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Toward a Revised 4.2 No-Contact Rule

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INTRODUCTION

In our adversarial system of legal representation, ethical rules of attorney conduct focus on protecting the client. Accordingly, the two mainstays of legal ethics are the duties, owed to clients, of loyalty and confidentiality. The duty of loyalty requires lawyers to adopt clients' interests as their own; the duty of confidentiality requires lawyers to keep matters relating to a representation confidential. A lawyer and client can then act together as a close working group, generally governed by principles of agency law.

However, a lawyer's duties to clients are constrained by obligations to others—to other persons, to the courts, and to the system of law and justice at large. Thus, for example, a lawyer may not engage in or assist in fraud committed on others; owes duties of candor to the courts; and must comply generally with the law of the land.¹ Another set of obligations, stated in general terms, requires a lawyer to deal fairly with others while acting on behalf of a client.

Our focus here is on Rule 4.2, the “no-contact” provision:

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 in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or court order.²

Rule 4.2 is only one of several provisions directly protective of third persons. In the American Bar Association (ABA) Model Rules of Professional Conduct, Rule 4.2 is situated in a cluster that includes Rules 4.1 through 4.4. Rule 4.1 provides that a lawyer “shall not knowingly . . . make a false statement of material fact or law to a third

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1. See MODEL RULES OF PROF'L CONDUCT R. 1.2, 3.3, 8.4 (2008).

2. *Id.* R. 4.2; see also MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (1969); ABA CANONS OF PROF'L ETHICS No. 9 (1908).

person; or . . . fail to disclose a material fact when disclosure is necessary to avoid assisting in a criminal or fraudulent act by a client”³ Rule 4.3 provides that:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. . . . The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows . . . the interests of such a person are . . . in conflict with the interests of the client.⁴

Rule 4.4 provides that “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person.”⁵

Other rules have similar effect in constraining and qualifying lawyers’ duties on behalf of their clients. Rule 3.3(a)(1) prohibits a lawyer from making a “false statement of fact or law to a tribunal”;⁶ Rule 3.3(a)(3) prohibits a lawyer from offering “evidence that the lawyer knows to be false”;⁷ Rule 3.3(d) requires that in an ex parte proceeding, a lawyer “inform the tribunal of all material facts . . . whether or not the facts are adverse.”⁸ Rule 3.4, meanwhile, includes a panoply of obligations to “opposing party and counsel,” which incorporate various rules of civil and criminal procedure that are themselves protective of opposing parties.⁹

In short, the idea voiced long ago by Lord Brougham that a lawyer “knows but one person in all the world, and that person is his client,”¹⁰ is simply not true and never has been. A lawyer representing a client must “know” many others. But under the no-contact provision of Rule 4.2, a lawyer is strictly circumscribed in whether and how to “know” a certain class of others—those who turn out to be clients of another lawyer.

Our thesis is that as now written, Rule 4.2 is overbroad and ambiguous in important respects. There is a strong argument that the Rule should be repealed and its work done by Rule 4.3—that is, a lawyer should not present himself to a nonclient as disinterested, should not give legal advice (except to consult another lawyer), and should not negotiate with a person he knows to be represented.¹¹ In the law of professional ethics, however, once a rule protective of the profession has been

3. MODEL RULES OF PROF’L CONDUCT R. 4.1 (2008).

4. *Id.* R. 4.3.

5. *Id.* R. 4.4.

6. *Id.* R. 3.3(a)(1).

7. *Id.* R. 3.3(a)(3).

8. *Id.* R. 3.3(d).

9. *See id.* R. 3.4.

10. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 580 (1986); *see also* Geoffrey C. Hazard, Jr., *Lawyer for the Situation*, 39 VAL. U. L. REV. 377, 378 (2004).

11. MODEL RULES OF PROF’L CONDUCT R. 4.3.

adopted, repeal is unlikely. In the absence of repeal, we propose reform along the lines described herein.

I. RULE 4.2 AS IT IS

Model Rule 4.2's version of the no-contact rule, set forth above, is currently in force in substantially similar form in all U.S. jurisdictions.¹² Its roots can be found in Canon 9 of the 1908 ABA Canons of Professional Ethics, which advised that "[a] lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel."¹³ Canon 9 was effectively a rule of evidence, however, and its no-contact concept was much more limited than that of today's provision. Case law addressing the canon generally focused on whether concessions or admissions obtained directly from a represented person should be denied legal effect.¹⁴

After the promulgation of the ABA Model Code of Professional Responsibility in 1970, this early formulation of the rule was expanded into the current prophylaxis of "no contact."¹⁵ DR 7-104(A)(1), which was carried forward in substantially similar form in Model Rule 4.2, provided that a lawyer should not "communicate . . . on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."¹⁶ Initially, ethics committees and courts treated DR 7-104(A)(1) with a more or less uncritical deference. They viewed the no-contact rule as providing necessary protection to lay persons who often lack the knowledge, training, and skills to protect their own interests, particularly when dealing with a lawyer representing an adversary.¹⁷ Some such protection against lawyer overreaching is no doubt desirable, but courts and litigants interpreted the rule to go farther, and to require that *all* information and communications with a represented person be routed

12. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. b (2000).

