

## Ethical Issues in Dealing with a Represented Party

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Every attorney thinks he or she knows the directive contained in Rule 4.2, Minnesota Rules of Professional Conduct—no contact with the represented adverse party. But that is not really what the rule says, and there are many fine nuances of the rule, which get lawyers in trouble.

Rule 4.2, MRPC, actually reads:

"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."

This raises many questions for the lawyer who is about to make a direct contact:

- Am I representing a client? (There is an exception in the second sentence for a lawyer who is a party, but that too has caveats.);
- What is the subject of the representation;
- What is the "matter" involved?
- What does a "party" mean, especially if litigation has not yet commenced?
- What if the adverse party initiates the contact?
- What if the other person's interest is not adverse?
- What if the communication is about a separate matter, only tangentially related to the subject of the representation?
- Who does the opposing counsel represent, anyway?

The wrong answer to these and other questions, and subsequent contact with a represented party, has led to issuance of an admonition to the offending lawyer, as in the following example.

In a workers' compensation case, two attorneys appeared at the settlement conference, one representing the injured claimant, and the second representing the employer and the insurer. After the settlement conference, the claimant's attorney communicated by telephone with an adjuster, one of the insurer's employees. The claimant's attorney apparently was under the mistaken belief that the second attorney represented only the employer, in which case it would be permissible to contact the insurer's employee directly. The second attorney then wrote to the claimant's attorney and advised that all communications should go through the attorney, and there should not be any direct communication with the employer or the insurer.

This should have cleared up any confusion about who was represented by counsel.

Several months later, however, the claimant's attorney submitted a settlement proposal to the employer's attorney, with a copy to the adjuster.

By separate letter, the claimant's attorney submitted the settlement proposal directly to the adjuster, but copied the employer's attorney on the letter. On the same day, the claimant's attorney left a voice mail message with the adjuster, advising of the settlement proposal and requesting a return call to discuss the proposal. The claimant's attorney was by this time cognizant of the scope of the second attorney's representation, but now claimed that his communications with the adjuster were permitted, because an insurer is not a party to a workers' compensation action.

Rule 4.2, MRPC, is not, however, limited to the parties to a contested litigation or administrative proceeding. The attorney violated Rule 4.2, MRPC, by direct contact with the insurer's employee, the adjuster, as the insurer was known by the attorney to be represented by counsel. The claimant's attorney received an admonition.

Is there a different rule for government attorneys? There has long been a debate whether federal prosecutors are subject to the state's ethics rule on contact with represented parties. See Cleary, "Communication with Persons Represented by Counsel," *Minnesota Bench & Bar*, April/May 1999. Clearly, however, state prosecutors are subject to Rule 4.2, even in criminal actions. *State v. Lefthand*, 488 N.W.2d 799 (Minn. 1992).

The Minnesota Supreme Court has even gone so far as to hold that if the prosecutor's conduct in contacting a represented defendant is egregious enough, the statements obtained from the defendant may be inadmissible, despite Miranda warnings and waiver of counsel. *Id.*

Determining who is represented by counsel, and whether direct contact is permissible, can be tricky. Don't forget, either, that the lawyer is not permitted to make the contact through another person, such as the client or a subordinate, a subject beyond the scope of this article.

The OLPR's Advisory Opinion service, at (651) 296-3952 or (800) 657-3601, is available to help the practitioner sort out the issues arising under this rule.