

Rule 4.2: Communication With Person Represented by Counsel

1. Current Kentucky Rule with Official Comments:

SCR 3.130(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.

Supreme Court Commentary

[1] This Rule does not prohibit communication with a party, or an employee or agent of a party, 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, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

[2] In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. Prior to communication with a nonmanagerial employee or agent of an organization, the lawyer should disclose the lawyer's identity and the fact that the lawyer represents a party with a claim against the organization. See Rule 4.3. If an agent or employee 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) (sic).

[3] This rule also covers any person, whether or not a party to a formal

proceeding, who is represented by counsel concerning the matter in question.

[4] A person's continued representation after the conclusion of a proceeding or matter is not necessarily presumed. The passage of time may be a reasonable ground to believe that a person is no longer represented by a lawyer, and the Rule is not intended to prohibit all direct contact in such circumstances.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(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~~ 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 to do so or a court order.

~~Supreme Court Commentary~~ 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.

~~[3]~~ [2] This rule also covers Rule applies to communications with any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question to which the communication relates.

[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.

~~[1]~~ [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, parties~~ 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. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

~~[4] A person's continued representation after the conclusion of a proceeding or matter is not necessarily presumed. The passage of time may be a reasonable ground to believe that a person is no longer represented by a lawyer, and the Rule is not intended to prohibit all direct contact in such circumstances.~~

[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.

[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.

~~[2]~~ [7] In the case of an a represented organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf a constituent of the organization, and

~~with any other person 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 that the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. Prior to communication with a nonmanagerial employee or agent of an organization, the lawyer should disclose the lawyer's identity and the fact that the lawyer represents a party with a claim against the organization. See Rule 4.3. Consent of the organization's lawyer is not required for communication with a former constituent. If an agent or employee 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) (g). 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.~~

[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.

[9] 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.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

(1) The proposed KRPC 4.2 adopts all MR 4.2 changes. This causes two significant changes in the Rule from the current KRPC 4.2 and a number of changes to the Comments.

(2) As do most state jurisdictions, Kentucky retains from the initial MR version of the Rule the usage "party," in barring communication with one who is represented by counsel.

Following the adoption of that original language, several courts and the ABA itself in a formal opinion (ABA Formal Ethics Op. 95-396) extended the coverage of the Rule to encompass represented persons who are not necessarily involved as a "party" in then-existing or prospective litigation. Courts addressing the issue and the ABA focused on the existence of an attorney-client relationship, rather than on the litigative posture of the matter or client; and included within the scope of the Rule persons represented in extra-judicial matters such as contract disputes. Accordingly, in 1995 the ABA amended the Rule by substituting "person" for "party." See discussion, ABA Center for Professional Responsibility, *Annotated Model Rules of Professional Conduct*, 5th ed. (2003) at 420-21.

(3) The recommended Rule differs from the current Kentucky Rule by the addition of the phrase "by a court order" to the language alerting lawyers to the exception permitting contact with represented persons when such contacts are otherwise "authorized by law." The "authorized by law" and "court order" language is more explicitly addressed in the new Comments [5] and [6].

(4) The Comments to the proposed KRPC 4.2 are far more extensive and provide more precise guidance than do the Comments to the current Kentucky Rule. Comment [5], for example, addresses the court decisions, legislation, and discussions among bar groups and government agencies on the unique role of the prosecutor in investigating and supervising investigations of criminal enterprises. See, *Annotated Model Rules of Professional Conduct*, supra, 427-29 (2003).

(5) Other Comments more clearly define the duties of a lawyer or parties communicating with "constituents" of an organization or government agents. See Comments [4], [5] and [7].

(6) Comment [2] to the current KRPC 4.2 differs from both Comment [7] of the MR 4.2 and proposed KRPC 4.2 Comment [7]. Comment [2] of the current Kentucky Rule instructs that, "prior to communicating with a nonmanagerial employee or agent of an organization, the lawyer should disclose the lawyer's identity and the fact that the lawyer represents a party with a claim against the organization." The Committee was unable to discover the provenance of this instruction. The report of the Kentucky committee which forwarded its recommendations on the first rendition of the MR did not note the divergence

from the MR Comment other than characterizing it (and other amendments) as "self-explanatory." (See, *1986 Report of the Special Committee to Consider Adoption to the ABA Model Rules of Professional Conduct or to Consider Revisions of the 1969 Code.*) The instruction appears in none of the proposed draft versions or amendments to those earlier MR, nor in the Model Code.

(7) The Committee concluded that proposed Comment [9] that directs the lawyer dealing with an unrepresented person to Rule 4.3 and its admonition that the lawyer avoid misunderstanding by making clear the posture of the lawyer and client adequately protects the interest of the nonrepresented person. The Committee also concluded that it is particularly important that there be a national consensus on Rule 4.2 because of the frequency with which lawyers have occasion to travel to foreign jurisdictions to investigate cases, interview witnesses and the like. A uniform Rule reduces the likelihood of confusion and inadvertent violation.

