Professional Conduct – Rule 4.2

Hi everyone,

I'm sure most states have some version of rule 4.2 - communications with people represented by counsel.

If someone is currently represented, looking to change attorneys, and wants to have a consult with you, are you barred under 4.2?

I like to play it safe, and think "yes."

Relying on the authority of the comments section in Pennsylvania, I believe the communication you describe is NOT barred. See Rule 4.2 comment 4 " ... Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter..."

Glenn A Brown, Pennsylvania

By consult, do you mean they are the opposing party? That's what's addressed by 4.2.

If the representation is ongoing, I would decline the contact absent consent by their counsel.

-Rick

Richard J. Rutledge, Jr., North Carolina

California (where I am) has its own rule, but the answer has to be what you say.

Suppose it's a litigation matter. If Conor's interpretation is correct, the party would have to fire counsel and go pro se before approaching new attorney. Makes no sense. And, depending on circumstance, court might not let first attorney out until second is on board.

James S. Tyre, California

4.2 applies to the situation in which you represent Person A in a matter against Person B, and Person B is represented by an attorney. You cannot talk to B about that matter unless B's attorney gives consent. If you are not involved in the A-B dispute, 4.2 does not apply.

Michael Jack Kaczynski

That's my alternative reading. In that case, the above scenario would play out properly in a practical application.

Conor Malloy, Illinois

+1 for Michael's explanation.

Joshua Smith, Idaho

On JT's coattails: Think about the purposes of the law. One, preclude actual conflicts of interest. Two, preclude over-reaching. Does that cover it?

If there is a hint of a ghost of a whiff of conflict of interest or over-reaching, run, don't walk, run in the other direction.

Here's that ABA model rule:

Transactions With Persons Other Than Clients
Rule 4.2 Communication With Person Represented By Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation 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 a court order.

In representing a client {

* a lawyer shall not communicate about the subject of the representation 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 a court order.
)

Or

(In representing a client, [a lawyer shall not communicate about the subject of the representation {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 a court order.>}])

Law is code, code is law. Shall we RAP?

Peace,

Robert Thomas Hayes Link, California

I can't think of any state that would bar a client from seeking the advice of other counsel, looking to switch, second opinion, etc.

Joseph D. Dang, California

I once received a phone call from an attorney claiming to represent a party in a child support case. Thing was, I represented that party.
She came to him for consult and did not tell him she was already represented. He looked up the case, saw my name, and figured I was representing the other party.
I don't think he did anything wrong, though he did run fas as he could away from that client. I wish I had too, but at least I didn't ultimately have to find an excuse to get rid of client.

So I'm with the interpretation that the client is free to talk to whomever he or she wants and that such consultation would not violate the rule.

Vincent T. Lyon. Florida, Maryland and the
District of Columbia

Thanks everyone. I appreciate the feedback!

No.

Clients have the choice of their own counsel, and can talk to whoever they want to, including counsel they are considering for replacement of their existing counsel.

How else would a client ever replace their current legal counsel?

You, as an attorney, cannot solicit, encourage, or initiate speaking to anyone you know is represented by counsel, but at that person's initiation

you can talk all day -- although I would be very careful to not say anything negative about their existing counsel. That last may or may not be the law or rule, but it is certainly good manners. This is also why your advertisements must include a disclaimer that says such advertising is not meant to disrupt an existing attorney-client relationship.

Try not to play it safe to the point where you put yourself out of business.

Sincerely,

Arthur B. Macomber, Idaho

This sits heavy with me. I can agree and contradict myself, or I can disagree and be wrong. Thoughts? Your point is spot-on.

Peace,

Robert Thomas Hayes Link

Posted on behalf of Anonymous:

The problem with this issue is that there is no black and white response as to what is right.¦nbsp; In the eyes of bar counsel, everything is gray ... and gray equals expensive.
I have a bar complaint pending against me now where I knew that other attorney ("OA") represented Person ("P") with respect to a DIFFERENT matter.¦nbsp; OA represented P in a breach of lease matter and P now contacted me regarding that sale of the building to a third-party.
P told me that OA did not and never had represented him with respect to the sale, that P couldn't afford to pay OA with respect to the sale, and that OA wouldn't do more work because P owed OA money.
I had P put this in writing and sign it.
OA filed a complaint with the Bar.¦nbsp; Bar counsel's view is that I violated 4.2 because I should have contacted OA to personally verify whether OA represented P in this matter. ¦nbsp; I further violated Rules as having P put this in writing was against P's interest and that I should have advised him to seek independent counsel.
This matter is still pending, but the result has been a substantial legal bill for me to hire ethics counsel that practices before the Bar.¼br> ¼br> I would warn anyone ... if approached with any situation where 4.2 could be a question ... apply the summary judgment standard in your mind.¦nbsp; If there is any fact that could cause even a gray reflection in a light most favorable to either the other party or the other attorney ... run, run very fast and run very far away from the matter.¦nbsp; Any fee that you might earn won't be worth the cost, stress. time wasted or risk to reputation.

