, and were intentionally kept secret from Lopez' attorney. In a scathing opinion, the court rejected Thornburgh's position, held that the AUSA had violated the disciplinary rule and the California rule comparable to Rule 4.2 but not the Sixth Amendment right to counsel and dismissed the indictment.

In *Lopez*, unlike in *Hammad* and many other cases in this area, the defendant had been indicted. The court in *Lopez* "attempted without success to locate any authority for the proposition that [the disciplinary rule equivalent to Rule 4.2] does not apply to a government attorney who communicates with a represented individual under indictment."[Ftn 13]

Other courts have distinguished pre-indictment from post-indictment investigations.[Ftn 14] The rationale for the distinction has not been clearly articulated. In one case, the Second Circuit stated that the person being investigated before indictment was not "in danger of being tricked by a lawyer's artfully contrived questions into giving his case away."[Ftn 15] In another case, the D.C. Circuit stated that, before indictment, the precise subject matter of the representation was "less certain and thus even less susceptible to the damage of 'artful' legal questions."[Ftn 16] Before indictment, the public interest permits advantage to be taken of a wrongdoer's mistaken belief that a confidant will not reveal confidences.[Ftn 17] The distinction between post-indictment and pre-indictment investigations may simply be based on what investigatory practices are generally accepted.

One concern raised by prosecutors is that career criminals will retain "house counsel" to represent them in connection with all criminal investigations. Under the *Hammad* holding, this will not usually be sufficient to immunize the criminals from communications with informants, for two reasons. First, Rule 4.2 only applies "to instances in which a suspect has retained counsel specifically for representation in conjunction with the criminal matter in which he is held suspect, and the government has knowledge of that fact."[Ftn 18] Most "house counsel" would be retained for more general purposes. Second, the government's use of informants will frequently be a legitimate investigative technique which is "authorized by law."[Ftn 19]

The Director's Office takes the position that Rule 4.2 applies to prosecutors. The Office will not, however, seek discipline of a prosecutor who engages in generally accepted investigatory techniques, such as the use of informants, before indictment or other formal charges are issued. If, however, a prosecutor personally or through another communicates with a represented party after formal charges about the subject matter of the charges, then that prosecutor may be subject to discipline. If the prosecutor obtains court approval for any such contact, the contact would be "authorized by law."

Suspected Improprieties

What if an attorney suspects opposing counsel of improprieties? Can the attorney then contact the opposing party to investigate whether improprieties have occurred?

An attorney may not contact a represented opposing party directly even if the attorney suspects that opposing counsel has engaged in improprieties. In 1990, a Minnesota attorney received an admonition for just such an investigation. The opposing counsel had stated to the court that her client had a scheduling conflict and therefore could not attend a pre-trial conference. The attorney who received the admonition suspected that this was a misrepresentation. Immediately after the pre-trial conference, he telephoned the opposing party directly, and questioned him about where he had been during the pre-trial conference. This telephone call violated Rule 4.2.[Ftn 20]

Lawyer as Client

May a lawyer acting *pro se* contact the represented adverse party directly?

Rule 4.2's first words ("In representing a client") have been construed to apply to lawyers who are representing themselves *pro se.* In *In re Coleman*, 463 N.W.2d 718 (Minn. 1990), an attorney was publicly reprimanded for, among other things, violating Rule 4.2 while acting *pro se*. Coleman represented certain parties to a legal dispute concerning an easement. After the trial court awarded attorney's fees against Coleman personally and his clients, Coleman sent a letter to the opposing parties, even though he knew they were represented by counsel. Coleman's letter threatened certain meritless actions if the opposing parties did not release the judgment against Coleman. Coleman also discouraged the parties from contacting counsel.[Ftn 21]

Rule 4.2 also applies to attorneys who are interested parties even if they themselves have retained counsel. For example, an attorney inquired about contacting a former client regarding settlement of a fee dispute. The attorney's firm, through its counsel, had commenced suit against the former client for fees, and the former client was represented in the matter. The Director's Office advised the attorney that direct contact with the client would violate Rule 4.2.[Ftn 22]

Attorneys who have questions about whether their own proposed conduct would violate Rule 4.2 are encouraged to telephone the Director's Office for advisory opinions.

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1. For an overview of the rule, *see* Wernz, *Communication with Represented Parties,* 44 Bench & Bar 11 (Dec. 1987).

