

# **PRACTICAL ETHICS**

## **When Can You Interview the Employees of Your Adversary?**

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## Introduction:

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. One writer attributed the concept to David Hoffman, in an 1836 treatise entitled, *A Course in Legal Study Addressed to Students and the Profession Generally*, 771 (2<sup>nd</sup> 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.

XLIV. Should the party, just mentioned, have no counsel, and my client's interests demand that I should still commune with him, it shall be done in writing only, — and no verbal response will be received. And if such person be unable to commune in writing, I will either delay the matter until he employs counsel, — or, take down in writing his reply, in the presence of others; so that, if occasion should make it essential to avail myself of his answer, it may be done through the testimony of others, and not by mine. Even such cases should be regarded as the result of unavoidable necessity, and are to be resorted to only to guard against great risk, the artifices of fraud, or with the hope of obviating litigation.

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 groundwork for the Canons of Professional Ethics, adopted by the American Bar Association (ABA) in 1908.

The ABA maintains a leading role in the development of ethics codes and in 1969, the House of Delegates of the ABA adopted a newly drafted code called the Model Code of Professional Responsibility. The Model Code is comprised of three parts: Canons (general expressions of standards of professional conduct), Ethical Considerations (the standard to which lawyers should aspire), and Disciplinary Rules (the minimum standard of conduct permissible). While the Canons and Ethical Considerations were aspirational standards, the Disciplinary Rules were mandatory. At that time, most state and federal jurisdictions adopted the Model Code.

In 1977, the ABA established a committee whose purpose was to evaluate the Model Code in light of evolving legal practice. The committee found the aspirational versus mandatory components to be unwieldy, and drafted a new code, the Model Rules of Professional Conduct, which were adopted by the ABA in 1983 and revised in 2002. Most states (47), as well as the District of Columbia and the Virgin Islands, have abandoned the Model Code for the Model Rules. Only California, Maine and New York have not adopted a code based on the Model Rules. New York State has retained the

Model Code, while California and Maine have designed their own rules. In November 2007, the House of Delegates of the New York State Bar Association unanimously approved revisions that would convert the code into a new state Rules of Professional Conduct. The revisions must yet be approved by the Appellate Divisions. Both the Model Code of Professional Responsibility and Model Rules of Professional Conduct prohibit communication with the client of an opposing attorney. However, even within states that follow the same code/rules, there are a number of permutations of this concept. Advocates are encouraged to check the version used by her or his state. An invaluable tool for exploring both codes is the Cornell Law School, American Legal Ethics website, <http://www.law.cornell.edu/ethics/aba>. In addition to the text of both codes, the website contains comments, history, and Model Code/Model Rules comparisons.

In the outline that follows, we are quoting the ethical codes and official comments without the use of quotation marks.

## **I. Part One: The Codes of Ethics**

### **A. Model Code of Professional Responsibility** (currently followed only by New York State)

1. Canon 7: A Lawyer Should Represent a Client Zealously Within the Bounds of the Law
2. Ethical Consideration (EC) 7-18: The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person. If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself, except that he may advise him to obtain a lawyer.
3. Disciplinary Rule (DR) 7-104 Communicating With One of Adverse Interest.

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

Essential elements of the Model Code are:

- A lawyer shall not;
- During course of his representation of a client;
- Communicate or cause another to communicate;
- On the subject matter of the representation;
- With a party he knows to be represented by a lawyer;
- Unless he has the consent of the lawyer; or
- It is authorized by law.

**B. Model Rules of Professional Conduct - Pre-2002 Version**

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 party 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 by law to do so.

**C. Model Rules of Professional Conduct - Current Version**

1. In representing a client, a lawyer shall not communicate about the subject matter 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.

Essential elements of the Model Rule 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;
- Unless lawyer has the consent of the other lawyer; or
- Is authorized to do so by law or court order.

2. History - Rule 4.2:

“Rule 4.2 was amended in August 1995 to make clear that the rule applies to contacts with represented persons whether or not they are, in a formal sense, actual or prospective "parties" to a proceeding or transaction. "Person" was substituted for "party" in the title and text of the rule. In addition, the Comment was also amended in important respects: (1) to acknowledge the case law limiting the application of anti-contact prohibitions in the context of pre-indictment, non-custodial law enforcement activity; and (2) to make clear that a lawyer may not evade the rule by avoiding actual knowledge that a person is represented by counsel.”

