

**Louisiana State Bar Association
Rules of Professional Conduct Committee**

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Permissible Communications with Persons Already Represented by Counsel

Rule 4.2 of the Louisiana Rules of Professional Conduct generally serves to prohibit a lawyer, while representing a client in a matter, from communicating about the subject of the representation with another person the lawyer knows to be already represented by counsel in the same matter. However, the Committee believes that when a person already represented by counsel in a matter initiates contact and communication with a lawyer who does not represent anyone in connection with that matter, the Rule does not prohibit that lawyer from responding to or communicating further with that person, such as when providing an initial consultation and/or a second opinion sought by that person, nor does it prohibit a lawyer from communicating with such persons concerning matters outside the scope of the representation.

Earning and collecting legal fees from clients is essential for the survival and success of nearly all private law practices. As a consequence, lawyers and law firms in private practice spend a great deal of their time, creativity and money seeking and developing new clients,² while also

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² Such client development efforts must be conducted in keeping with Rules 7.1 through 7.5 of the Louisiana Rules of Professional Conduct and, as such, must not involve forms of solicitation of professional employment that are prohibited by those Rules.

trying to satisfy and keep the clients they already have. Naturally, then, lawyers and law firms become protective of their clientele and are less than comfortable with the thought of another lawyer or law firm daring to encroach upon such hard-fought, hard-earned territory, especially with the thought of another lawyer or law firm daring to try and “poach” one or more of those carefully-cultivated clients.³

It is against this competitive, business-oriented backdrop that many lawyers have often misunderstood or misinterpreted the intent and limits of Rule 4.2 of the Louisiana Rules of Professional Conduct,⁴ sometimes believing that the Rule blindly prohibits contact of any kind with any person who already has a lawyer. The Committee now takes this opportunity to clarify when communication with persons already represented by counsel may, in fact, be permissible and appropriate. The Committee strongly cautions, however, that this opinion is NOT intended to be read or construed as advocating or condoning any form of prohibited solicitation of professional employment as defined by Rule 7.3.⁵

³ Despite these feelings, it is fundamental that clients are not the property or “chattel” of lawyers or law firms. Even Comment [1] to ABA Model Rule 1.17 (governing the sale of a law practice)—which has not been adopted by the Supreme Court of Louisiana—states, in pertinent part, that “... *Clients are not commodities that can be purchased and sold at will...*”

⁴ Rule 4.2 of the Louisiana Rules of Professional Conduct states: “...*In representing a client, a lawyer shall not communicate about the subject of the representation with:...(a) 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...(b) a person the lawyer knows is presently a director, officer, employee, member, shareholder or other constituent of a represented organization and...(1) who supervises, directs or regularly consults with the organization’s lawyer concerning the matter;...(2) who has the authority to obligate the organization with respect to the matter; or...(3) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.*”

⁵ In particular, Rule 7.3(a) of the Louisiana Rules of Professional Conduct prohibits a lawyer from soliciting professional employment in person, by person to person verbal telephone contact or through others acting

A. Rule 4.2—“Communication With Person Represented by Counsel”

A lawyer must already represent a client in connection with a matter in order for Rule 4.2 to apply to any communications that the lawyer proposes to make to others who are also involved in the same matter—i.e., if the lawyer does not already represent a client in a matter, Rule 4.2 is NOT triggered and does not apply.⁶ Put another way, if the lawyer DOES already represent a client in connection with a matter, Rule 4.2(a) prohibits that “already-affiliated” lawyer from communicating about the subject of the representation with anyone that the lawyer knows to be represented by another lawyer in the same matter, unless the “already-affiliated” lawyer obtains the consent of the other lawyer or unless the “already-affiliated” lawyer is authorized by law or a court order to communicate with the already-represented person.

Rule 4.2(b) likewise prohibits a lawyer who already represents a client in connection with a matter from communicating about the subject of the representation with anyone whom the lawyer knows is presently a director, officer, employee, member, shareholder or other constituent of an organization already represented by counsel: 1) where such person supervises, directs or regularly consults with the organization’s lawyer concerning the matter; 2) where such person has the authority to obligate the organization with respect to the matter; or 3) where such person’s act or omission in connection with the matter may be imputed to the organization for

at the request of or on behalf of the lawyer, from persons with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.