That is completely and utterly insane.

The purpose of Rule 4.2 is to prevent attorneys from communicating directly with OTHER PARTIES IN THE CASE NOT THEIR OWN CLIENTS when those parties are represented. If an attorney can't communicate with her/his own client the entire profession would be out of business.

That's the first level of ridiculousness.

The second part is why was this even worth the other attorney's time? I have people come all the time that used to be represented by someone that they owed money. I take this under advisement in determining how big of a retainer to charge. If one is required to contact the former attorney named by the potential client to verify this information, every single attorney where I practice should be disbarred. Did he think the client was more likely to come back and pay him if he prevented another attorney from coming on board?

That's the second level of ridiculousness.

That being said, the advice to steer clear of anything that seems gray because gray is expensive, is one I try to live by. Still how anyone could remotely think this one is gray escapes me. But obviously I'm wrong.

Deborah Zaccaro Hoffman, Ohio

"[You allegedly] violated 4.2 because [you] should have contacted OA to personally verify whether OA represented P in this matter."

This is only what we call a colorable argument from an ethical perspective. OTOH, I can see emailing OA to see what was up just as a professional courtesy, and cc:ing P for clarity.

My email goes like this:

Dear OA,

I was approached by P regarding the sale of a building to a third-party, and was told that you had represented P in a breach of lease matter in that same building. Prior to a formal engagement, I am writing today to verify the scope of your fee agreement with P to make sure you are not representing P in the sale of the building matter. If the scope of your fee agreement with P indicates that you were hired to represent P for that matter, I am by this email informing you that P has chosen my firm over you to represent him in that matter.

There may be items in your file that are irretrievable from other sources which I need to effectuate the sale of the building. I do not know what those items are today. If during my representation of P, P informs me that a particular document is in your file, I will contact you to retrieve a copy.

Please let me know your thoughts on this matter. Thank you for your consideration.

Art.

The point is to find out what the OA thinks his relationship with P might be, and let OA know that if his fee agreement covers the sale of the building that is services have been terminated by P. Like I said earlier, this is more a matter of professional courtesy, and a method of making sure the client knows that the other attorney knows that you know, and that everybody knows -- what the heck is going on!

The ethical rules frequently mirror excellent business policy for your firm. This is one of those situations for which I stated the other day, "Try not to play it safe to the point where you put yourself out of business." In this case, playing it safe means not contacting the other attorney. Writing the email above is actually quite easy. Wait until you have to walk into OA's office and discuss it with him or her face-to-face.

From personal experience, I can say it is always FUN -- and always followed up with a confirming email!

Sincerely,

Arthur B. Macomber

Wow. This is ridiculous.

4.2 should exist to prevent attorneys from hassling a represented party,
not as a protectionist regulation or a way to make it more difficult for
clients to switch attorneys. The profession is about serving clients,
not lining our own pockets.

Michael Jack Kaczynski

What's ridiculous is that fairly straightforward language is being so
mis-construed. By lawyers. Here's a hint: If the Model Rules are too
abstruse, too arcane, just to confusing for you, you've picked the
wrong career and need to ask your guidance counselor for a second
choice. It's not like we're dealing with the rule against
perpetuities. Law is a language arts job, and if you haven't the
language arts you will lose.

Worse: So will your clients.

Peace,

Robert Thomas Hayes Link

If P says they are not represented, and signs a document to that effect,
it can't be said that the attorney knew that P was represented.

The issue of the document being against P's best interests is distinct.

Michael Jack Kaczynski

> The issue of the document being against P's best interests is
> distinct.

Haven't tracked "the issue". Have only tracked the list's general failure to parse the rule.

When I first chimed in on the thread I offered no less than four angles for analysis, but the reason I offered the least valuable one first is I know our audience.

Peace,

Robert Thomas Hayes Link

I think the missing fact here is what side ANON was on. Everyone assumes that the P contacted ANON to hire ANON to help sell the building, but that was not IN the facts.