2. Although the comments to the Rules of Professional Conduct are not binding on the Minnesota Supreme Court, the Office of Lawyers Professional Responsibility finds the comments useful in interpreting the rules.

3. Disciplinary Rule 7-104(A)(1), contained in the ABA Model Code of Professional Responsibility, states:

> During the course of his representation of a client a lawyer shall not: (1) 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.

This disciplinary rule was in effect in Minnesota, as part of the Minnesota Code of Professional Responsibility, before the Minnesota Rules of Professional Conduct were adopted effective September 1, 1985. Although the disciplinary rules do not have "comments" like the new rules, the Model Code of Professional Responsibility contains "Ethical Considerations" which are aspirational in character. Ethical Consideration 7-18 concerns contact with represented parties, but does not address the issue of contact with organizations. Courts interpreting DR 7-104(A)(1) thus have neither the comment to Rule 4.2 nor an equivalent ethical consideration for guidance in the case of an organizational party.

4. *Niesig v. Team I*, 76 N.Y.2d 363, 374, 559 N.Y.S.2d 493, 498, 558 N.E.2d 1030, 1035 (1990).

5. *Dent v. Kaufman*, 406 S.E. 2nd 68 (W. Va. 1991).

6. *See* Wernz, *supra* note 1, at 12.

7. ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 91-359 (Mar. 22, 1991).

8. *See* Comment to Rule 4.2.

9. *See Levin v. C.O.M.B. Co.,* 469 N.W.2d 512 n.4 (Minn. Ct. App. 1991).

10. 858 F.2d at 842. There have been numerous other cases on the applicability of Rule 4.2 (or its equivalent disciplinary rule) to criminal investigations. Courts have had difficulty reconciling the rule with generally accepted conduct in criminal investigations. Some courts have held that the rule does not apply to the investigatory stage of a criminal case. *See, e.g., U.S. v. Fitterer,* 710 F.2d 1328, 1333 (8th Cir.), *cert. denied*, 464 U.S. 852, 104 S. Ct. 165, 78 L.Ed.2d 150 (1983); *U.S. v. Guerrerio,* 675 F.Supp. 1430, 1438 (S.D.N.Y. 1987).

11. Reported at 6 Lawyers' Manual on Professional Conduct (ABA/BNA), Current Reports, No. 2 at 27 (Feb. 28, 1990).

12. 765 F.Supp. 1433 (N.D. Ca. 1991).

13. *Id.*

14. *See, e.g., U.S. v. Lemonakis*, 485 F.2d 941, 956 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989, 94 S. Ct. 1586, 39 L.E.d.2d 885 (1974); *U.S. v. Massiah,* 307 F.2d 62, 66 (2d Cir. 1962), *rev'd on other grounds*, 377 U.S. 201, 84 S. Ct. 1199, 12 L.Ed.2d 246 (1964).

15. *U.S. v. Massiah,* 307 F.2d at 66.

16. *U.S. v. Lemonakis*, 485 F.2d at 956.

17. *Id.*

18. *U.S. v. Hammad,* 858 F.2d at 839 (quoting district court, 678 F.Supp. at 401).

19. *U.S. v. Hammad,* 858 F.2d at 839.

20. *See also* Florida Bar Professional Ethics Committee, Opinion 88-4 (May 1988) (digested at [1988] 4 Lawyers' Manual on Professional Conduct (ABA/ BNA) 202) (suspicions that opposing counsel, who failed to appear at oral argument, had neglected his

client's legal matter and also billed the client for an appearance do not justify direct contact with opposing party to investigate these suspicions); ABA Committee on Ethics and Professional Responsibility, Informal Opinions, No. 1348 (1975) (suspicions that opposing counsel is not communicating settlement offers do not justify copying the adverse party on settlement correspondence).

21. For cases holding that *pro se* attorneys violated the disciplinary rule equivalent to Rule 4.2, *see The Florida Bar v. Hooper,* 507 So.2d 1078 (Fla. 1987); *In re Segall,* 509 N.E.2d 988 (Ill. 1987).

22. *See In re Glass,* 784 P.2d 1094 (Or. 1990) (attorney who was a party represented by counsel violated a different disciplinary rule which prohibits certain conduct during "representation of a client").