3. Model Code Comparison

Except for the substitution of the word “person” for “party”, the Model Code and Model Rules are equivalent.

**D. Purpose of the Rule:**

1. ABA Comment: [1] This Rule 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 those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.
2. Texas Comments: Paragraph (a) of this Rule is directed at efforts to circumvent the lawyer-client relationship existing between other persons, organizations or entities of government and their respective counsel. It prohibits communications that in form are between a lawyer's client and another person, organization or entity

of government represented by counsel where, because of the lawyer's involvement in devising and controlling their content, such communication in substance are between the lawyer and the represented person, organization or entity of government.

3. *State v. Gilliam*, 748 So.2d 622 (La.App. 4 Cir., 1999, writ denied, 769 So.2d 1215, 2000-0493, 9/29/00). The court recognized that Rule 4.2 had two purposes:
  - a. to prevent disclosure of attorney-client communications, and
  - b. to protect against "liability-creating statements" at the hands of skilled interrogators.
4. *State v. Miller*, 600 N.W.2d 457 (Minn. 1999). "The focus of MRPC 4.2 is on the obligation of attorneys to respect the relationship of the adverse party and the party's attorney. See *United States v. Lopez*, 4 F.3d 1455, 1462 (9th Cir.1993). 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. See *id.*"

## II. What Is the Force or Effect of Rule?

- A. *Niesig v. Team I et al*, 76 N.Y.2d 363 (1990): The court noted that disciplinary rules are approved by the New York State Bar Association and then enacted by the Appellate Divisions, and are the legal profession's document of self-governance. While they are unquestionably important and respected by the courts, they do not carry the force of law, a fact which is particularly relevant when a rule is invoked during litigation.
- B. *Wasmer v. Ohio Dept. Of Rehabilitation and Correction*, S.D. Ohio, 2007 WL 593564, discusses the role of comments versus text of rule. Ohio Supreme Court approved the comments, but that does not mean the court would give the comments the force of law. In the absence of guidance from court, however, court in *Wasmer* considered the comment to be persuasive if not authoritative.

- C. *Grievance Committee for Southern Dist. of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995). Rules of ethics are not statutes, but are standards of conduct. When neither the plain meaning nor the intent of the drafters can be discerned from the face of the rule, matters of policy are appropriately considered in determining its scope.

### **III. Texas Disciplinary Rules of Professional Conduct**

#### Texas Rule 4.02 Communication with One Represented by Counsel

- (a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
- (b) In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
- (c) For the purpose of this rule, "organization or entity of government" includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.
- (d) When a person, organization, or entity of government that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by paragraph (a) from giving such advice without notifying or seeking consent of the first lawyer.

### **IV. New York Lawyer's Code of Professional Responsibility**

#### DR 7-104 [1200.35] Communicating With Represented and Unrepresented Parties:

- A. During the course of the representation of a client a lawyer shall not:

1. Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.
  2. Give advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.
- B. Notwithstanding the prohibitions of DR 7-104 [1200.35] (A), and unless prohibited by law, a lawyer may cause a client to communicate with a represented party, if that party is legally competent, and counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented party's counsel that such communications will be taking place.

**V. New York's Proposed Rules of Professional Conduct**

- A. If approved by the Appellate Divisions, New York will replace the Code of Professional Responsibility. Paragraph (a) of the Proposed Rules is identical to the ABA version of the Model Rules. However, paragraph (b) does not appear in the Model Rules. See part I.C.1, above, p. 3.
- B. The Proposed Rules are accompanied by official Comments. The Proposed Rules and Comments can be reviewed on the New York State Bar Association website, [http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/Professional\\_Standar.htm](http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/Professional_Standar.htm)
- C. The following is the text of the proposed new Rule 4.2:

**Communication With a Person Represented by Counsel**

- (a) 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 court order.
- (b) Notwithstanding the prohibitions of paragraph (a), a lawyer may:
- (1) cause a client to communicate with a represented person unless the lawyer knows that the represented person is not

- legally competent; and
- (2) counsel the client with respect to the client's communications with a represented person.

