CAN WE TALK?

Should A Client's Interests Outweigh Rule 4-4.2's Prohibition Against *Ex Parte* Communication With Persons Represented by Counsel?

Sam Phillips, Deputy Disciplinary Counsel

"In representing a client, a lawyer shall not communicate with a person 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 to do so by law or court order." Missouri Supreme Court Rule 4-4.2.

Lawyers often face circumstances where Rule 4-4.2 seems counter to their client's best interests. Some may see an ethical dilemma between their professional duty under Rule 4-4.2 and their duty to their client. This article uses a hypothetical to consider the OCDC's application of Rule 4-4.2 in those settings.

Attorney Represents a Doctor in an Employment Matter

An employment lawyer represented a doctor who was employed by and practicing at a hospital. Over many months, the hospital received complaints that the doctor engaged in repeated inappropriate conduct. A supervisor, on behalf of the hospital, warned Doctor several times, eventually imposing sanctions, including salary reduction and a demotion. The hospital required Doctor to attend an anger management course, warning him that if more episodes occurred, he would be dismissed.

Offended by the hospitals' demands, Doctor consulted with Attorney. In response, Attorney wrote to the hospital's General Counsel. He asked for more information about the anger management course. The hospital lawyer replied, directing Attorney to the course director.

Sixteen months later, the hospital suspended Doctor. His supervisors announced the suspension by email to a group of doctors and administrators at the hospital. Doctor went back to Attorney. He was concerned that the word of his suspension might spread to peers at a national conference scheduled for the next day. Attorney

immediately sent a letter to the doctor's department chief and the chief's boss. His letter bypassed the hospital lawyers. Both lawyer and client believed the situation was made more difficult by the impending national conference.

In his letter, Attorney told the hospital leadership that they had reported the suspension to people who didn't need to know. And, he said the hospital violated his client's privacy rights. He also declared they had breached hospital policies on confidentiality. His letter described the suspension as a deprivation of his client's right to due process. Finally, he directed them to cease and desist further dissemination of information about his client's suspension.

DID THE ATTORNEY VIOLATE RULE 4-4.2?

May an Attorney Justify *Ex Parte* Contact if Compliance with the Rule is Contrary to a Client's Interests?

Suppose Attorney argued that he acted in his client's best interests when bypassing the hospital lawyers. The hospital executives followed his direction; they stopped disseminating information about his client's suspension. What if he believed, in advance, that by contacting the non-lawyer executives, instead of the hospital lawyers, he could expedite the hospital's reaction, thereby better protecting Doctor.

Under that argument, a lawyer who persuades the opposing party to accede to *ex parte* demands would not violate Rule 4-4.2. Under that theory, a lawyer could easily justify a decision to ignore Rule 4-4.2 or several other other rules of professional conduct, in almost any situation. That can't be the rule's intent.

Courts applying the rule, in situations where attorneys sought to justify *ex parte* contact by pointing to client benefit, have clarified its purpose: "The rule is . . . is fundamentally concerned with duties of attorneys, not with the rights of parties." *United States v. Lopez,* 4 F3d 1455,1462 (9th Cir. 1993)

Does An Attorney's Duty of Diligence Supersede Duties Imposed by Rule 4-4.2?

Consider an ethical dilemma. Did Attorney violate Rule 4-4.2 if he considered that rule but decided his obligations under that rule were outweighed by his duty of diligence under Rule 4-1.3. Does it matter that his client's career would be at greater risk if he didn't quickly stop the hospital from further publication of the doctor's suspension?

Explaining that question another way, are there exigent circumstances, such as Doctor's next-day conference, that could warrant *ex parte* contact with represented persons? Under that analysis, a lawyer could act contrary to the tenets of Rule 4-4.2 without violating that rule – because the client was facing exigent circumstances.

Comment 1 to Rule 4-1.3 (diligence) reminds lawyers to represent clients with zeal and commitment. But that comment limits the scope of the diligence obligation to "*lawful and ethical measures."* Nothing in Rule 1.3 overrides lawyers' obligations under Rule 4-4.2.

Do Previous Tardy Responses From Opposing Counsel Justify *Ex Parte* Contact with Opposing Parties?

Occasionally, opposing lawyers don't promptly respond. What if the hospital lawyers had ignored Attorney's correspondence about earlier sanctions imposed on the doctor? Rule 4-4.2's *Comment 6* recognizes that circumstances might occur where direct contact may be warranted. But, the comment merely allows lawyers to seek court authority to reach out to opposing parties in "exceptional circumstances." Nothing in the comments permits breach of the rule on the basis of opposing counsel's failure to respond. Nothing in the rule or comments permits lawyers to exercise their own judgement in ignoring Rule 4-4.2.

Does An Opposing Party's Acquiescence to Direct Contact Authorize Further *Ex Parte* Contact?

Suppose Attorney had routinely communicated directly with represented parties, including the same hospital leadership, without notice to opposing counsel. Would the hospital staff's historical acquiescence relieve him of the responsibility to working through the hospital's lawyers?

The rule itself answers the question. Consent to talk with a represented person cannot come from the person; it only be acquired through that person's counsel. *Comment 3* to Rule 4-4.2 restates the point: "Rule 4-4.2 applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule 4-4.2."

Is It Permissible For A Lawyer To Talk Directly to Opposing Parties If He Doesn't "Overreach"?

Attorney might try to justify his actions by arguing that he did not overreach or ask for information from his client's supervisor. In *Comment 1,* the term "overreaching" indeed helps define the rule's purpose. Did Attorney violate Rule 4-4.2 if he simply told the supervisor to stop spreading information about Doctor's suspension?

