

Colo. R. Prof'l. Cond. 4.2

Rule 4.2 - Communication with Person Represented by Counsel or an LLP

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 or LLP in the matter, unless the lawyer has the consent of the other lawyer or LLP or is authorized to do so by law or a court order.

RPC 4.2

Comment amended and adopted June 17, 1999, effective 7/1/1999; entire Appendix repealed and readopted April 12, 2007, effective 1/1/2008; amended and adopted by the Court, En Banc, effective 11/16/2023.

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] This Rule applies to communications with any person who is represented by counsel concerning the matter 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 person is one with whom communication is not permitted by this Rule.

[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. 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, such as a contractually-based right or obligation to give notice, is permitted to do so.

[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.*

[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. Consent of the organization's lawyer is not required for communication with a former constituent. 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). 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.*

[9A] *A pro se party to whom limited representation has been provided in accordance with C.R.C.P. 11(b) or C.R.C.P. 311(b), and Rule 1.2, is considered to be unrepresented for purposes of this Rule unless the lawyer has knowledge to the contrary.*

*ANNOTATION Law reviews. For formal opinion of the Colorado Bar Association on Ex Parte Contacts with Government Officials, see 23 Colo. Law. 329 (1994). For formal opinion of the Colorado Bar Association on Ex Parte Communications With Represented Persons During Criminal and Civil Regulatory/Investigations and Proceedings, see 23 Colo. Law. 2297 (1994). For article, "Discrete Task Representation a/k/a Unbundled Legal Services", see 29 Colo. Law. 5 (January 2000). For article, "Policing the Legal System: The Duty to Report Misconduct", see 30 Colo. Law. 85 (September 2001). For article, "Settlement Ethics", see 30 Colo. Law. 53 (December 2001). For article, "Investigative Tactics: They May Be Legal, But Are They Ethical?", see 35 Colo. Law. 43 (January 2006). For article, "The New Rules of Professional Conduct: Significant Changes for In-House Counsel", see 36 Colo. Law. 71 (November 2007). For formal opinion of the Colorado Bar Association on Propriety of Communicating With Employee or Former Employee of an Adverse Party, see 39 Colo. Law. 21 (October 2010). Annotator's note. Rule 4.2 is similar to Rule 4.2 as it existed prior to the 2007 repeal and readoption of the Colorado rules of professional conduct. Relevant cases construing that provision have been included in the annotations to this rule. The protections of this rule attach only once an "adversarial relationship" sufficient to trigger an organization's right to counsel arises. *Johnson v. Cadillac Plastic Group, Inc.*, 930 F. Supp. 1437 (D. Colo. 1996). The fact that an employee is a management level employee alone does not make him a "party" for purposes of this rule. *Johnson v. Cadillac Plastic Group, Inc.*, 930 F. Supp. 1437 (D. Colo. 1996). Attorneys are responsible for ethical violation when their investigator, without the defendant's permission, contacted an employee of the defendant whose statements about the events surrounding a fight may constitute admissions by the defendant. *McClelland v. Blazin' Wings, Inc.*, 675 F. Supp. 2d 1074 (D. Colo. 2009). This rule does not require any greater or more specific limitations on the communications of government lawyers with*

suspects, or with indigent suspects in particular, than apply to attorney communications in general. The fact that the defendant was appointed counsel in a different matter does not automatically prohibit certain communications with prosecution investigators relating to a different matter. An assessment of compliance with this rule requires facts concerning the matters for which the public defender had already been appointed to represent the defendant and the subject of the subsequent interviews with the investigators. People v. Wright, 196 P.3d 1146 (Colo. 2008). Public censure was warranted for attorney who prepared motions to dismiss for his client's wife to sign when proceedings had been brought by the client's wife against the client and the client's wife was represented by counsel and was not advised that she should contact her own lawyer before signing the motions, nor asked if she wished to discuss the motions with her lawyer before signing. Three letters of admonition for unrelated misconduct also were an aggravating factor for purposes of determining the appropriate level of discipline. People v. McCray, 926 P.2d 578 (Colo. 1996). Thirty-day suspension warranted where lawyer, who represented an individual accused of first-degree murder, communicated with co-defendant who also was charged with first-degree murder and whose interests were adverse to the lawyer's client, without the knowledge or consent of the co-defendant's lawyers. The potential for harm was high in a first-degree murder case and the number of unauthorized contacts demonstrated more than negligence on the lawyer's part. People v. DeLoach, 944 P.2d 522 (Colo. 1997). Conduct violating this rule in conjunction with other disciplinary rules is sufficient to justify suspension. People v. Crews, 901 P.2d 472 (Colo. 1995); People v. Wotan, 944 P.2d 1257 (Colo. 1997); In re Tolley, 975 P.2d 1115 (Colo. 1999).