⁶ Contrary to the belief of some lawyers, a “matter” is not necessarily defined by the actual filing of a lawsuit. A lawyer who has not yet filed a lawsuit on behalf of a client—but who has nevertheless already begun representing the interests of that client through consultation, advice or investigation—is still governed by Rule 4.2 with respect to communications with others who are known to be represented by counsel in connection with the same matter that is the subject of the representation. In other words, the filing of a lawsuit does not necessarily constitute the defining moment for the beginning of a lawyer-client relationship in connection with a “matter”, even with respect to a “matter” involving contemplated or anticipated litigation.

purposes of civil or criminal liability. If the person is NOT presently a director, officer, employee, member, shareholder or other constituent of a represented organization, Rule 4.2(b) is NOT triggered and the lawyer—even if already representing a client in connection with the same matter [which otherwise triggers application of Rule 4.2]—is NOT prohibited from communicating about the subject of the representation with that FORMER director, officer, employee, member, shareholder or other constituent of the represented organization, unless, of course, that person happens to be already represented by his/her own private counsel in connection with the same matter.⁷ In the event that the person DOES have his/her own private counsel in the same matter, Rule 4.2(a) is triggered and the lawyer must avoid the communication unless consent of the person’s private counsel is obtained or the lawyer is authorized by law or a court order to make the communication.

B. Second Opinions to Persons Already Represented by Counsel

As noted above, when a lawyer does NOT already represent a client in connection with a matter, Rule 4.2 is not triggered and does not prohibit the lawyer from communicating with a person the lawyer knows is already represented by counsel in that matter. While lawyers and law firms are often reluctant to enter and tread upon unfamiliar ground already being tilled by another lawyer—and, for that reason, some might simply prefer to decline/avoid any communication with a person known to be already represented by counsel in a matter as long as that person remains the client of the other lawyer⁸—Rule 4.2 does not prohibit an “as-yet-unaffiliated”

⁷ If the former director, office, employee, member, shareholder or other constituent of the represented organization is NOT represented by his/her own private counsel in the matter, the lawyer should comply with Rule 4.3 of the Louisiana Rules of Professional Conduct, avoiding any statements or implications that the lawyer is somehow disinterested, making reasonable efforts to correct any misunderstandings of that nature and giving no legal advice to that person other than the advice to secure his/her own counsel. The lawyer also must avoid any invasion of the attorney-client privilege in any communication with these former constituents of an adverse party.

⁸ For instance, in contingent fee matters, dividing and sharing representation, expenses and any contingent fee may become confusing and/or result in disputes when clients attempt to acquire simultaneous representation by

lawyer from communicating with such a person who seeks to initiate communications with the lawyer.

The most obvious example of this form of permissible communication would be when a person who is already represented by counsel in a matter chooses to seek a second (or third...or fourth...) opinion from a different, “as-yet-unaffiliated” lawyer regarding that person’s legal rights, options, interests, etc. Likewise, while the lawyer who is already representing such a person will quite often be less than comfortable with the thought of another lawyer (or two...or three...) suddenly on the scene, overlooking his/her shoulder and perhaps second-guessing or even re-directing what courses of action might be most appropriate for the client, there is little that the first lawyer can do to prevent the client from choosing to explore the client’s legal options more thoroughly. More to the point, for purposes of this discussion, the first lawyer cannot hope to cloister his/her client behind the normally-impenetrable wall of Rule 4.2 since the second (or third...or fourth) lawyer chosen and consulted by the client does not already represent a client in connection with the same matter (i.e., Rule 4.2 is NOT triggered).