## VI. Who Is a "Party" or "Person"?

### A. Corporate entities

1. ABA Comment: [7] In the case of a represented organization, this Rule 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...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. Compare Rule 3.4(f) . . . .
2. Texas Comment: 4. In the case of an organization or entity of government, this Rule prohibits communications... by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject of the representation and with those persons presently employed by such organization or entity whose act or omission may make the organization or entity vicariously liable for the matter at issue, without the consent of the lawyer for the organization or entity of government involved. This Rule is based on the presumption that such persons are so closely identified with the interests of the organization or entity of government that its lawyers will represent them as well. If, however, such an agent or employee is represented in the matter by his or her own counsel that presumption is inapplicable. In such cases, the consent by that counsel to communicate will be sufficient for purposes of this Rule. Compare Rule 3.04(f). Moreover, this Rule does not prohibit a lawyer from contacting a former employee of a represented organization or entity of a government, nor from contacting a person presently employed by such an organization or entity whose conduct is not a matter at issue but who might possess knowledge concerning the matter at issue." (emphasis added)
3. *Niesig v. Team 1*, 76 N.Y.2d 363 (1990):
  - a. The court held that the rule clearly covers party corporations.

Since corporations must act through people, the rule is negated unless natural persons are considered parties. The issue becomes which employees of the corporation are parties for the purpose of the rule. The broader the definition, the greater the cost in terms of preventing vital informal access to facts. Costly formal depositions that may deter litigants of limited resources, or even less formal and costly interviews attended by adversary counsel, are no substitute for off-the-record private efforts to learn and assemble information.

- b. The court 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.

4. *Messing, Rudavsky & Weliky, P.C., v. President and Fellows of Harvard College*, 436 Mass. 347 (2002).

- a. In a suit against Harvard for employment discrimination and retaliation, plaintiff's communicated ex-parte with five employees. The suit did not claim that any of these employees were involved in the alleged discrimination or retaliation against her, nor that they exercised any management authority with respect to the alleged acts. Court found that contact did not violate the Rule.
- b. In arriving at that decision, the Court reviewed the various "tests" used by courts in other jurisdictions, noting that most courts have rejected extension of the rule to all employees of the organization. (at 352).
- c. The Court also noted that when DR 7-104 was superceded by Rule 4.2 in 1998, the term "party" was replaced with "person", suggesting that the drafters intended to broaden the class of people covered under the rule.
- d. The Court adopted a test similar to the one adopted in *Niesig*, even though *Niesig* declined to tie the ban to employees whose admissions would bind the employer under Fed.R.Evid. 801(d)(2)(D). The "limits of the ethical rule are not dictated by the breadth or narrowness of local

evidentiary rules” (at 835) and therefore, application of the *Niesig* test is not inappropriate simply because New York has a narrower rule than Massachusetts on employee admissions.

- e. Court noted other jurisdictions which have adopted the *Niesig* test. In addition, the Restatement (Third) of the Law Governing Lawyers endorses this rule. See Restatement (Third) of Law Governing Lawyers § 100 Reporter's Note comment e, at 98 (1998).” (at 832-833).
- f. The court recognized the difficulties of applying its test in comparison to a “bright-line rule” or a blanket ban, both of which would be easier to apply.

5. *Dent v. Kaufman*, 406 S.E.2d 68 (WV, 1991)

- a. The plaintiff sued her past employer for its conduct in firing her, and plaintiff’s 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.
- b. In reviewing the protective order, The Supreme Court of Appeals discarded the comment to the Rule as not binding and too ambiguous to be helpful, and instead, adopted the test in *Niesig*. Pursuant to that test, direct communication by opposing counsel is prohibited with those corporation officials, “but only those,” 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. The test would permit direct access to all other employees, including any who are only witnesses.
- c. Court noted that the rule involves professional conduct and not admission of evidence and its purpose is not to protect a corporate party from disclosure of prejudicial facts.

6. *Snider v. Superior Court*, 7 Cal. Rptr. 3d 119 (Cal.App. 4 Dist. 2003).

- a. The Superior Court disqualified an attorney from representing a former employee because of the attorney’s

ex parte interview with two employees of the former employer. The former employee filed a petition for writ of mandate.

- b. The Court of Appeal held that the attorney did not violate the Rule. In doing so, the court reviewed the history of the rule in California, noting that following the Supreme Court's decision in *Upjohn Co. v. United States* (1981) 449 U.S. 383, 390 (1981) (attorney-client privilege extended to communications with middle and low level corporate employees), local bar associations issued new opinions advising attorneys to avoid contact with any employees of a corporation.
- c. California thereafter adopted Rule 2-100, which sought to clarify the troubling issue of which employees may be approached without consent of the employer's attorney.
- d. The court noted that in revising the Rule, the State Bar was sensitive to the hardship an absolute bar would work on certain types of litigation and to certain administrative proceedings which may have no discovery mechanisms.

