

**Communications with Person
Represented by Counsel
Rule 4.2**

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Minnesota Rule of Professional Conduct 4.2

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*.

Background

- The origin of Rule 4.2 can be traced to an 1836 treatise, which declared, “I will never enter into any conversation with my opponent’s client, relative to his claim or defense, except with the consent, and in the presence of counsel.” *State v. Miller*, 600 N.W.2d 457, 463 n.5 (Minn. 1999).
- “It was not until the twentieth century however that the rule became generally accepted. The rule was part of the American Bar Association’s 1908 Canon of Ethics.” *Id.* (citation omitted).
- “The Minnesota Rules of Professional Conduct were patterned after the ABA Model Rules of Professional Conduct, and were formally adopted in 1985 to replace the Minnesota Code of Professional Responsibility.” *Id.*

Interpretation

Resources for interpreting Rule 4.2 include:

- Court interpretation and application.
- Advisory opinions of the Minnesota Office of Lawyers Professional Responsibility (“OLPR”) and the Lawyers Professional Responsibility Board (“LPRB”).
- Formal Opinions of the ABA Standing Committee on Ethics and Professional Responsibility.
- RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS.
- Comments to Rule 4.2.

Interpretation

Minnesota Legal Ethics (7th ed., 2017), by William J. Wernz.

- Discusses Minnesota Rules of Professional Conduct, with citations to authority and illustrations.
- William J. Wernz served as a staff attorney and later as director of the OLPR.
- Free digital copy available through the Minnesota State Bar Association at www.mnbar.org, under the “Publications” drop-down menu.

Purpose

Rule 4.2 contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against:

- Possible overreaching by other lawyers who are participating in the matter.
- Interference by other lawyers with the client-lawyer relationship.
- The uncounseled disclosure of information relating to the representation.

See Rule 4.2 cmt. 1.

Scope

Rule 4.2 applies to:

- Communications
- With any person who is represented by counsel
- Concerning the matter to which the communication relates.

See Rule 4.2 cmt. 2.

Communication Initiated by Represented Person

- The rule applies even if 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 Rule 4.2.

See Rule 4.2, cmt. 3.

Consent of the Other Lawyer

- Consent is ineffective if given solely by a represented person, and not by the person's attorney.
- The right to be present during any communication between an attorney's client and opposing counsel "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." *State v. Miller*, 600 N.W.2d 457, 464 (Minn. 1999).

Copying a Represented Person or Lawyer on Correspondence

A lawyer's prohibited communication to a represented party does not become permissible under Rule 4.2 by:

- Sending correspondence to the represented person, with a copy to the represented person's lawyer, or
- Sending correspondence to the represented person's lawyer, with a copy to the represented person.

See Wernz, *Minnesota Legal Ethics*, Rule 4.2 § VI.A (citing Martin Cole, *Summary of Admonitions*, BENCH & BAR OF MINN., Feb. 2010, at 16; and Klausing, *Communications with Represented Parties*, MINN. LAW., Nov. 5, 2001, at 2).

“Reply All”

- The OLPR has noted that the use of “reply all” on emails can be a dangerous tool for a lawyer.
- In one such case, a lawyer received an email from opposing counsel whose client was also a recipient. The lawyer clicked “reply all,” and sent a response to opposing counsel and the represented person. Because the email was sent to the opposing party, it violated Rule 4.2, and the lawyer received an admonition.

See Wernz, Minnesota Legal Ethics, Rule 4.2 § XII.E (citing Timothy M. Burke, Summary of Private Discipline, BENCH & BAR OF MINN., Feb. 2016).

Communication Concerning Matters Outside the Representation

- Rule 4.2 does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation.
- For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter.
- Rule 4.2 does not preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.

See Rule 4.2, cmt. 4.

Communication Through Acts of Another

- A lawyer may not make a communication prohibited by Rule 4.2 through the acts of another. *See* Rule 8.4(a) (stating that it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct through the acts of another).
- Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.
- A lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

See Rule 4.2, cmt. 4.

