



Advocate

Newsletter of the National Assistive Technology Advocacy Project
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Funded through a grant received from the Rehabilitation Service Administration, U.S. Department of Education, to the Rehabilitation Engineering Society of North America (RESNA) (with a subcontract to Neighborhood Legal Services, Inc.) under contract number H224B050003. The opinions expressed herein do not necessarily reflect the position of the U.S. Department of Education, and no official endorsement by the U.S. Department of Education of the opinions expressed herein should be inferred.

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Volume XIII Issue 4

Spring-Summer 2010

PRACTICAL ETHICS FOR THE DISABILITY ATTORNEY:

When Can You Interview the Employees of Your Adversary?

Most attorneys and advocates are aware that they cannot contact the represented opposing party without the consent and/or in the presence of the party's attorney. Our lead article will look at the historical underpinnings of this principal, discuss the purpose behind it, look at the American Bar Association's (ABA's) Model Rule 4.2, and review how the courts and state ethics opinions have interpreted this Model Rule when confronted with real cases. Finally, we will provide a short case scenario to give context for how this might play out in a Medicaid case.

A Brief History: The Model Code, the Model Rules and the Communication Ban

According to one writer, the principle originated with David Hoffman, in an 1836 treatise entitled, *A Course in Legal Study Addressed to Students and the Profession Generally*, 771 (2nd ed. Baltimore, 1836), wherein he wrote:

XLIII. 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 his counsel.

This principle has survived to the present day. David Hoffman's treatise and a series of lectures by Judge George Sharswood, published in 1854 as *Professional Ethics*, formed the basis for the Code of Ethics of the Alabama Bar Association, which in turn was the cornerstone for the Canons of Professional Ethics, adopted by the ABA in 1908. When the Canons of Professional Ethics were replaced by the Model Code of Pro-

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essional Responsibility in 1969, the prohibition was passed on in Disciplinary Rule (DR) 7-104, which provided that a lawyer "could not, during the course of representation of a client, communicate or cause another to communicate on the subject matter of the representation, with a party known to be represented by a lawyer, unless the opposing lawyer has consented or it is authorized by law."

The Model Code of Professional Responsibility was replaced by the ABA's Model Rules of Professional Conduct in 1983. The ban on communicating with a represented opposing party, outside the presence of the opposing attorney and without the attorney's consent, is carried over in Model Rule 4.2.

Model Rule 4.2 is very similar to its predecessor. The current version of the Model Rule (it was amended in 2002) substituted the word "person" for "party" and omitted the phrase, "or cause another to communicate." The substitution of "person" for "party" may be seen as intent on the part of the drafters to broaden the applicability of the rule to non-litigation contexts.

In 2009, New York became the last state to abandon the Model Code. With the exception of California and Maine, who have designed their own ethics rules, states have adopted some version of the Model Rules. However, even among those states, there are a number of permutations of the principle that generally, an attorney cannot communicate directly with an opposing attorney's client. Attorneys and advocates are encouraged to check the version used by their respective states, including a review of comments or discussions to the rule published by each state. An invaluable tool for exploring ethics codes is the Cornell Law School, American Legal Ethics website, www.law.cornell.edu/ethics/aba. In addition to the text of the Model Rules, the website contains comments, history, and Model Code/Model Rules comparisons.

The Purpose of the Rule

According to Comment 1 of Model Rule 4.2, the rule prohibiting contact with a person known to be represented by another attorney regarding a particular matter is intended to:

- protect that person against overreaching by other attorneys;
- to prevent interference in the attorney-client relationship; and
- to protect the person against uncounseled disclosure of information regarding that matter.

However, as noted by the court in *Dent v. Kaufman*, 185 W.Va. 171 (W.Va, 1991), the protection afforded by the rule is not unlimited, and the purpose is not to allow persons or entities to hide facts unfavorable to them. In *Dent v. Kaufman*, the court noted that the rule involves professional conduct and not admission of evidence, and its purpose is not to protect a corpo-

rate party from disclosure of prejudicial facts. The chilling effect a broad application of the rule would have on discovery was also a concern for the court in *Niesig v. Team 1*, 76 N.Y.2d 363 (N.Y. 1990). The court noted that costly formal depositions that discourage litigants with limited means, or less formal interviews in the presence of counsel, are no substitute for private conversations.