## **B. Governmental entities**

- 1. Texas Ethics Committee Opinion 474 (June 1991): Where the opposition's client is a municipality represented by the City Attorney, communications by plaintiff's attorney with an individual City Counsel member to voice disapproval of the municipality's settlement offer is prohibited under Rule 4.02.
- 2. New York Ethics Opinion No. 404 - August 13, 1975
  - a. Issues were: whether an individual member of a board of education must be considered an adverse party in regard to a decision he opposed; and whether counsel may 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.
  - b. Opinion:
    - (1) A board of education is a governmental unit that acts through the members of its board.

- (2) Minority members of a public body should not be considered adverse parties to their constituents whom they were selected to represent.
- (3) There is an exception to the applicability of DR 7-104(A)(1) because a public body is involved and should not be extended beyond such public entities.
- (4) In the absence of consent of the board's attorney, communications with members of a public body in an adversarial proceeding should be made only when the public official has indicated his or her desire to speak with opposing counsel.

3. Federal Court:

- a. *Frey v. Dept. of Health and Human Services*, 106 F.R.D. 32 (E.D.N.Y. 1985). Plaintiff filed a sex discrimination suit against the Social Security Administration, claiming she was not promoted by reason of her sex. Citing DR 7-104, the Social Security Administrative requested a protective order, prohibiting ex parte contacts between plaintiff's attorney and employees of SSA.
  - (1) Court held that extending the term "party" to include all SSA employees would bar plaintiff's access to a vast number of potential witnesses who might have direct knowledge of agency practice or facts relevant to plaintiff's case. In formal discovery, the cost could be prohibitive.
  - (2) Also, unlike a corporate party, the government has a duty to advance the public's interest in achieving justice, an obligation that outweighs its narrower interest in prevailing in a law suit.
  - (3) The court also discussed NYS Bar Association opinion No. 404 (1975), which stated that an attorney could communicate with individual minority members of a board of education about a contested board decision. One commentator considers that this opinion implicitly made rule DR7-104 inapplicable to government bodies, based on the public's right to direct communication with their representatives and to unrestricted contact with their government. Not all

states necessarily agree.

- (4) The SSA employees who may be reached by ex parte interviews are not those who could bind the agency or make uncounselled admissions, usable against the agency at trial.
- (5) Agency was adequately protected because plaintiff's counsel agreed to advise all SSA employees that she is plaintiff's counsel and that they may get their own attorney or have the agency's attorney present during the interview.

b. *Katt v. NYC Police Dept.*, 1997 WL 394593 (S.D.N.Y. 1997), was a suit alleging sexual harassment and disability discrimination against the City of New York (the "City"), the New York City Police Department (the "NYCPD"), and various police officers, some in their official and individual capacities, and some in only their individual capacities. In order to reduce the number of depositions she would need to conduct, the plaintiff's attorney sought a court order permitting ex parte interviews with employees who were possible witnesses of alleged incidents. The court was concerned that the admissibility of employee statements was broader in Federal Courts than in New York and held that employees who are deemed non-parties under DR 7-104(A)(1) are also non-parties under Fed.R.Evid. 801(d)(2)(D)). The court established a procedure for conducting the interviews and held that statements made by the interviewees would not be admissible.

c. *Vega v. Bloomsburgh*, 427 F.Supp 593 (D.C. Mass. 1977). Massachusetts residents eligible for Medicaid brought action against agency, seeking full implementation of the Early and Periodic Screening Diagnosis and Treatment (EPSDT) program. The commissioner sent out 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.

- (1) The court rejected the defendant's argument that the employees were parties, finding that there had been no showing that individual employees were

represented by the attorney general, or that their interests were opposed to the plaintiff's or consistent with the agency.

- (2) While it might serve the defendant's interests to prevent the interviews, those interests are outweighed by the first amendment rights of the employees.
- (3) The defendant 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 department present, if they wished.

- d. *B.H. by Monahan v. Johnson*, 128 F.R.D. 659 (N.D. Ill., 1989). Plaintiffs represented a class of children who have been or will be in custody of the Illinois Department of Children and Family Services (DCFS) and who have been or will be placed somewhere other than with their parents. CFS issued an Information Transmittal forbidding direct contact between DCFS employees and opposing counsel without the consent of the agency's attorney. Defendant moved for a protective order supporting the transmittal.