13. ABA CANONS OF PROFESSIONAL ETHICS No. 9 (1908).

14. See, e.g., *Coughlan v. United States*, 391 F.2d 371, 376-78 (9th Cir. 1968) (Hamley, J., dissenting); *Reinke v. United States*, 405 F.2d 228, 230 (9th Cir. 1968); *United States v. Smith*, 379 F.2d 628, 633 (7th Cir. 1967); *United States v. Ferguson*, 243 F. Supp. 237, 238 (D.D.C. 1965); *Juskowitz v. Hahn*, 56 Misc. 2d 647, 648 (N.Y. Sup. Ct. 1968); *State v. Nicholson*, 463 P.2d 633, 636-37 (Wash. 1969). *But see* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 108 (1934) (referring to Canon 9's broad prohibition).

15. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104(A)(1) (1969).

16. *Id.*

17. See, e.g., *United States v. Guerrero*, 675 F. Supp. 1430, 1437 (S.D.N.Y. 1987); Comm. on Prof'l Ethics of the Ass'n of the Bar of the City of N.Y., Inquiry Ref. No. 80-46, at 7 (1980) [hereinafter N.Y.C. Bar Inquiry Ref. No. 80-46]; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. b.

through the lawyer.¹⁸ DR 7-104(A)(1) came to be “strictly construe[d]”¹⁹ as a broad and strict prohibition against any communications—written or oral, direct or indirect—with *any* represented person in *any* legal context. Its successor provision, Model Rule 4.2, adopted this broad and strict approach.

The primary advantage of this approach is the predictable standard of conduct it purports to provide through an absolute prohibition on contact. It also eases problems of proof by making the critical evidential issue whether there was contact with a represented person, rather than what was said or done in the course of the contact. This approach has shortcomings as well, however. It fails to accommodate countervailing interests, and it offers little flexibility to address situations where the rule’s application has undesirable or adverse results. For example, it subjects a lawyer to risk of disqualification for exercising her authority and fulfilling her duty to investigate facts by interrogating witnesses.

These problems are exacerbated by the procedural context in which the rule is typically invoked. Rarely is it raised in the disciplinary context, where, strictly speaking, ethical rules have their only sovereign effect. Instead, it is typically raised in a motion in litigation.²⁰ Use of the rules of attorney conduct as standards in contexts outside of discipline is both acceptable and proper, but different contexts give rise to different sanctions.²¹ In the disciplinary context, the sanction for an infraction of the no-contact rule would likely be a reprimand.²² In a litigation context, in contrast, the sanction typically sought is disqualification of opposing counsel, and courts typically feel obliged to award it, whether or not real injury has resulted.²³ In fact, it is rare that a motion complains of actual injury to the protected client—for example, the elicitation of harmful admissions—and rare also that the remedy sought is suppression of the harmful admission, rather than expulsion of counsel.

Even if the text of Model Rule 4.2 is not changed, courts should be mindful that the proper remedy is a matter of judicial discretion,²⁴ and that in the absence of actual or apparent injury, an admonition or

18. See, e.g., ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 359 (1991).

19. ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 517 (1962).

20. See, e.g., *Faison v. Thornton*, 863 F. Supp. 1204 (D. Nev. 1993); *MMR/Wallace Power & Indus. v. Thames Assocs.*, 764 F. Supp. 712, 714 (D. Conn. 1991); *Papanicolaou v. Chase Manhattan Bank*, 720 F. Supp. 1080, 1084–87 (S.D.N.Y. 1989); *Shoney’s, Inc. v. Lewis*, 875 S.W.2d 514, 514–16 (Ky. 1994).

21. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 6 (2000).

22. We know of no specific disciplinary case, which indicates that unless the accused lawyer had obviously exploited a naïve individual, the worst sanction that would be imposed would be a reprimand.

23. See cases cited *supra* note 20; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. b.

24. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 6 cmts. c. i.

referral to a disciplinary authority could be the appropriate response. As Comment i to section 6 of the *Restatement (Third)* states, “tribunals should be vigilant to prevent [the motion for disqualification] as a tactic by which one party may impose unwarranted delay, costs, and other burdens on another.”²⁵

Addressing Rule 4.2’s sanctions, however, will not address the root of the Rule’s problems—its overbroad and inflexible prohibition on communications. These problems invite new attention to the Rule’s text, comments, and application. Accordingly, the next Part reviews, evaluates, and proposes change to current conceptions of Rule 4.2’s function within the legal system.

