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ETHICAL DUTIES OF A LAWYER WHO IS PARTY TO A MATTER SPEAKING WITH A REPRESENTED PARTY

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Facts

A lawyer who is a party in a legal matter desires to discuss information material to the matter with the opposing party without seeking the consent of the opposing party's lawyer. The lawyer/party does not represent any other party in the legal matter.

Question Presented

May a lawyer who is a party in a legal matter communicate directly with a represented adverse party concerning the matter without the consent of the adverse party's lawyer?

Discussion

Rule 4.2 of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules) provides that: "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be

represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."[1] RPC 4.2's cmnt [4] provides: "[p]arties 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."

There are two scenarios to consider when applying Colo. RPC 4.2 to a lawyer who is a party to a matter.[2] The first scenario is when the lawyer/party is not representing himself or herself in the matter, including circumstances where the lawyer/ party is represented by counsel in the matter. The second scenario is when the lawyer/party is representing himself or herself in the matter. This Opinion addresses each scenario.

First Scenario – Does a Representational Relationship Exist?

The key distinction between these scenarios turns on whether the lawyer is "representing a client" in the matter. If he or she is representing a client, then the black letter prohibition contained in Colo. RPC 4.2 prohibiting communication with the other party, without the consent of the lawyer representing the other party,

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[1] Colo. RPC 4.2 is identical to ABA Model Rule 4.2. Other states mentioned in this Opinion likewise have adopted either the Model Rule *verbatim* or a materially similar version of the Model Rule.

[2] For purposes of this Opinion, it is assumed that the lawyer/party does not have the consent from the opposing party's lawyer to communicate about the subject matter of the case with opposing party and is not authorized or prohibited from such communication by law or a court order.

applies. If, however, the lawyer is not representing a client in the matter (including representing himself or herself *pro se*), then the black letter prohibition contained in Colo. RPC 4.2 does not apply. Rather, RPC 4.2 cmt [4] permits the lawyer acting as a party, not representing himself or herself in the legal matter, to communicate with the other party without the consent of the other party's counsel.

Comment [17] to the RPC's Preamble explains that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists." Colorado substantive law provides a client-lawyer "relationship is 'established when it is shown that the client seeks and receives the advice of the lawyer on the legal consequences of the client's past or contemplated actions.'" *People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991) (quoting *People v. Morley*, 725 P.2d 510, 517 (Colo. 1986)). A client-lawyer "relationship may be inferred from the conduct of the parties," but the "proper test is a subjective one, and an important factor is whether the client believes that the relationship existed." *Id.* (citing *In re Petrie*, 154 Ariz. 295, 299-300, 742 P.2d 796, 800-01 (1987)); *see also* Restatement (Third) of Law Governing Lawyers § 14 (2015) (identifying elements necessary to create a client-lawyer relationship). Whether such a relationship exists is inherently fact-dependent and is a question of law beyond the scope of this Opinion.

Given the *Bennett* test, generally it is simpler to determine if a lawyer is representing himself or herself in a litigated matter. For example, if the lawyer appears in a litigated matter *pro* se and files pleadings or serves disclosures or discovery in that capacity, the lawyer would be considered to be representing himself or herself.[3]

In a transactional matter, however, it may be more difficult to determine if the lawyer is representing himself or herself. Some facts to be considered are whether the lawyer uses his or her firm's letterhead,[4] whether the lawyer uses his

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[3] *See, e.g., People v. Crews*, 901 P.2d 472, 475 (Colo. 1995) (lawyer stipulated violating RPC 4.2 when lawyer communicated with his former spouse in a divorce matter in which the respondent where lawyer was representing himself *pro se*). In *Crews,* the lawyer respondent admitted that he was representing himself in the divorce proceeding with his ex-wife. *Id.* The lawyer respondent also admitted "that his pressure and interference harmed his former wife's interests, and violated DR 7-104(A)(1) and R.P.C. 4.2…." *Crews* does not support the proposition that a lawyer who is advocating his own interests in a proceeding ***always*** represents himself or herself for all matters in the divorce proceeding. *Crews* nevertheless provides a cautionary tale for lawyers who are advocating their own interests in a litigated case. Absent clear evidence to the contrary, it will be difficult for a lawyer to overcome the presumption that he or she is representing himself or herself in the litigated case.

