



The No-Contact Rule Revisited

In a previous column,¹ we looked at what is known as the “no-contact rule” as it relates to communications between a lawyer and the former employees of an opposing and represented organizational party. The rule, set forth as ER 4.2 (Communication with Person Represented by Counsel) in Arizona’s Rules of Professional Conduct,² states essentially that if you know that another party, opposing or otherwise, is represented by counsel in a matter, you are prohibited from communicating with that party about the subject of the representation unless that party’s lawyer has given you permission to do so. The rule’s purposes are to prevent opposing counsel from overreaching, from interfering in other lawyers’ relationships with their clients, and from acquiring protected information through what has been described as “uncounselled disclosure.”³

Unfortunately, there are several situations where it might not be so obvious that you may be dealing with a party contemplated by the rule. With this in

mind, let’s get a few ground rules established.

First, the rule applies even if it’s the represented party who initiates the contact or otherwise consents to the *ex parte* communication. That party’s lawyer is the only person who can waive the injunctions of the rule. Second, the rule applies only to communications about the subject matter of the representation in the same matter: Talking to a represented party about an entirely different matter is not prohibited by the rule. Third, the rule applies only if the lawyer actually knows⁴ that the party is represented by counsel. This is an objective standard and can be “inferred from circumstances” by the trier of fact. With these basics in mind, let’s look at some not so common situations that you might encounter:

- A person contacts you to say that she is unhappy with her current lawyer and wants you to give her a “second opinion” on her case. You are allowed to talk to her because you are not presently “representing a client” in the matter, a predicate for the rule’s application. Be careful here: If you sense that the person might be considered to be a “prospective client”⁵ who might hire you as substitute counsel if she is considering discharging her present lawyer, you may be limited when and if communicating with her present lawyer about the matter because of the confidentiality obligations owed to prospective clients.⁶
- Your client wants your investigator to interview and take a statement from a represented opposing party. No go. ER 8.4 (Misconduct) at subsection

(a) prohibits you from violating an ethical rule through the acts of another. If you can’t do it, you can’t hire someone to do it for you.

- Your client wants to contact the other party about the pending matter. Watch out here. While represented parties are allowed to communicate directly with each other,⁷ you as the lawyer may not “script” or orchestrate what your client says in the communication in order to get some sort of admission or to gain some advantage in the matter. On the other hand, if for instance you believe opposing counsel has failed or refused to convey your client’s settlement offer to his client, you may counsel your client about his ability to communicate on the question with the opposing party even though you may not.⁸
- You want to talk to a former client who has replaced you with a new lawyer, the subject being the fees she still owes you. Not so fast. You may be deemed to be a lawyer representing your own interests in the same matter, and therefore subject to the rule.⁹ Deal with her new lawyer who, after a few calls from you, will probably gladly permit you to call the former client directly.
- You want to interview a current employee of an opposing and represented organizational party about the subject of the representation. This has presented problems for lawyers over the years, and various rules have been adopted in various jurisdictions. If you are in Arizona, look at Comment [2] to ER 4.2. Persons having a “managerial responsibility” on behalf of the organization are off limits, as are any other persons whose acts or omissions in connection with 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. As long as the persons you wish to interview do not fall within these categories, the rule does not prevent you from interviewing fact

—continued on p. 89


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by agreement with opposing counsel. If not, be aware that a violation of the rule can have consequences such as exclusion of evidence acquired, return of documents, monetary sanctions and even disqualification of counsel.¹¹ 

endnotes

1. *The No-Contact Rule and Former Employees*, ARIZ. ATT'Y (July/August 2015) at 10.
2. Rule 42, ARIZ.R.S.Ct.
3. See cases collected in ABA Center for Professional Responsibility, ANNOTATED RULES OF PROFESSIONAL CONDUCT (9th ed. 2019) at 454-455; see also the excellent article on the rule by Jessica J. Berch & Michael A. Berch, *May I have a Word With You: Oops, Have I Already Violated the No-Contact Rule?*, 6 PHOENIX L. REV. 433 (Spring 2013).
4. “Knows” is a defined term. See ER 1.0 (Terminology) at subsection (f). See also discussion in ANNOTATED MODEL RULES, *supra* note 3, at 460-461.
5. Defined by ER 1.18 (Duties to Prospective Client) at subsection (a) as a person “who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.”
6. ER 1.18(b).
7. ER 4.2 at Comment [1]; see discussion and authorities cited in ANNOTATED MODEL RULES, *supra* note 3, at 457-458.
8. ABA Formal Op. 11-461 (Advising Clients Regarding Direct Contacts with Represented Persons) (Aug. 4, 2011); ABA Formal Op. No. 92-362 (Contact With Opposing Party Regarding Settlement Offer) (July 6, 1992).
9. ANNOTATED MODEL RULES, *supra* note 3, at 462.
10. See discussion and authorities cited in ARIZONA LEGAL ETHICS HANDBOOK (4th ed. 2016) at ¶ 4.2:210.
11. See examples and authorities cited in ANNOTATED MODEL RULES, *supra* note 3, at 472-473.