Lawyer's Supervision of Agents

A lawyer could be responsible for a Rule 4.2 violation if the lawyer's agent communicates with a represented person.

- Rule 5.3(c) requires lawyers reasonably ensure the conduct of their employees and agents complies with the Rules of Professional Conduct.
- In one case, a lawyer hired investigators who interviewed a person the lawyer knew was represented by counsel, but communicated no instruction or prohibition regarding the contact. The lawyer was admonished for violating Rules 4.2, 5.3, and 8.4(a).

See Wernz, Minnesota Legal Ethics, Rule 4.2 § V.J (citing Klausning, Beware of What You Ask Nonlawyers To Do On Your Behalf, MINN. LAW., June 5, 1998, at 2, 2.).

Communication with Represented Person Authorized by Law

Communications authorized by law may include:

- Communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.
- Investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.
- When communicating with the accused in a criminal matter, a government lawyer must comply with Rule 4.2 in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this rule.

See Rule 4.2, cmt. 5.

Service of Process

Service of process by a lawyer on a represented person is permitted under Rule 4.2 where it is "authorized by law."

- For example, Rule 4.03(a) of the Rules of Civil Procedure generally requires personal service of a summons on the defendant, even if the defendant is represented by counsel.
- But service of motion papers on a represented party has been charged as a Rule 4.2 violation, given that Rule 5.02 of the Rules of Civil Procedure requires service of motion papers on a represented party's lawyer unless service upon the party is ordered by the court.

See Wernz, Minnesota Legal Ethics, Rule 4.2 § VI.E (citing Wernz, Communication with Represented Parties, BENCH & B. OF MINN., Dec. 1987, at 11, 11).

Contact with Government Official

OLPR has used ABA Formal Opinion 97-408 as guidance concerning ex parte contacts with represented government officials. Such contacts may be permissible if all of the following conditions apply:

- The official has authority to recommend or take action in the matter.
- The sole purpose of the ex parte contact is to address a policy issue, including settling a controversy.
- No part of the reason for contacting the official is to conduct a factual inquiry or obtain evidence.
- The official could not be personally liable in the matter.
- Notice was provided to the government lawyer of the intention to contact the official directly.

See Wernz, Minnesota Legal Ethics, Rule 4.2 § XVI.C (citing Kenneth L. Jorgenson, Contacting Government Officials, MINN. LAW., May 1, 2000, at 2, 11).

Court Order

- A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order.
- A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

See Rule 4.2, cmt. 6.

Represented Organization

In the case of a represented organization, Rule 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.

See Rule 4.2, cmt. 7.

Constituent of Represented Organization

- The term "constituent" is defined in Comment [1] to Rule 1.13 as: “Officers, directors, employees, and shareholders are the constituents of the corporate organizational client.”
- Consent of the organization's lawyer is not required for communication with a former constituent.

See Rule 4.2, cmt. 7.

Constituent Who is Represented by Counsel

- If a constituent of the organization is represented in the matter by his or her own counsel, consent by that counsel to a communication will be sufficient for purposes of this rule.
- 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. (stating that in representing a client, a lawyer shall not use means that violate the legal rights of a third person).

See Rule 4.2, cmt. 7.

Knowledge of Representation

- The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed.
- This means that the lawyer has actual knowledge of the fact of the representation, but such actual knowledge may be inferred from the circumstances. *See* Rule 1.0(g) (stating that knowledge may be inferred).
- The lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

See Rule 4.2, cmt. 8.

Communication with Unrepresented Person

- In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3 (Dealing with Unrepresented Person).

See Rule 4.2, cmt. 9.

Consequences for Violating Rule 4.2

- Professional sanctions have been imposed.
- Evidence has been suppressed.
- Fines have been imposed against culpable attorneys.
- Attorneys have forfeited their work product.
- Attorneys have been disqualified from representing their client in a matter.

See, e.g., State v. Miller, 600 N.W.2d 457 (Minn. 1999); *Midwest Sport v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003); *Featherstone v. Schaerrer*, 34 P.3d 194 (Utah 2001); *Arnold v. Cargill Inc.*, 2004 WL 2203410 (D. Minn.).