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"Close Encounters With Non-Clients: Bridging the Communication Gap, Ethically"
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Rules 4.2 and 4.3 of the New York Rules of Professional Conduct impose varying duties on attorneys regarding their communications with other represented and unrepresented persons about the subject of the representation. While most attorneys know the basic premise of Rules 4.2 and 4.3, in everyday practice, these seemingly distinct rules that are designed to serve separate purposes, do not always operate independently in the course of a representation.

Contact Ethicquette

Rule 4.2(a), commonly known as the "no-contact rule," prohibits a lawyer from communicating about the subject matter of a representation with a party the lawyer knows to be represented by counsel, unless authorized by law or the lawyer obtains prior consent from the party's counsel. On its face, the rule appears relatively straightforward but it is not so simple once translated into practice.

Rule 4.2 is applicable both before a lawsuit has begun as well as in a non-litigation setting. In the civil context, the term "party" has a liberal interpretation and may apply not only to litigants but also to such others as represented witnesses, targets of a criminal investigation, potential parties to a civil litigation, others with an interest or right at stake, and anyone who has retained counsel in a matter on whose behalf a lawyer is acting.[1]

Rule 4.2 imposes a duty on an attorney only if that attorney "knows" that a party is represented. While actual knowledge is required and there is no specific duty to inquire, a lawyer may not ignore the obvious. A person's knowledge may be inferred from the circumstances.[2] N.Y. State Bar Op. 728 (2000) observed that a party who has counsel in a criminal matter should be presumed to have counsel for related civil claims. N.Y. State Bar Op. 607 (1990) noted that when it is unclear whether a party is represented by counsel in a matter, the safest approach is to inform the party that in the event that he or she is represented by counsel, such communications should be referred to counsel.

Despite these prohibitions, Rule 4.2(b) states that "a lawyer may cause a client to communicate with a represented person unless that person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place." Note, that while Rule 4.2(a) permits communication where prior consent is obtained, Rule 4.2(b) only requires

"reasonable advance notice." The term "reasonable advance notice" means "notice provided sufficiently in advance of the direct client to client communications, and of sufficient content, so that the represented person's lawyer has an opportunity to advise his or her own client with respect to the client to client communications before they take place."[3]

Rule 4.2(b) does not expressly limit a client's ability to proactively communicate with a represented person and is triggered when the lawyer "causes" the client to initiate communication. Note, however, that bar association ethics opinions in New York place certain limitations on the attorney's role in client-initiated communications with an adversary. See N.Y. City Bar Op. 2002-2 (2002) (if the client "conceives of the idea" of communicating with the represented adversary, the lawyer may advise the client about it but must avoid helping the client to elicit confidential information or to encourage the adversary to proceed without counsel); N.Y. County Lawyers' Ass'n, Ethics Op. 618 (1973) (lawyer has an obligation to inform opposing counsel of his client's intention to discuss settlement with the adverse party); and N.Y. State Bar Op. 768 (2003) (lawyer cannot give advice to her client during a client-to-client call, absent reasonable advance notice to the opposing lawyer).

Rule 4.3 permits attorneys to communicate with unrepresented persons in certain circumstances. Under Rule 4.3, a lawyer must not state that he or she is disinterested or give legal advice to the unrepresented person, other than to advise such person to secure separate counsel. N.Y. State Bar Op. 477 (1977) clarified that although the rule clearly prohibits the lawyer from giving legal advice to an unrepresented person (except for advice to seek counsel), the practical application of the rule is to permit the attorney to provide "non-controvertible information" about the law so that the unrepresented person can understand why it is important to seek independent counsel, such as advising an unrepresented surviving spouse of the possible existence of his or her right to elect a statutory share against a will.[4]

In addition, Rule 4.3 provides that where the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Ability to Communicate

Rule 4.2 is titled, "Communication with Person Represented by Counsel" and Rule 4.3 is titled, "Communicating with Unrepresented Persons." Both rules regulate an attorney's ability to communicate with non-clients. From a practical standpoint, it is important to be aware of how these rules often interact, especially where the status of a person as "represented" or "unrepresented" is sometimes unclear or changes unexpectedly. The scenario below illustrates the interrelationship between Rules 4.2 and 4.3.

Scenario 1: Lawyer has no reason to believe that a witness to an incident, which has become the subject of civil litigation, is represented by counsel. Lawyer has been complying with Rule 4.3 until one day when the witness tells Lawyer, "let me check with my lawyer."