In *State v. Miller*, 600 N.W.2d 457 (Minn. 1999), the court cautioned against confusing the rule with the constitutional right to counsel. The rule does not protect the client's right to counsel, but rather, protects that attorney's right to be present whenever his or her client communicates with opposing counsel. Citing *United States v. Lopez*, 4 F.3d 1455, 1462 (9th Cir.1993), the court noted that "the right 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." 600 N.W.2d at 463. As noted by the court in *Wright by Wright v. Group Health Hosp.*, 103 Wash.2d 192, 197 (Wash. 1984), "[t]he general thrust of the rule is to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralizes the contact."

The ABA's Model Rule 4.2

The current version of Model Rule 4.2 provides that "[i]n 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 a court order." The rule has several essential elements, and it is important to remember that each element must be present for the rule to apply.

The essential elements are:

- 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.

The rule does not apply if the lawyer has the consent of the other lawyer or if it is authorized by law or a court order. Further, if any of these ele-

“Bridges to Better Advocacy”

Conference:

***Join us in Austin, Texas,
September 28-30, 2010***

Our 14th annual “Bridges” conference will take place once again at the Hilton Garden Inn in Austin, Texas. Our traditional two-day event will take place on September 29th and 30th (Wednesday-Thursday). An optional pre-conference is scheduled for Tuesday, September 28th on the subject, “Social Security and SSI Work Incentives: Using the Work Incentives to Fund Assistive Technology and Make Work a Reality.” Ed Lopez of Cornell University’s Employment and Disability Institute will join Jim Sheldon of the National AT Advocacy Project for this special full-day session.

Many great presentations are planned, including a presentation by Sarah Somers of the National Health Law Program on the subject, “The National Health Care Reform Legislation: What it Means for Individuals with Disabilities, What it Means for AT Funding.” Registration forms and full agendas/session description are available on our website: www.nls.org/2010%20conf%20flyer.pdf (flyer and registration form); www.nls.org/2010%20conf%20agenda.pdf (agenda for two-day conference, September 29-30); www.nls.org/2010%20preconf%20agenda.pdf (agenda for preconference).

ments are missing in a given situation, the rule is not violated by the communication.

Consider the case of Janet, a fictional nine year old with a primary diagnosis of cerebral palsy. Janet lives with her mother and an infant brother. Janet receives Medicaid-funded services, including 86 hours per week private duty nursing. Medicaid’s nursing services plan is reviewed every six months, and the next review will begin soon. The reviewing nurse, Florence Nightingale, is scheduled to come to the home to meet with Janet’s mother.

Janet’s mother is active in a parents’ support group and is aware of a recent trend to reduce nursing services to children. Apparently, the Medicaid agency has hired a new director, Alice Burcrat, who believes Medicaid costs could be reduced if parents played a more significant role in the care of their children. Janet’s mother is concerned that Medicaid may attempt to decrease the number of hours of private duty nursing Janet would receive, even though reducing hours would severely curtail her ability to attend to other household matters, including caring for Janet’s infant sibling. Janet’s mother asks you, a Protection and Advocacy attorney, to help her prevent a reduction in hours of nursing services for Janet.

You believe the case has merit and have agreed to represent Janet and her mother at a fair hearing or even in litigation, if necessary. Whether you are banned from communicating with either Nurse Nightingale or Director Burcrat outside the presence of the agency’s attorneys, will depend on whether each essential element is met in each situation. We will look at each element individually, coming back periodically to Janet’s situation.

Who is a “Person”?

Rule 4.2 prevents an attorney from communicating with a “person.” While this element of the Rule may be fairly easy to apply when dealing with individuals, the issue becomes clouded when organizations or corporations are involved. In Janet’s scenario, the opposing person would be the Medicaid agency. For the rule to apply to organizations, agencies and other entities, individuals associated with the entities must be identified for whom the ban would apply. Many courts and state ethics committees interpreting this rule have been unwilling to apply the rule so broadly that communication with all employees of the entity would be prohibited. In *Snider v. Superior Court*, 113 Cal.App. 4th 1187 (Cal.App. 4 Dist. 2003), the Court of Appeal noted that an absolute bar would work a hardship on certain types of litigation and to certain administrative proceedings which may have no discovery mechanisms.

According to ABA Comment 7, Rule 4.2 would prohibit communication 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.

In *Niesig v. Team 1*, 76 N.Y.2d 363 (1990), the trial and appellate courts held that an employee of a represented corporate party in litigation is by definition also a “party” within the rule (i.e., the old Model Code), and therefore interviews by the plaintiff’s attorney were prohibited. On appeal to the Court of Appeals, the highest appeal court in New York, the court disagreed with the lower courts and adopted a definition of “party” to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation or imputed to the corporation for purposes of liability, or employees implementing the advice of counsel. All other employees, including witnesses to an event for which the corporate employer is being sued, may be interviewed informally. (See *Schmidt v. State of New York*, 279 A.D.2d 62 (4th Dept. 2000), where the plaintiffs claimed that a faulty traffic light caused an accident. The court held that the state employees who installed the light were definitely “parties.”)