Court was concerned about the ability of case workers to bind the agency with their out-of-court statements pursuant to Fed.R.Evid 801(d)(2)(D). To prevent a party from "having their cake and eating it too," the court decided that plaintiffs could interview low level employees, but plaintiffs would not be allowed to use such informally gathered evidence as admissions of party-opponents.

**C. Does the Rule apply to retained experts and independent contractors?**

1. Texas Comment : 3. Paragraph (b) of this Rule 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. However, certain governmental agents or employees such as police may be contacted due to their obligations to the public at large.
2. *Aguilar v. Trujillo*, 162 S.W.3d 839 (Tex.App.-El Paso, 2005). An attorney appearing pro se contacted, and ultimately retained the services of the opposing party's expert, without the consent of opposing counsel, knowing the expert had been previously consulted by the opposing party. The trial court excluded the witness, on the premise that violation of Rule 4.02 was an abuse of the discovery process. On appeal, the sanction was upheld as just.
3. New York Ethics Opinion No. 735 - January 12, 2001
  - a. Issue: in civil litigation, may a lawyer communicate with an independent contractor hired by the opposing corporate party without consent of opposing counsel?
  - b. Opinion:
    - (1) If the independent contractor has not retained counsel in the matter and is not considered to be represented by the corporation's counsel under the standard set forth in *Niesig v. Team 1*, 76 N.Y.2d 363 (1990), DR 7-104(A)(1) does not bar the attorney from interviewing the contractor,
    - (2) Unless it is known or learned that the contractor possesses information protected by an attorney-client privilege or as attorney work product.

**D. May clients contact clients?**

1. ABA Comment: [4]...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...

2. California Discussion: Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.
3. *Snider v. Superior Court*, 7 Cal. Rptr. 3d 119 (Cal.App. 4 Dist. 2003). The rule is not intended to prevent the parties themselves from communicating with each other about the “matter”.
4. New York’s Proposed Rules of Professional Conduct
  - a. Comment (11) Persons represented in a matter may communicate directly with each other and a lawyer may properly advise a client to communicate directly with a represented person without obtaining consent from the represented person’s counsel. Agents for lawyers, such as investigators, are not considered clients within the meaning of the Rule even where the represented entity is an agency, department or other organization of the government, and therefore a lawyer may not cause such an agent to communicate with a represented person, unless the lawyer would be authorized by law or a court order to do so. A lawyer may also counsel a client with respect to communications with a represented person, including by drafting papers for the client to present to the represented person. In advising a client in connection with such communications, a lawyer may not advise the client to seek privileged information or other information that the represented person is not personally authorized to disclose, or is prohibited from disclosure, such as a trade secret or other information protected by law, or to encourage or invite the represented person to take actions without the advice of counsel.

5. Some states do not permit attorneys to encourage contact.
  - a. Texas Comment: 2. Paragraph (a) does not, however, prohibit communication between a lawyer's client and persons, organizations, or entities of government represented by counsel, as long as the lawyer does not cause or encourage the communication without the consent of the lawyer for the other party...Similarly, that paragraph does not impose a duty on a lawyer to affirmatively discourage communication between the lawyer's client and other represented persons, organizations or entities of government.
6. What if one client is more sophisticated and knowledgeable than the other client? See *Kocher v. Oxford Life Insurance Company*, 602 S.E.2d 499 (WV. 2004):

While an action for breach of contract against a credit disability insurer was awaiting trial, the vice-president of the company, with the knowledge of the company's president and compliance director, paid an unexpected visit on the home of the plaintiff, without the knowledge or consent of the plaintiff's attorney.

The court sanctioned the defendant company by striking its defenses and allowed the case to proceed to trial before a jury on the issue of actual and punitive damages. The trial court instructed the jury that it was its duty to assess punitive damages.

The Supreme Court of Appeals, in reviewing the compensatory and punitive awards, noted that "this is a case where a sophisticated corporation deliberately lied to a litigant for the purpose of contacting the litigant without his counsel's knowledge, and improperly sought to influence the litigant to settle the case." (FN3)

The court held that "[i]n the face of Oxford's severe misconduct described herein, coupled with a history of substantial other misconduct in the litigation, the trial court in the instant case was acting well within its discretion in imposing the sanctions that it did. However, the court held that the jury should have had discretion to determine whether to direct punitive damages, and remanded to the trial court for a new trial solely on the issue of punitive damages.