Like it or not, some clients will have the means and the desire to obtain the advice of more than just one lawyer in connection with the same legal matter. A lawyer confronted with the

multiple lawyers without disclosing to the lawyers the co-existence of their clients’ other counsel (i.e., believing they are hedging their chances for successful recovery by having more than one advocate working on contingency at the same time). For that reason, many lawyers elect to establish a policy regarding contingent fee matters that requires the already-represented client to formally terminate any existing legal representation prior to the new lawyer’s acceptance of representation of the same client. This policy and practice—while acceptable under the Rules—has perhaps unintentionally contributed to a common misunderstanding regarding application of Rule 4.2, whereby many lawyers mistakenly believe that if a prospective client initiates communication with a lawyer, the lawyer is ethically obligated to ensure that the prospective client is not already represented by counsel before communicating further with that prospective client—even when the lawyer does not represent anyone else in the same matter.

knowledge that his/her client has consulted and/or also hired another lawyer in connection with the same matter may perhaps then decide to decline or terminate a representation based on a belief or concern that “too many cooks might spoil the broth”⁹ but, since clients have the ultimate authority to hire and fire their lawyers,¹⁰ the same lawyer may just as easily be faced one day with a situation where an undeniably good and valuable client decides to seek such a second opinion. The Committee simply takes this opportunity to point out that Rule 4.2 does not serve to prevent the already-represented client from seeking such a second opinion nor does it serve to prevent the would-be second lawyer from communicating with the already-represented client who initiates contact with the lawyer when that lawyer does not already represent a client in connection with the same matter. In short, despite the beliefs and/or hopes of some lawyers—especially those made uncomfortable by a mistaken belief that their clients are engaging in some imagined form of “professional adultery”—Rule 4.2 is not an “anti-poaching” rule and cannot be used to shield clients from their own decisions to consult another lawyer.

C. Communication with a Represented Person—or an Agent or Employee of Such a Person—Concerning Matters Outside the Scope of the Representation

Rule 4.2 also does not prohibit a lawyer—even a lawyer who is already representing a client in connection with a matter—from communicating with a person the lawyer knows to be already

⁹ A lawyer choosing to decline or terminate representation as a result of unanticipated/unwanted oversight by another lawyer who has been chosen independently by the client might perhaps rely on Rule 1.16(b)(4) [“...*the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement...*”] and/or Rule 1.16(b)(6) [“...*the representation...has been rendered unreasonably difficult by the client...*”].

¹⁰ Rule 1.16(a)(3) of the Louisiana Rules of Professional Conduct states: “...*(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:...(3) the lawyer is discharged.*” See also *Succession of Wallace*, 90-0159, 574 So.2d 348 (La. 1991), supporting the principle that a client has “...*the absolute right to fire a lawyer in whom he has lost faith or confidence...*” (p. 355), and, as such, the right to choose (and/or change) lawyers at will.

represented by counsel in that same matter if the communication is limited to matters that are outside the scope of the subject of the representation. Such communications are admittedly much more suspect and prone to provoke controversy, dispute and/or complaint, given the fact that the lawyer DOES already represent another person in the same matter and the fact that the person whom the lawyer intends to contact is also already represented by a lawyer in the same matter, thereby satisfying two out of three elements needed to trigger application of Rule 4.2. However, the language of the Rule specifies that, to be prohibited, the communication must be “...*about the subject of the representation...*”

A simplified example of such a permissible communication would be when the lawyer who already represents a person in the matter happens, by chance, to encounter at a social event another person that the lawyer knows is already represented by counsel in the same matter. In that accidental, unintended setting, the Rules would not prohibit simple, polite communication regarding topics such as the weather, the enjoyable atmosphere of the mutually-shared social event and/or the fine quality of the food or entertainment being experienced at that event (assuming, of course, that none of these topics is also pertinent to the underlying legal matter they share in common).¹¹

D. Conclusion

Rule 4.2 of the Louisiana Rules of Professional Conduct generally serves to prohibit a lawyer, while representing a client in a matter, from communicating about the subject of the representation with another person the lawyer knows to be already represented by counsel in the same matter. However, the Committee believes that when a person already represented

¹¹ Prudence would suggest, given the existence of two of three requirements needed to trigger application of Rule 4.2, that the lawyer who encounters such an already-represented person—even in a setting such as this—should avoid any unprofessional or utterly rude conduct, but recognize the dangers and risks inherent in encouraging and/or prolonging any in-depth communication with the represented person under these circumstances.

by counsel in a matter initiates contact and communication with a lawyer who does not represent anyone in connection with that matter, the Rule does not prohibit that lawyer from responding to or communicating further with that person, such as when providing an initial consultation and/or a second opinion sought by that person, nor does it prohibit a lawyer from communicating with such persons concerning matters outside the scope of the representation.