In a suit against Harvard for employment discrimination and retaliation, the plaintiffs’ attorneys in *Messing, Rudavsky & Weliky, P.C., v. President and Fellows of Harvard College*, 436 Mass. 347 (Mass. 2002), communicated ex-parte (i.e., outside the presence of counsel) with five employees. The court found that contact did not violate the rule. The suit did not claim that any of these employees were involved in the alleged discrimination or retaliation against the plaintiff, nor that they exercised any management authority with respect to the alleged acts.

The plaintiff in *Dent v. Kaufman*, above, sued her past employer for its conduct in firing her, and her attorney interviewed an employee who may have been a witness to the events leading up to the firing. The circuit court granted the defendant/employer a protective order, prohibiting plaintiff’s attorney from interviewing any past or present employee without consent of the defendant’s counsel. In reviewing the protective order, the Supreme Court of Appeals adopted the test in *Niesig*, above, and held that direct communication by opposing counsel is prohibited only to those corporation officials who have the legal power to bind the corporation in the matter, or who are responsible for implementing the advice of the corporation’s attorney, or any member

whose own interests are directly at stake. Direct access to all other employees, including witnesses, would be permitted.

Governmental Entities

In many cases, the organization may be a governmental body. States’ ethics rules may deal with governmental bodies somewhat differently than other organizations or entities. Unlike a corporate party, the government has an obligation to advance the public’s interest in achieving justice, an obligation that outweighs its narrower interest in prevailing in a law suit. *Frey v. Dept. of Health and Human Services*, 106 F.R.D. 32 (E.D.N.Y. 1985).

New York ethics opinion No. 404 (1975) considered the following issues: whether an individual member of a board of education must be considered an adverse party in regard to a position he opposed; and whether the attorney could discuss a matter in controversy with a member of the board who voted against the contested decision, without consent of the board’s designated attorney. The opinion noted that minority members of a public body should not be considered adverse parties to their constituents whom they were selected to serve. Referencing the New York ethics opinion, the court in *Frey v. Dept. of Health and Human Services*, above, noted that the public has a right to direct communication with their representatives and to unrestricted contact with their government. California’s Rules of Professional Conduct, Rule 2-100(C)(1) specifically makes the prohibition inapplicable to communications with a public officer, board, committee, or body.

In *Vega v. Bloomsburgh*, 427 F.Supp 593 (D.C. Mass. 1977), Massachusetts residents eligible for Medicaid brought an action against the Medicaid agency, seeking full implementation of the Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program of the federal Medicaid Act. The commissioner sent a memorandum to his employees responsible for implementing the EPSDT, instructing them that it would be inappropriate for them to meet with the plaintiff’s attorneys without specific approval of the agency’s attorney, and that failure to obey the memo could result in disciplinary action. The court rejected the agency’s argument that the employees were parties (note: case decided before “party” changed to “person” in 2002 amendment to Rule 4.2), and noted that while it might serve the agency’s interests to prevent the interviews, those interests are outweighed by the

first amendment rights of the employees. The agency was ordered to rescind the memo and issue a new one, instructing the employees that they were free to meet, or refuse to meet, with the attorney, and may have an attorney from the agency present, if they wished.

In *B.H. by Monahan. v. Johnson*, 128 F.R.D. 659 (N.D. Ill. 1989), the court was concerned about the ability of case workers employed by the Illinois Department of Children and Family Services to bind the employer with out-of-court admissions pursuant to Rule 801(d)(2)(D) of the Federal Rules of Evidence. The court balanced competing interests by holding that plaintiff's attorney could interview low level employees, but could not use such informally gathered evidence as admissions of party-opponents.

The issue is clearly not uniform among all jurisdictions, however. Texas Ethics Committee Opinion 474 (June 1991) found communications with an individual City Council member to voice disapproval of the municipality's settlement offer to be prohibited under the rule. Advocates and attorneys are again encouraged to check their state's version of this provision with accompanying comments.

Consider Janet's situation. Director Burcrat has purportedly implemented a policy of reducing nursing services. This might constitute an act or omission that may be imputed to the agency for purposes of civil liability, and therefore Director Burcrat may be considered a "party" in some jurisdictions. Whether Nurse Nightingale is a "person" would more difficult to ascertain. Possibly, she would not be a "person" if she was required to comply with the Director's policy while reviewing the nursing services plan.