## **E. Witnesses**

1. *People v. Kabir*, 13 Misc.3d 920, 822 N.Y.S.2d 864 (N.Y.Sup. 2006). Defendants were charged in connection with alleged schemes involving Medicaid claims. Rule does not prohibit prosecutor from contacting represented witness who had already been granted transactional immunity, since the prosecutor had no intention of charging her in connection with the matter. “Thus, given its plain and commonly understood meaning, 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.” at 925.

## **F. Former employees**

1. ABA Comment: [7]...Consent of the organization’s lawyer is not required for communication with a former constituent...
2. Texas Comment: 4...Moreover, this Rule does not prohibit a lawyer from contacting a former employee of a represented organization or entity of a government...
3. *Schmidt v. Gregorio*, 705 So.2d 742 (La.App. 2 Cir., 1993). Citing ABA formal opinion 91-359 and the ABA comment to Rule 4.2 as persuasive, the court held that counsel could contact former employees of the hospital for the purposes of determining whether they are needed as witnesses, without violating Rule 4.2.
4. California Discussion: Paragraph (B) is intended to apply only to persons employed at the time of the communication. (See *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493.]...)”

## **G. Privileged and confidential information**

1. *Siebert & Co. , Inc., v. Intuit, Inc.*, 8 N.Y.3d 506 (2007). Following it’s decision in *Niesig*, the Court noted there is no ban against informally interviewing ex-employees, even when those employees had been privy to privileged and confidential information. However, the court noted that this is not a license to elicit privileged or confidential information. Since the attorneys in this case were careful to point out to the ex-employee that he was not to give them any privileged and confidential information, disqualification of the attorneys from this case based on the interview had not been justified.

2. ABA Comment: [7]...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.

## **VII. Whose Conduct is Affected by the Rule?**

### **A. Establishing the Attorney-Client Relationship:**

1. *In re Application for Disciplinary Action Against Hoffman*, 670 N.W.2d 500 (N.D. 2003). Generally, a lawyer need only claim he is acting on behalf of an individual for third parties to presume the attorney possesses the necessary authority to act on behalf of a client. The court held that an attorney who discussed terms of visitation with the represented father of his fiancée was the fiancée's attorney and therefore, violated the Rule.

### **B. Attorney Litigants:**

1. *Aguilar v. Trujillo*, 162 S.W.3d 839 (Tex.App.-El Paso, 2005). 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.
2. *Pinsky V. Statewide Grievance Committee*, 578 A.2d 1075 (Conn. 1990). An attorney appearing in an eviction proceeding pro se did not violate the Rule by writing a letter directly to employee of represented bank.
3. *Sandstrom v. Sandstrom*, 880 P.2d 103 (Wyo. 1994). Court issued a "protective order" prohibiting husband-attorney from contacting his represented wife regarding settlement of their post-matrimonial dispute.

## **VIII. Lawyer Must Know That Person or Party Is Represented.**

- A. ABA Comment: [8] 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(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

- B. *Snider v. Superior Court*, 7 Cal. Rptr. 3d 119 (Cal.App. 4 Dist. 2003). 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.
- C. *Schmidt v. State of New York*, 279 A.D.2d 62 (2000).
1. The issue in this case was the point at which a governmental party is in fact represented by a lawyer in a matter, because technically, the state is always represented by counsel. The claimant alleged that a faulty traffic light caused an accident during which he was injured, and between filing the notice of intention to file a claim and the actual claim for personal injury, his attorneys interviewed the state’s employees who installed the traffic light.
  2. Court held that while the employees are definitely “parties” in that their acts or omissions formed the basis of the lawsuit, claimant’s counsel did not know and should not have known that the employees were parties represented by the Attorney General at the time of the interviews.
  3. “If a governmental party were always considered to be represented by counsel for purposes of [DR 7-104(a)(1)], the free exchange of information between the public and the government would be greatly inhibited” (citing NY St. Bar Assn. Opn. No 652 [1993]). (at 65) Nor could the attorneys have known prior to the interview that the employees were “parties”.
  4. The court made it clear it was not suggesting that counsel may always interview anyone simply because a claim had not yet been filed or served. There was a two judge dissent.