If you stop and think about it, ANON may have been representing the buyer, having a discussion with P (who is the seller) whom P told her had at one time had counsel over a similar matter (OC).

That scenario makes the claim by OC that ANON should have informed P to get independent counsel in regards to signing the document make sense

Erin M. Schmidt

If P says they are not represented, and signs a document to that effect, it can't be said that the attorney knew that P was represented.

Keep in mind this was an anonymous post by the lawyer who feels they were wrongfully subjected to a bar complaint and you have only heard their side of the story. I would take that with a large grain of salt. That aside, did you ask yourself why did the attorney feel it was prudent to have PC sign statement defining the terms of his relationship/non-relationship with another attorney, but did not feel it was necessary or prudent to contact that attorney himself prior to undertaking representation?

D.A. "Duke" Drouillard, Nebraska

> I think the missing fact here is what side ANON

Still sounds like Agency 101 to me.

Peace,
Robert Thomas Hayes Link

Personally, I would have contacted the attorney to verify this. This is something I've done in the past. But, assuming all the facts provided are true, I still don't see how it can be said that Anon "knew" that P was represented. He had fairly strong evidence to the contrary. I don't know if P was being untruthful or OA simply wants to punish Anon for "stealing" a client, but I think that having P assert that they are unrepresented is enough.

Michael Jack Kaczynski

No

If your looking to buy X property for your client Z, and P (the owner of X) calls you saying he wants to sell. You ask P if he is represented by counsel and P says no I have an attorney for the broken lease we are currently litigating in regards to X, but he is not representing me on this (related) matter due to money issues. So you have P sign a document (without telling them they should speak to independent counsel first) stating that and proceed to negotiate.

First, you are put on notice that P is represented in at least a related matter and in order to do due diligence it would trigger at least a phone call to the OC to confirm that what P said is true.

And 2, any time your dealing with an unreped person and you want them to sign anything, you have to inform them of their right to see independent counsel before signing it.

None of that is an agency issue, it's an ethics issue. P expressely stated OC was not his agent, thus agency is out, but just because the agent is out does not mean that it clears any ethical duties the lawyer has under the rules.

The same scenario except that instead of ANON being an attorney, they were a Real Estate agent and the P did the EXACT same thing, there IS no issue (as P would have revoked an agent's authority by stating OC was not his agent).

Erin M. Schmidt

I am glad I am not the only one that read it that way. I was beginning to think I was crazy. It never sounded to me like Anonymous was representing other attorney's client, but rather that Anonymous represented the buyer of the building and that he was negotiating directly with other attorney's former client for the sale, a person he knew had been previously represented by counsel. Why else have him sign

a statement that he is not being represented by counsel? Anonymous knew that he had been in the past and wanted to be sure he was not represented now, so he had him sign a paper to that effect.

Do not get me wrong, in any event I am not sure that Anonymous did anything wrong under the rules, I just think a call, e-mail, or letter to other attorney might have avoided this. Of course, hind sight is 20/20 and I may well have done what Anonymous did prior to reading this.

Frank J. Kautz, II, Massachusetts

Well lets see

Because people do things like call up their OC and tell them they don't want to pay their attorney to be the go between in a negotiation and want to talk to you directly so they have "fired" OC for that purpose.

Because people do things like LIE and say they aren't represented by OC, when in fact OC agreed to take that part of the case and just has not been paid or entered yet or is taking it on contingent and P thinks that if they settle it before OC does anymore they can jip OC on the fee

But again, this does NOT sound liek a case where P became an client of ANON, but rather was still on the opposing side, which again, once ANON knew P had an attorney for any ongoing litigation, in order to compelte due diligence, they needed to speak to OC.

and I have had attorneys call me to confirm I was not representing a client on another matter completely unrelated to what I was doing (ie family law case and the new case was a PI case etc)

Erin M. Schmidt

> I'm sure most states have some version of rule 4.2 - communications
> with people represented by counsel.

Here's where the original analysis fails. First: No jurisdiciton.
Next, not even the text invoked. From a simple critical thinking
standpoint this fails on two key items. And the conversation flows
/down/ hill from there, therefor.

The reason to think in 1L hypos is one actually is required to think
clearly in order to construct same, much like studying mate-in-two if
you want to get better at chess. Topic sentence. General. Specific.
Concluding or summary sentence. Make the paragraph the unit of
composition.

ymWillNotv

Peace,
Robert Thomas Hayes Link