Retained Experts and Independent Contractors

States are not uniform about whether the prohibition applies to retained experts and independent contractors. An ethics opinion from New York, No 735 - January 12, 2001, considered whether a lawyer could communicate with an independent contractor hired by the opposing corporate party without consent of opposing counsel. The opinion stated that an attorney would not be barred from interviewing the contractor if the contractor had not retained counsel and was not considered to be represented under the standard set forth in *Niesig v. Team 1*, above, unless the attorney learned that the contractor possessed information protected by an attorney-client privilege or as attorney work product.

In contrast, Texas Comment 3 provides that unless authorized by law, experts employed or retained by a lawyer for a particular matter should not be contacted by opposing counsel regarding that matter without the consent of the lawyer who retained them. An exception would be governmental agents or employees such as police who have obligations to the public at large. In *Aquilar v Trujillo*, 162 S.W.3d 839 (Tex.App. El Paso 2005), an attorney appearing pro se contacted and retained the services of the opposing party's expert, knowing the expert had previously been consulted by the opposing party. The trial court excluded the witness on the premise that violation of the rule was an abuse of the discovery process. The sanction was upheld on appeal.

May Clients Contact Clients?

The now-defunct provision of the Model Code, DR 7-104, provided that a lawyer could not cause another to communicate with a person known to be represented in the matter. This prohibition was not continued in the Model Rules. Current ABA Comment 4 states, "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..." This would seem to allow Janet's mother, in the scenario above, to communicate directly with Alice Burcrat even if Ms. Burcrat would be considered a party, even if advised to do so by her attorney.

According to the discussion of Rule 2-100 by the State Bar of California, the rule was not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation. New York's new Rule 4.2 goes even further and allows a lawyer to "cause a client to communicate with a represented person unless the represented 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." Notice that this requires advance notice but not consent, provided the represented person is legally competent. New York's Comment 11 to Rule 4.2 adds further details: "a lawyer may even draft papers for the client to give to the represented person, but may not advise the client to seek privileged information, information protected by law, or which the person is not authorized to disclose, or encourage or invite the person to take actions without the advice of counsel."

In contrast, some states do not permit attorneys to encourage contact between clients. Texas Comment 2 provides that the rule does not prohibit communications between clients as long as the lawyer does not encourage or cause the communication without the consent of the other person's lawyer. Once again, advocates and attorneys are encouraged to check on the rules in their own state to determine whether it is permissible to cause or encourage communication between clients.

Former Employees

Generally, the rule does not prohibit communication with past employees. See *Schmidt v. Gregorio*, 705 S.2d 742 (La.App. 2 Cir. 1983), ABA Comment 7, ("Consent of the organization's lawyer is not required for communication with a former constituent"), Texas Comment 4, ("this Rule does not prohibit a lawyer from contacting a former employee of a represented organization or entity of a government..."), and California Discussion to Rule 2-100.

However, in *Siebert & Co., Inc., v. Intuit, Inc.*, 8 N.Y.3d 506 (N.Y. 2007), the court noted that while there is no ban on interviewing past employees, even when those employees had been privy to privileged or confidential information, it is not a license to elicit privileged or confidential information. In this case, disqualification of the attorneys was not justified because they had been careful to instruct the employees not to disclose any privileged or confidential information.

Lawyer Must Know That Person or Party Is Represented

The ban applies only to those situations in which an attorney knows the person is represented. ABA Comment 8 states, "[t]he 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(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious."

In *Snider v. Superior Court*, above, the court held that even if the interviewed employees had been "parties," the court could not conclude that the attorney had actual knowledge that the employees were deemed "represented parties" under the rule.

The court in *Schmidt v. State of New York*, above, had to determine at what point a governmental party is in fact represented by a lawyer in the matter, because technically, the state is always represented by counsel. While finding that the interviewed employees were definitely "parties" in that their acts or omissions formed the basis for the lawsuit, claimant's counsel did not know and should not have known that they were represented by the Attorney General at the time of the interview. "If a governmental party were always considered to be represented by counsel...the free exchange of information between the public and the government would be greatly inhibited." 279 A.D.2d at 65 (citing NY St. Bar Assn/Opn. No 652 [1993]).