## **IX. Cannot Communicate About the “Matter”**

- A. ABA Comment: [4] This Rule 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...Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

- B. *Grievance Committee for Southern Dist. of New York v. Simels*, 48 F.3d 640, (C.A.2 (N.Y.) 1995). Court held that attorney who interviewed a potential witness in a drug conspiracy case and a potential codefendant of his client in a related but distinct matter, the attempted murder of Diggins, did not violate the Rule because, in neither case was the witness a “party” in the same “matter.” But see *In re Chan*, 271 F.Supp.2d 539 (S.D.N.Y. 2003).
- C. Texas Comment: 2...Furthermore, it does not prohibit client communications concerning matters outside the subject of the representation with any such person, organization, or entity of government. Finally, it does not prohibit a lawyer from furnishing a "second opinion" in a matter to one requesting such opinion, nor from discussing employment in the matter if requested to do so. But see Rule 7.02.
- D. California Discussion: As used in paragraph (A), "the subject of the representation," "matter," and "party" are not limited to a litigation context.
- E. What is a “communication”?
  - 1. *State v. Habisch*, Not Reported in N.W.2d, 2004 WL 2937826 (Minn.App. 2004.) In light of the purpose of the rule, 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. “

## **X. Consent of Opposing Counsel**

- A. ABA Comment: [3] The Rule 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.
- B. *State v. Clark*, 738 N.W.2d 316 (Minn. 2007). “...a lawyer representing a criminal defendant is owed more than notice and an opportunity to be present before the state interviews the defendant about the subject of the representation. We also agree that the operative word in Rule 4.2 is ‘consent’.”

- C. Texas Comment: 2...Consent may be implied as well as express, as, for example, where the communication occurs in the form of a private placement memorandum or similar document that obviously is intended for multiple recipients and that normally is furnished directly to persons, even if known to be represented by counsel...

## **XI. Unless Authorized by Law or by Court Order**

- A. ABA Comment: [5] 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. Communications authorized by law may also include 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 this Rule 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.
- B. ABA Comment: [6] 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.
- C. *Wasmer v. Ohio Department of Rehabilitation and Correction*, 2007 WL 593564 (S.D. Ohio, 2007). A lawyer who is uncertain whether a communication would violate this rule could ask for a court order clarifying his or her professional responsibilities.
- D. California Discussion: “Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.

## **XII. Possible Consequences for Violating the Rule**

*Mosaic Systems, Inc. v. Cisco Systems, Inc.*, Not Reported in Cal.Rptr.3d, 2006 WL 2567761 (Cal.App. 6 Dist., 2006) (non-published, non-citable) noted that possible consequences for violating Rule 2-100 include disqualification, limiting admission of evidence, in camera proceedings, payment of attorney fees and costs, use of sealed records, and attorney disciplinary proceedings.

## **XIII. References**

- A. Cornell Law School, American Legal Ethics, [www.law.cornell.edu/ethics/aba/](http://www.law.cornell.edu/ethics/aba/)
- B. American Bar Association, <http://www.abanet.org/cpr/links.html#States>
- C. The Texas Center for Legal Ethics and Professionalism, <http://www.txethics.org/reference.asp>
- D. The State Bar of California, [http://www.calbar.ca.gov/state/calbar/calbar\\_extend.jsp?cid=10158](http://www.calbar.ca.gov/state/calbar/calbar_extend.jsp?cid=10158)
- E. Louisiana Attorney Disciplinary Board, [http://www.ladb.org/Publications/rules\\_of\\_prof\\_conduct.pdf](http://www.ladb.org/Publications/rules_of_prof_conduct.pdf)
- F. New York State Bar Association, <http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/LawyersCodeDec2807.pdf>
- G. Index to the Rules of Professional Conduct, <http://www.mass.gov/obcbbo/rpcnet.htm>
- H. The Supreme Court of Ohio, <http://www.sconet.state.oh.us/Atty-Svcs/ProfConduct/default.asp>
- I. The West Virginia State Bar, <http://www.wvbar.org/BARINFO/rulesprofconduct/index.htm>
- J. State Bar of Arizona, <http://www.myazbar.org/Ethics/rules.cfm>
- K. State Bar of South Dakota, <http://www.sdbar.org/Rules/rules.shtm>
- L. Minnesota Rules of Professional Conduct, <http://www.mncourts.gov/lprb/conduct.html>