Since Lawyer had no prior knowledge of the representation, Rule 4.2 was likely not violated, but continuing communication at this point would result in a rule violation. In situations where it

appears at the outset of the communication that the person is unrepresented (i.e., Rule 4.3 applies), but thereafter becomes clear it was not the case, the communication is no longer permitted, and the attorney should immediately cease communication.[5] From that point onward, the attorney will need to proceed under Rule 4.2.

Conversely, an attorney operating under Rule 4.2 may be thrust into complying with Rule 4.3 when a previously represented party becomes unrepresented. The obvious scenario is where an attorney receives notice from the court or opposing counsel regarding the withdrawal of adverse counsel. N.Y. State Bar Op. 959 (2013) observed that when a lawyer knows that an adverse party's lawyer has withdrawn from representation or resigned from the bar, the attorney "may contact the adverse party to determine if he or she has retained new counsel or plans to represent himself or herself." However, a more difficult yet not uncommon situation arises where the attorney's ethical obligations may shift from under one rule to the other, as discussed below.

Scenario 2: After working with opposing counsel on a transaction for months, opposing counsel stops returning Lawyer's messages. Repeated emails and numerous voicemails go unanswered. Weeks pass and Lawyer's client becomes increasingly anxious to close the deal. Can Lawyer assume that the representation has terminated and contact the adverse party directly?

N.Y. State Bar Op. 663 (1994) states that before contacting the opposing party directly, an attorney should "undertake a complete and thorough inquiry to determine the ultimate fact of existing or continuing representation." However, this due diligence undertaking for an attorney should not necessarily affect the ability of the parties themselves to communicate directly with each other, in order to resolve a deadlock in negotiations.

In interactions with represented organizations, the lines dividing the entity from its constituents who act for it may become blurred. So, it is necessary to analyze which individuals within the organization are considered "represented" or "unrepresented" for purposes of applying Rules 4.2 and 4.3. For example, see the scenario below.

Scenario 3: Lawyer represents an individual client in an employment dispute. The opposing party is the client's former employer, a corporation. Lawyer receives an email from an existing employee of the corporation indicating he witnessed an incident which gave rise to the subject dispute. Can Lawyer communicate with this employee directly?

In *Niesig v. Team 1,* the New York Court of Appeals formulated a test to determine which corporate employees are represented by counsel in order to determine whether Rule 4.2 applies. The Niesig test classifies "represented parties" as employees whose acts or omissions in the matter under inquiry are binding on the corporation, or are imputed to the corporation for purposes of its liability, and employees responsible for effectuating the advice of counsel in the matter.[6] Thus, a lawyer is permitted to communicate directly with a corporate employee who does not fall within one of these categories, provided the employee has not retained independent counsel.[7]

Note, the Niesig test is only applicable to current employees of the organization. Once a represented employee leaves the corporate employer, and does not retain separate counsel, direct

communication with that now former employee is permissible under Rule 4.3, provided that "measures are taken to steer clear of privileged or confidential information."[8]

'No Contact' Rule

Even when it is clear that a person is represented by counsel, the contours of Rule 4.2 may not be well defined, thereby leaving room for possible inadvertent violation of the rule, as highlighted below.

Scenario 4: Lawyer represents the mother of a minor in a child abuse proceeding. The mother comes to Lawyer's office for a meeting with her son who is the subject of the action. The son is represented by his own attorney with whom Lawyer has not yet spoken. During the meeting, the son translates for his mother who is not proficient in English. Has Rule 4.2 been violated?[9]

Scenario 5: Lawyer represents a plaintiff in a litigation. One of the co-plaintiffs is dissatisfied with his counsel and reaches out to Lawyer to inquire about joint representation. Lawyer agrees to speak with the co-plaintiff regarding the case and the possibility of common representation. Has Lawyer violated Rule 4.2?

Under both scenarios above, Rule 4.2 appears to be violated. The rule cannot be waived by the represented person. Only counsel to a represented person may consent to the direct communication.[10] This applies even where the represented person initiates or consents to the communication.[11]

Note, however, that including opposing counsel as an additional recipient on email does not satisfy the "prior consent" requirement of Rule 4.2(a), as illustrated below.