[4] *See, e.g., People v. Meyer*, 908 P.2d 123, 124 (Colo. 1995) (lawyer stipulated to discipline in Wyoming for violating RPC 4.2 when, in part, lawyer wrote a letter to her opposing party, prelitigation, even when she knew opposing party was represented by counsel). *Meyer* does not control the analysis on RPC 4.2 because it was the subject of a stipulation and there was no detailed discussion about the reach of RPC 4.2. *Meyer* nevertheless is an example of where a lawyer was disciplined for violating RPC 4.2 based on communications before litigation occurred.

or her training as a lawyer to gain leverage as part of the communication,[5] or whether the legal issues involved were within the competency and experience of the lawyer-party. Additionally, the circumstances of the transaction are important in determining whether a lawyer is representing himself or herself. Some transactions, such as buying a car, a routine home purchase, or an employment contract may be so ordinary and routine that a reasonable person would not expect the lawyer to be representing himself or herself. More complicated transactions, however, may routinely involve representation by counsel. Because the factual circumstances of potential transactions are so varied and fact-dependent, the Committee cannot evaluate all potential transactions to evaluate whether Rule 4.2 applies. Prudent lawyers should evaluate the specific facts and circumstances of a proposed transaction to determine whether the transaction is such that the lawyer could reasonably be viewed as representing himself or herself in the matter.

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[5] *See, e.g., In re Schaefer*, 117 Nev. 496, 25 P.3d 191, 199 (2001) ("The lawyer still has an advantage over the average layperson, and the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se."); *In re Segall*, 509 N.E.2d 988, 990 (1987) ("A party, having employed counsel to act as an intermediary between himself and opposing counsel, does not lose the protection of the rule merely because opposing counsel is also a party to the litigation."); *see also Runsvold v. Idaho State Bar*, 129 Idaho 419, 421, 925 P.2d 1118, 1120 (1996) (focusing on the protection Rule 4.2 affords to the represented party).

In *HTC Corp. v. Tech. Properties Ltd.*,[6] a California federal court evaluated California's equivalent to Colo. RPC 4.2. The court noted the rule applied only when a lawyer was "representing a client," and concluded that because the subject lawyer, who was serving as in-house counsel representative for the party, was not representing the client in that matter, the rule was inapplicable. *Id.* ("[Lawyer] is a business officer holding the highest executive position at [the corporate party] and has final settlement authority with respect to any litigation concerning [the corporate party]. That he also is a member of the State Bar of California does not transform his position in this litigation to that of an attorney representing a client within the meaning of [California's rule]."). Based on *HTC*, the consideration of whether a lawyer is representing a party in a matter likely involves consideration of what function the lawyer is serving (e.g., is the lawyer advocating for himself or herself or is the lawyer instead acting as a corporate officer or a similar role).

As the above demonstrates, the first step to determine whether RPC 4.2's prohibition applies is determining whether the lawyer acting as party is representing himself or herself, consistent with the *Bennett* test. If the lawyer is not representing himself or herself, then RPC 4.2 permits the lawyer acting only as

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[6] 715 F. Supp. 2d 968, 972 (N.D. Cal. 2010).

a party to communicate with the other party without the consent of the other party's counsel.

Considerations When Lawyer/ Party is Independently Represented

A subset of the first scenario occurs when a lawyer is a party to a matter but is independently represented by counsel. This circumstance can be nuanced, as explained below. Generally stated, however, a lawyer who is independently represented in a matter is acting only as a party and therefore may communicate with the adverse party without the consent of the adverse party's lawyer.

Although the Colorado Supreme Court has yet to address a case involving facts where a lawyer is independently represented and communicates with the adverse party without the consent of the adverse party's lawyer, two other jurisdictions have addressed this situation. The case law is split.