(8) Finally, the Comments to the MR do not contain Comment [4] of the current KRPC 4.2. As in the case of Comment [2] of the current Kentucky Rule, the Committee was unable to determine how or why that provision was inserted. That Comment postulates that passage of time may be considered evidence that a client-attorney relationship had terminated. However, inasmuch as Rule 4.2 deals with representation in a specified matter, the Committee regarded Comment [4] to the current Kentucky Rule as at best unhelpful to the practitioner and, at worst, misleading. Again, the interest of uniformity supports deletion of that Comment.

(9) The ABA Reporter's Explanation of Changes expresses in more detail the Committee's view on the proposed changes to KRPC 4.2. It is adopted by the Committee for purposes of explaining recommended changes and is quoted below.

- ABA Reporter's Explanation of Changes -- Model Rule 4.2 [edited to conform to February 2002 ABA amendments]

TEXT:

Add reference to "court order"

Although a communication with a represented person pursuant to a court order will

ordinarily fall within the "authorized by law" exception, the specific reference to a court order is intended to alert lawyers to the availability of judicial relief in the rare situations in which it is needed. These situations are described generally in Comment [6].

After consideration of concerns aired by prosecutors about the effect of Rule 4.2 on their ability to carry out their investigative responsibilities, the Commission decided against recommending adoption of special Rules governing communications with represented persons by government lawyers engaged in law enforcement. The Commission concluded that Rule 4.2 strikes the proper balance between effective law enforcement and the need to protect the client-lawyer relationships that are essential to the proper functioning of the justice system.

COMMENT:

[1] This new Comment states the purposes served by Rule 4.2 and, in particular, emphasizes that the Rule is designed not merely to protect individual clients but also to enhance the proper functioning of the legal system.

[2][3] These Comments revise current Comment [3][by splitting into two Comments and] by adding two new sentences [now in Comment [3].]. The first [sentence] makes clear that the protections accorded by Rule 4.2 may not be waived by the client. The second addition addresses situations in which a lawyer does not know at the initiation of a communication that a person is represented by counsel but finds out later. It reminds lawyers that they must terminate communication once they learn that the person is represented by counsel in the matter to which the communication relates. No change in substance is intended.

[4] This contains the substance of current Comment [1]. The last sentence has been deleted and its subject addressed in Comment [5]. A new sentence clarifies that Rule 4.2 does not preclude communication with a represented person who is seeking a second opinion from a lawyer who is not representing a party in the matter. Also, material has been added from the Commentary to Rule 8.4(a) emphasizing that a lawyer may not make a communication prohibited by this Rule through the acts of another. At the same time, parties are not precluded from communicating with one another, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.

[5] This Comment addresses when communications to or by the government may be within the Rule's "authorized by law" exception. The first sentence revises the final sentence of current Comment [1] and alerts lawyers to the possibility that a citizen's constitutional right to petition and the public policy of ensuring a citizen's right of access to government decision makers may create an exception to this Rule. The remainder of the Comment substantially revises current Comment [2] on the applicability of the "authorized by law" exception to communications by government lawyers, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. The reference in current Comment [2] to judicial precedent has been

deleted, and the relationship between the Rule and applicable constitutional limits on government conduct has been reformulated. In place of the statement that the Rule imposes ethical restrictions that "go beyond" those imposed by constitutional provisions, the Comment explains that the fact that a communication does not violate the constitution "is insufficient to establish" that the communication is permissible under the Rule. For example, the fact that an individual has waived the constitutional right to consult the individual's lawyer at the time of arrest "is insufficient to establish" the ethical propriety of an ex parte communication by the government with that individual if the individual's lawyer has not agreed to the communication. In reformulating the relationship between the Rule and applicable legal or constitutional requirements, the Commission intends no substantive change in the applicable standard.

[6] This new Comment explains the two circumstances in which a lawyer may seek a court order authorizing a communication: 1) where a lawyer is uncertain whether or not the communication is permitted by Rule 4.2; and 2) where a communication is prohibited by the Rule but "exceptional circumstances" nonetheless justify it. The example given is where ex parte communication with a represented person is necessary to avoid reasonably certain injury.

[7] This Comment modifies current Comment [4] (*Ed. Note: This is Comment [2] in the current KRPC 4.2*) identifying the constituents of a represented organization with whom a lawyer may not communicate without the consent of the organization's lawyer. The current Comment's inclusion of all "persons having a managerial responsibility on behalf of the organization" has been criticized as vague and overly broad. As reformulated, the Comment contains the more specific reference to "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." In focusing on the constituent's authority in the matter at issue and relationship with the organization's lawyer, the Comment provides clearer guidance than the broad general reference to "managerial responsibility."

In addition, the reference in the current Comment to a constituent whose act or omission in the matter may be imputed to the organization for purposes of civil or criminal liability

has been retained. However, the Commission deleted the broad and potentially open ended reference to "any other person ... whose statement may constitute an admission on the part of the organization." This reference has been read by some as prohibiting communication with any person whose testimony would be admissible against the organization as an exception to the hearsay rule.

A new sentence has been added to clarify that consent of the organization's lawyer is not required for communications with former constituents. The Commission, however, has added a warning to lawyers that Rule 4.4 precludes the use of methods of obtaining evidence that violate the legal rights of the organization.

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

There is no variance in proposed KRPC 4.2 from MR 4.2.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.