Nothing in the rule permits lawyers to unilaterally decide what constitutes overreaching. As importantly, *Comment 1* defines the purpose of the rule to prohibit both overreaching and "interference with the client-attorney relationship." At a minimum, a lawyer interferes with an attorney-client relationship when - without consent of counsel - he or she tells represented persons what the law is, or what they should do, or what they shouldn't do, or seeks information from them.

Does Rule 4-4.2 Prohibit Contact With *Employees* of the Opposing Party?

Comment 7 to Rule 4-4.2 answers this question:

> In the case of a represented organization, Rule 4-4.2 prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule 4-4.2. Compare Rule 4-3.4(f). In

communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4-4.4.

Does It Matter if the Lawyer Doesn't *Know* Whether the Opposing Party is Represented?

Comment 8 explains that the rule applies only if the "lawyer knows that the person is in fact represented in the matter." "Actual knowledge" is required, but the Comment adds: "actual knowledge may be inferred from the circumstances." And, "the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious."

Can an Opposing Party's Behavior Justify *Ex Parte* Communication?

Does the hospital's publication of Doctor's suspension on the day before a national conference justify *ex parte* communication? Clients routinely retain lawyers because they feel mistreated by the opposing party. Most clients, just like Doctor, believe the opposing party created the problem. Permitting an exception to Rule 4.2 on the basis of that theory would thoroughly undermine the rule.

Does Rule 4.2 Apply to Both Sides?

Attorney suggested he should be permitted to weigh his duty of diligence, exigent circumstances, the hospital's actions, and his client's best interests against his professional obligation to seek consent from General Counsel before communicating with the hospital. Consider that balancing approach in a mirror image of Doctor's situation. Think of a lawyer representing a plaintiff against a large corporation. Assume the corporate lawyer communicated directly to the represented plaintiff without plaintiff's counsel's consent. Would corporate counsel overreach or interfere with their attorney-client relationship if they sent an *ex parte* letter to the plaintiff/client? Assume corporate counsel sent an *ex parte* letter stating this: "We represent Company X. We have analyzed the legal issues and have determined that Company X did not violate your rights. You created this problem. We expect you to report our action to no one. Only we can decide who needs to have this information." Under Rule 4-4.2, what exigent circumstances might justify corporate counsel's *ex parte* correspondence? It should be clear: the rule must be applied to both sides.

Would These Arguments Justify *Ex Parte* Communication in Family Law Matters?

Now consider the potential application of these questions in one corner of Family Law cases. On any given weekend, hundreds of Missouri lawyers deal with custody disputes; they face dilemmas as important to their clients as Attorney and Doctor faced. Sometimes, opposing parents indeed act unfairly. Some weekends, lawyers might believe that opposing counsel must not have fully explained a court order to their clients. Occasionally, opposing counsel isn't immediately available. Maybe a client/parent just wants to briefly extend visitation – for a very good reason. Should family lawyers be allowed – or required – to weigh their client's immediate interests against their Rule 4-4.2 obligations? Under which of those circumstances should it be okay for a family lawyer to bypass opposing counsel and send an email to the opposing parent? What would justify an *ex parte* telephone call or email to the opposing parent?

Upon consideration, it becomes evident that the exceptions would quickly swallow the rule if family law practitioners could engage in *ex parte* communication with an represented person whenever they believed that approach was better for their clients, or was justified by a an exigent circumstance, or was excusable because the opposing party created the situation, or that opposing counsel made everything difficult. Further, an exception based on a represented person's previous acquiescence to *ex parte* communication is inherently unreasonable. As noted, consent can only be granted by the represented person's lawyer. The rule is applicable throughout the profession.

Fortunately, lawyers neither must nor may weigh those interests. Rule 4-4.2 is straightforward: "In representing a client, a lawyer shall not communicate with a person 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 to do so by law or court order."

Beyond the Hypothetical

A 2014 federal case in Illinois offers key analysis as to whether a lawyer could properly weigh a client's interests in deciding whether to communicate with the client's manager. *Goswami v. DePaul University*, 8 F. Supp. 3d 1004 (U.S. Dist. Ct. N.D. Il 2014). In that case, the attorney represented a professor in a discrimination matter after DePaul University denied the professor's request for tenure. The professor's attorney wanted to contact university administrators and other professors, including those who had managerial authority over her client. She argued that her need to prepare by interviewing fact witnesses predominated over the University's desire to "shield its employees from access in order to ensure its effective representation." The court rejected her theory, describing it as "one-sided," and noted that her argument "begs the question and ignores the reality of our adversary system. The Illinois court rejected plaintiff's "contention that unless her lawyers had untrammeled access to [the manager] they could not effectively represent her." *Goswami v. DePaul University*, 8 F. Supp. 3d at 1014.

When dealing with *un*represented persons, including unrepresented parties whose interests may conflict with a client's, lawyers should look to Rule 4-4.3. That rule reflects concepts similar to those found in Rule 4-4.2. Though practical reality requires that some communication may occur with unrepresented opposing parties, Rule 4-4.3 prohibits lawyers from explaining the law to those persons. Lawyers may suggest that unrepresented persons seek counsel.

Some variation of Rule 4.2 is found in every state. The concept can be traced to English common law, *United States v. Lopez,* 4 F3d 1455,1462 (9th Cir. 1993).

The ABA issued a comprehensive Ethics Opinion addressing the issues considered here, Communications With Represented Persons, ABA Formal Op. 95-396. And, the Missouri Legal Ethics Counsel answers calls and emails, helping lawyers navigate ethical issues, including Rule 4-4.2. Extensive academic analysis and ethics advice about Rule 4.2 is readily available.