Scenario 6: Lawyer's client is selling assets to buyer. Lawyer and buyer's attorney have negotiated an agreement and plan to speak on the eve of closing to confirm mutually agreed changes. Shortly before the call, Lawyer receives an email from buyer indicating her attorney had an emergency and is unavailable but that buyer has attached the final agreement which is ready for execution. When Lawyer opens the attachment, she realizes that the previously agreed-upon changes were not made. Lawyer replies to buyer's email noting the problem, attaches the document with the changes and copies buyer's attorney. Has Lawyer violated Rule 4.2?

It appears so. "Communication" for purposes of Rule 4.2 is not limited to verbal communication but encompasses email, text messaging, facsimile and other modes of electronic communication.[12]

Speaking Ethically

While Rules 4.2 and 4.3 impose separate ethical duties on lawyers, these rules are closely connected and, in practice, often play out in a dynamic setting where the boundaries around "represented" and "unrepresented" persons are not so clear cut or are in flux. Violation of the rules is likely to be detrimental to the client, the case and the lawyer's career. Disciplinary

authorities strictly enforce the rules, and courts impose serious sanctions for such rule violations.[13] This may be true even where no complaints of actual injury to the client occur.[14]

To avoid inadvertent violation, it is best to examine both rules side-by-side before communicating with non-clients. Lawyers should stay alert to any change in status of "represented" and "unrepresented" non-clients with whom they interact during the course of a representation, and to promptly comply with their ethical duties under either Rule 4.2 or Rule 4.3.

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Endnotes:

1. N.Y. State Bar Op. 735 (2001). See also *Schmidt v. State*, 695 N.Y.S.2d 225, aff'd 279 A.D.2d 62; ABA Formal Ethics Op. 187 (1938); ABA Formal Ethics Op. 95-396 (1995).But see criminal case, *People v. Kabir*, 822 N.Y.S.2d 864 (Sup. Bronx Co. 2006) (the term "party" does not include a witness to an event which is the subject of a judicial proceeding unless such witness is also one of those by or against whom the same judicial proceeding was brought); *Grievance Committee for the S.D.N.Y. v. Simels*, 48 F.3d 640 (2d Cir. 1995); *People v. Quiroz*, 2007 WL 1247257 (Nassau Co. Dist. Ct. 2007).

2. See Rule 1.0(k).

3. Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated, p. 1052 (West 2013 Ed.).

4. *Simon*, supra at 1068.

5. Comment [3] to Rule 4.2.

6. *Niesig v. Team I*, 76 N.Y.2d 363 (1990). See Comment [7] to Rule 4.2 ("in the case of a represented organization, paragraph (a) ordinarily prohibits communications with a constituent of the organization who: (i) supervises, directs or regularly consults with the organization's lawyer concerning the matter, (ii) has authority to obligate the organization with respect to the matter, or (iii) whose acts or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability").

7. Note, New York courts have not settled on whether an attorney who is litigating against an opposing corporation that is represented by outside counsel, may communicate with in-house lawyers without first obtaining outside counsel's consent. See *Simon* supra at 1032 citing *Tylena M. v. HeartShare Human Services*, 2004 WL 1252945 (S.D.N.Y. 2004); N.Y. City Bar Op. 2007-1 (2007).

8. *Muriel Siebert v. Intuit*, 8 N.Y.3d 506 (2007); See also Comment [7] to Rule 4.2 ("Consent of the organization's lawyer is not required for communication with a former unrepresented constituent"); ABA Formal Ethics Op. 91-359 (1991). Note, some circuit courts have limited this rule only to former employees who were not members of the adversary's management team or control group and whose acts were not imputed to the former employee. E.g., *Armsey v. Medshares Mgmgt. Servs.*, 184 F.R.D. 569 (W.D. Va. 1998); *Rentclub v. Transaamerica Rental Finance*, 811 F.Supp. 651 (M.D. Fl. 1992).

9. *In re Brian R.* 48 A.D.3d 575 (2d Dept. 2008) (disqualification of father's counsel in four related child abuse and neglect proceedings was warranted where counsel communicated with one of the subject children and used her as an interpreter when speaking with the parties, without the knowledge and consent of the law guardian).

10. 60 Hastings L.J. 797, citing Restatement (Third) of the Law Governing Lawyers §99(1)(e)(1998).

11. See Comment [3] to Rule 4.2.

12. See N.Y. City Bar Op. 2009-1 (2009).

13. *In re Kiczales*, 36 A.D.3d 276 (1st Dept. 2006).

14. 60 Hastings L.J. 797 citing *Papanicolaou v. Chase Manhattan Bank*, 720 F.Supp. 1080 (S.D.N.Y 1989).

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