

Court Clarifies Coverage of No-Contact Rule

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For many years, attorneys in civil litigation have kept their copy of Minnesota Rule of Professional Conduct (MRPC) 4.2 close at hand to consider their frequent questions on whether they can contact witnesses directly who may be represented by counsel. Now criminal prosecutors may want to become reacquainted with the rule, based on the Minnesota Supreme Court's recent decision in *State v. Miller*.

Rule 4.2 prohibits a lawyer from communicating with a party about a matter if the lawyer knows that party is represented by another lawyer, "unless the [first] lawyer has the consent of the other lawyer or is authorized by law" to contact the witness.

The rule, which has existed in various forms since the ABA promulgated the Canons of Ethics in 1908, tries to protect unrepresented individuals from zealous lawyers, who may try to circumvent opposing counsel to obtain favorable admissions or settlements from opposing parties. Detractors of the rule, particularly state and federal prosecutors engaged in enforcing civil and criminal statutes, have long argued that the rule impedes their investigations. Relying on the "authorized by law" language in the rule, these attorneys have even gone so far as to argue that the rule does not apply to criminal prosecutors.

The Minnesota Supreme Court disabused prosecutors of this notion in *State v. Lefthand*. In *Lefthand*, a prosecutor authorized the police to interrogate a defendant in custody without notifying the defendant's public defender. The court specifically rejected, with "dismay," the assertion that prosecutors were beyond the reach of the Rules of Professional Conduct. Agreeing with the majority of jurisdictions that had considered the issue, the court stated that communicating with in-custody criminal defendants who are represented by counsel violates Rule 4.2.

The court then imposed a requirement that in-custody interrogations of formally accused individuals who are represented by counsel could not proceed without prior notification to that person's attorney. To protect the attorney-client relationship, statements obtained without notice would be subject to exclusion at trial.

Indeed, the court excluded the statements in *Lefthand*.

Lefthand left open, however, the difficult question of when Rule 4.2 is triggered during the course of a criminal investigation where no defendant has been charged. A similar question vexes attorneys in civil matters who wish to interview employees prior to commencing a lawsuit against a corporation. As described in the Comment to Rule 4.2, the analysis turns on whether the prospective witness has managerial responsibilities on behalf of the organization or whether the witness's act or omission could be imputed to the organization or constitute an admission on the organization's behalf.

All of these factors came together in *State v. Miller*. A county attorney's office investigated a corporation for civil and criminal violations of a landfill fee statute. The local police department, acting with the knowledge of the county attorney's office, executed a search warrant on the corporation and began informally interviewing Miller, the company's general manager, who had sent notice of the search warrant to his

attorney. By telephone, Miller's attorney first asked an officer to stop the interview until the attorney arrived at the scene. The officer refused. Miller's attorney then telephoned the county attorney to make the same request. The county attorney also refused to stop the interview or to allow Miller's attorney to be present. At trial, Miller attempted to suppress his statements, arguing that the county attorney violated Rule 4.2.

The Minnesota Supreme Court agreed, holding for the first time that Rule 4.2 applies to statements taken in a voluntary, noncustodial interview by law enforcement officers. The court called the prosecutor's conduct "a systematic isolation of the client from his attorney by refusing to terminate the noncustodial interview despite the attorney's request and prohibiting the attorney from speaking with the client." The court suppressed the statements and remanded for trial.

In reaching its decision, the court noted that in contrast to the Sixth Amendment protection of a client's right to counsel, Rule 4.2: "[P]rotects the right of counsel to be present during any communication between the counsel's client and opposing counsel. . . . The right belongs to the party's attorney, not the party, and the party cannot waive the application of the no-contact rule--only the party's attorney can approve the direct contact and only the party's attorney can waive the attorney's right to be present during a communication between the attorney's client and opposing counsel."

The impact of this dicta may be widespread. In addition to identifying when Rule 4.2 attaches to a contact, the dicta implicitly suggests a rule for the converse situation, when a witness speaks with opposing counsel after having previously been represented by counsel. *Miller* suggests attorneys cannot rely solely on a witness's statement that they are no longer represented by counsel or that they will volunteer to speak with an opposing attorney.

Instead, the burden may be on the attorney for the party seeking the information to objectively determine whether the witness is still represented. In most cases, this will require some form of communication between the attorneys before any conversation with the witness may take place.

The Supreme Court's recent pronouncements on Rule 4.2 reinforce the original purpose of the rule: to protect the attorney-client relationship and the represented party. Hence, both criminal prosecutors and civil attorneys will want to take a second look at Rule 4.2 and the *Miller* decision before initiating direct contact with a represented party.