Consider Janet again. In most states, as Janet's attorney, you could communicate with both Nurse Nightingale and Director Burcrat during the nursing services plan review. Even if each met the definition of "party," there would be no reason to believe either had consulted the agency's attorney about the review. Whether communications with either could continue into the fair hearing process and litigation would not only depend on whether either would be considered "parties," but also on when you knew or should have known either would be "represented parties."

Lawyer Cannot Communicate About the "Matter"

The rule does not ban communication on matters outside the representation. ABA Comment 4 notes that the existence of a dispute between two parties, or between two organizations, does not prevent the attorney for one of those parties or entities from communicating with nonlawyer representatives from the other about a totally unrelated matter.

What constitutes communication? In *State v. Habisch*, Not Reported in N.W.2d, 2004 WL 2937826, 2 (Minn.App. 2004), the court noted that even a legitimately issued subpoena may be a communication because "it could create a coercive circumstance for the represented party if the party does not consult counsel prior to responding to the subpoena."

Consent of Opposing Counsel

An attorney may communicate with a represented party with the consent of the party's attorney. Importantly, consent must come from the attorney and not the party, and Texas Comment 2 states that consent may be implied as well as

express. ABA Comment 3 notes that the rule applies even when the represented person initiates or consents to the communication. If a represented person contacts the other attorney and the attorney does not know nor should not know that the person is represented, the rule is not violated. However, the lawyer must terminate communication immediately after learning that communication is prevented by the rule. Perhaps a wise practice would be to ask the person whether he or she is represented before continuing any discussions or interviews.

Whose Conduct is Affected by the Rule?

The rule extends beyond lawyer conduct. Pursuant to Model Rule 5.3(c), the lawyer must take steps to ensure that “nonlawyer assistants,” employed or retained by the lawyer, also comply with the lawyer’s ethical responsibility. The lawyer shall be responsible for that conduct if “(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.” It is very clear that the advocate, legal assistant, or paralegal who works for the Protection and Advocacy agency is bound by this rule.

Lawyers appearing pro se may likewise be bound by the prohibition. In *Sandstrom v. Sandstrom*, 880 P.2d 103 (Wyo. 1994), the court issued a protective order, directing the husband-attorney to refrain from contacting his represented wife regarding settlement of their post-matrimonial dispute. In *Aquilar v. Trujillo*, above, a party in a nuisance suit appeared pro se and, at times, also held himself out as counsel for his wife. The court upheld sanctions for retaining an expert knowing that the expert had previously been consulted by the opposing attorney.

Unless Authorized by Law or by Court Order

Communication is allowed if authorized by law or by court order. Those confused about whether a particular communication would violate their state rule could resolve the matter by seeking a clarifying court order. See *Wasmer v. Ohio Department of Rehabilitation and Correction*, 2007 WL 593564 (S.D. Ohio 2007), ABA Comment 6.

California’s discussion of the rule recognizes a number of “express statutory schemes” which

would allow otherwise prohibited communications. For example, employees have the right to organize and to engage in collective bargaining and government prosecutors must be able to conduct criminal investigations. ABA Comment 5 includes communications by lawyers on behalf of clients exercising a constitutional right or other legal right to communicate with government.

What Is the Force or Effect of Rule?

Ethics rules have been called “the legal profession’s document of self-governance, embodying principles of ethical conduct for attorneys as well as rules for professional discipline.” *Niesig v. Team 1*, above, 76 N.Y.2d at 369. It is a disciplinary rule, not a statute, and therefore does not carry the force of law. While the importance of the rules should not be amplified, neither should it be minimized.

What are the possible consequences for violating the rule? Possible consequences for violating Model Rule 4.2 include disqualification, limiting or excluding the admission of evidence, in camera proceedings (i.e., proceedings in the judge’s chambers without others present), payment of attorneys fees and costs, use of sealed records, and attorney disciplinary proceedings.

Conclusion

The court in *Snider v. Superior Court*, above, 113 Cal.App.4th at 1193-1194, offered sage advice when it noted that “counsel desiring to contact an employee of a represented organization should endeavor to ensure, prior to the contact, that the employee, either because of his or her status within the organization or the subject matter of the proposed communication, does not come within the scope of [the rule]. Further, once contact is made, counsel should at the outset pose questions designed to elicit information that would determine whether the employee comes within [the rule’s] scope and should not ask questions that could violate the attorney-client privilege. By the same token, if organizations do not want employees within the scope of [the rule] to have contact with opposing counsel, it is incumbent upon them to take proactive measures to ensure that the employees and opposing counsel understand the organization’s position. Ethical violations and unnecessary litigation over such ex parte contacts would largely be obviated by prudent actions taken by counsel and organizations in applying [the rule].”

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