The Connecticut Supreme Court held that a lawyer/party who had hired a lawyer did not violate Rule 4.2 when he sent correspondence regarding the case directly to the opposing party who was also represented by counsel.[7] The *Pinsky* decision has been criticized in some states and an intermediate appellate court in Texas rejected its conclusion on the basis that it allowed a lawyer/party to "do that

[7] *Pinsky v. Statewide Grievance Comm.*, 578 A.2d 1075, 1079 (Conn. 1990).

which he would otherwise be unable to do if he represented himself, by simply employing a counsel of record."[8]

Although no Colorado decision has directly addressed a scenario where a lawyer is a party to a matter but is represented by counsel, the Committee concludes that Rule 4.2 does not prohibit a lawyer/party from discussing the matter with a represented adverse party when the lawyer/party is also represented by counsel. The Committee reaches this conclusion for two reasons.

First, RPC 4.2's plain language applies to a lawyer only when he or she is representing a client. The basic canon of statutory construction provide that, if the plain language permits, the rule "should be construed as written, giving full effect to the words chosen, as it is presumed that the General Assembly meant what it clearly said."[9] This rule of statutory construction applies equally to court rules.[10] Rule 4.2's prohibition against communication with a represented adverse party is

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[8] *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 259 (Tex. App. Houston [14 Dist.] 1999); s*ee also Schaefer*, 25 P.3d at 199 (finding "[t]he lawyer still has an advantage over the average layperson, and the integrity of the relationship between the represented person and counsel is not entitled to less protection merely because the lawyer is appearing pro se."); *Haley*, 126 P.3d at 1269 (noting the apparent discrepancy in holding that Rule 4.2 applies to a *pro se* lawyer/parties but not to a lawyer/party represented by counsel).

[9] *See generally State Dep't of Corrections v. Nieto,* 993 P.2d 493, 500 (2000) (stating "in construing a statute, we must seek to avoid an interpretation that leads to an absurd result"); C.R.S. § 2-4-201(1)(c) (2017) ("A just and reasonable result is intended."); C.R.S. § 2-4-101 C.R.S. (2017) ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage.").

[10] *See In re Marriage of Wiggins,* 279 P.3d 1, 7 ¶ 24 (Colo. 2012).

qualified by the phrase, "when representing a client." This plain language could not be construed to apply to a situation where a party who also is a lawyer has his or her own counsel because the lawyer would not reasonably communicating with a represented adverse party while "representing a client."[11]

Second, Colo. RPC cmt [4] directly permits communication between parties to a matter. The Comment does not exempt from its reach the situation where a party happens to be a lawyer. Thus, the Committee concludes comment [4]'s permission for parties to communicate directly would apply to a lawyer who is a party when that lawyer is represented by counsel.

Second scenario – lawyer is representing himself or herself in the matter

If the lawyer is representing himself *pro se* in a matter, however, the lawyer violates Rule 4.2 by communicating directly with a represented adverse party about the subject matter of the representation without the consent of the other lawyer[12] or a court order permitting the communication.[13] "An opposing lawyer

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[11] *See generally Fasing v. LaFond,* 944 P.2d 608, 612 (Colo. App. 1997) ("an attorney seeks legal counsel as a client, not as an attorney")

[12] *See In re Wollrab,* 2018 CO 64, ¶ 31 (June 25, 2018); *see also Crews*, 901 P.2d at 475; *People v. Marquardt,* 03PDJ053 (Colo. O.P.D.J. 2003); *People v. Waitkus,* 02PDJ022 (Colo. O.P.D.J. 2002).

[13] Rule 4.2 cmnt [6] provides that "[a] lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order." Comment [6] further provides that "[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." The

may consent or acquiesce to direct discussions with his client."[14] "Such consent may be implied rather than express, such as where such direct contact occurs routinely as a matter of custom, unless the opposing lawyer affirmatively protests.'"[15]

The Colorado Supreme Court reversed the Presiding Disciplinary Judge's decision in *Wollrab*, so the continued vitality of the OPDJ's decision in *Wollrab* regarding RPC 4.2 is uncertain. Nevertheless, the Committee believes it is helpful to review the OPDJ's decision in *Wollrab* because it provided guidance regarding the scope of RPC 4.2 relating to a lawyer participating as a party in a matter.

In *Wollrab,* the OPDJ rejected the lawyer/party's argument that he was communicating with the opposing party as a *pro se* party, not as a lawyer "representing a client" under the plain language of the Rule.[16] The OPDJ concluded that Rule 4.2 applies to a lawyer's communication while acting *pro se*,

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Committee recognizes that it may be burdensome or impractical to seek a court order in every case where a lawyer is acting as the party to the case. It may be prudent to seek such an order at the beginning of a case to ensure that the circumstances are clear as to when the lawyer/ party may communicate with his adverse party without the consent of the adverse party's lawyer. For example, in a divorce case, the lawyer/ party would be wise to seek a prophylactic order allowing him to communicate with his ex-spouse about routine matters or childcare arrangements in order to make the matter more efficient, with less court involvement, while mitigating the risk that the lawyer may violate Rule 4.2.

[14] *Wollrab,* 2018 CO 64, ¶ 31 (citing Restatement (Third) of the Law Governing Lawyers § 99 cmt. j (Am. Law Inst. 2000)).

[15] *Id.* (quoting the Restatement).

[16] *People v. Wollrab,* 16PDJ062 (Colo. O.P.D.J. 2017).

based on relevant Colorado precedent, the weight of authority from other jurisdictions, and the OPDJ's assessment that such a conclusion supports the purposes of the rule.[17] Based on ABA Formal Op. 95-396, the OPDJ identified three purposes of Rule 4.2: (1) to provide protection of the represented person against overreaching by adverse counsel; (2) to safeguard the client-lawyer relationship from interference by adverse counsel; and (3) to reduce the likelihood that clients will disclose privileged or other information that might harm their interests.[18] The OPDJ's decision in *Wollrab* is consistent with decisions in other jurisdictions, which have held that when a lawyer represents his or her own interest in a matter, Rule 4.2 prohibits the lawyer/party from discussing the matter with another party who is represented by counsel.[19]

Comment [4] to Rule 4.2 explains that the Rule "does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation." Accordingly, even when the lawyer is representing himself or herself in a matter, the lawyer may still communicate with a represented person as long as the communication concerns

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[17] *Id.*

[18] ABA Standing Comm. on Ethics and Prof. Resp., Formal Op. 95-396, "Communications with Represented Persons" (1995).

[19] *People v. Wollrab,* 16PDJ062 (Colo. O.P.D.J. 2017) (citing *Runsvold*, 925 P.2d at 1120; *In re Schaefer*, 25 P.3d at 199; *In re Segall*, 509 N.E.2d at 990; and *Sandstrom v. Sandstrom*, 880 P.2d 103 (Wyo. 1994)).

matters outside of the representation. The Committee advises lawyers confronting this circumstance to proceed with caution, however, because it often is very difficult to distinguish between matters related to the representation with "matters outside the representation."

Additionally, Comment [4] clarifies that Rule 4.2 does not prohibit communication with a represented party by "a lawyer having independent justification or legal authorization for communicating with a represented person, such as a contractually-based right or obligation to give notice, is permitted to do so." In a family law case, for example, a lawyer/ party may have independent legal justification to communicate with his or her adverse party regarding uncontested matters in the case or regarding temporary matters, such as childcare arrangements or the health needs of their children. Additionally, a lawyer/party to a contract may have an independent obligation to communicate with a represented party due to the contract's terms. For example, a contract may require the lawyer/ party to give notice to the other party to the contract, even when that party is represented by counsel. Consistent with comment [4], a lawyer does not violate Rule 4.2 by giving such notice even when the lawyer/ party knows that the other party to the contract is represented by counsel.

Conclusion

If the lawyer/party is representing himself or herself in a legal matter, the lawyer/party may not communicate about the matter directly with a represented adverse party without the consent of the adverse party's lawyer or a court order. However, the same lawyer/party may communicate about the matter directly with a represented adverse party when the lawyer/party himself or herself is represented by counsel or the lawyer is not representing any party, including himself or herself, in the matter.