II. RULE 4.2’S PURPOSE

As commonly explained, the no-contact rule has two primary functions: (i) protecting the client-lawyer relationship from interference by opposing counsel and (ii) shielding the client from improper approaches by opposing counsel.²⁶ These functions overlap to a substantial degree, but are conceptually, and often functionally, distinct. Courts and commentators recite both functions, but generally focus on the latter.²⁷ A third function—protection of the lawyer’s interest in the client-lawyer relationship—is less frequently discussed.

The 2002 amendments to Model Rule 4.2 included a new Comment I, which articulates the Rule’s purpose as follows:

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 uncounseled disclosure of information relating to the representation.²⁸

The *Restatement (Third)*’s explanation of the no-contact rule is substantially similar:

[States’ no-contact rules] protect against overreaching and deception of nonclients. The rule of this Section also protects the relationship between the represented nonclient and that person’s lawyer and

25. *Id.* § 6 cmt. i.

26. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95-396 (1995); ABA Comm. of Prof’l Ethics and Grievances, Formal Op. 108 (1934).

27. See, e.g., *Wright ex rel. Wright v. Group Health Hosp.*, 691 P.2d 564, 567 (Wash. 1984) (explaining that in recent years, “the purpose of the rule has been said to shield the represented client from improper approaches”). Commentators have noted this shift. See, e.g., Sophie Hager Hume, Comment, *Niesig v. Team I: Permitting Ex Parte Communication with Corporate Employees*, 57 BROOK. L. REV. 953, 957 (1991); Stephen M. Sinaiko, Note, *Ex Parte Communication and the Corporate Adversary: A New Approach*, 66 N.Y.U. L. REV. 1456, 1463-64 (1991).

28. MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. I (2008).

assures the confidentiality of the nonclient's communications with the lawyer.²⁹

Courts and commentators have elaborated on the ways in which Rule 4.2 serves its three functions of protecting the client, the lawyer, and the client-lawyer relationship.³⁰ They have explained that the Rule guards a party against rhetorical attack by opposing counsel, which could undermine the party's confidence in her lawyer's competence and assessment of a case.³¹ The Rule prevents opposing counsel from causing a party to ignore her lawyer's advice and from "driving a wedge" between a party and her lawyer.³² And it protects the attorney-client privilege—critical to a strong client-lawyer relationship—by precluding inadvertent or legally imprudent disclosures of privileged information.³³

This last function—protection of the attorney-client privilege—is thought by many to be the core function of Rule 4.2. Our constitutional tradition honors the attorney-client privilege as a rule of privacy and of protection of citizens from the force of government coercion, even while accepting that the privilege can sometimes obstruct access to truth.³⁴ The merits of this trade-off may be debatable, and the traditional value placed on the privilege has been periodically challenged, but it remains a central feature of legal representation.³⁵ Rule 4.2's role in reinforcing its protections is therefore critical.

29. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. b (citation omitted).

30. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995) (no-contact rule "safeguard[s] the client-lawyer relationship from interference by adverse counsel").

31. See, e.g., *Univ. Patents, Inc. v. Kligman*, 737 F. Supp. 325, 327-28 (E.D. Pa. 1990); *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990); *Papanicolaou v. Chase Manhattan Bank*, 720 F. Supp. 1080, 1082, 1084 (S.D.N.Y. 1989); N.Y.C. Bar Inquiry Ref. No. 80-46, *supra* note 17.

32. *Polycast*, 129 F.R.D. at 625.

33. See, e.g., *United States v. Jamil*, 707 F.2d 638, 646 (2d Cir. 1983); *Univ. Patents*, 737 F. Supp. at 327; *Polycast*, 129 F.R.D. at 625; N.Y.C. Bar Inquiry Ref. No. 80-46, *supra* note 17; see also Sherman L. Cohn, *The Organizational Client: Attorney-Client Privilege and the No-Contact Rule*, 10 GEO. J. LEGAL ETHICS 739, 744 (1997); Jerome N. Krulewitch, *Ex Parte Communications with Corporate Parties: The Scope of the Limitations on Attorney Communications with One of Adverse Interest*, 82 NW. U. L. REV. 1274, 1278 (1988).

34. See CHARLES TILFORD McCORMICK ET AL., *McCORMICK ON EVIDENCE* § 87, at 204-05 (3d ed. 1984); 2 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 503(02), at 503-16 (1990).

35. See Michael L. Seigel, *Corporate America Fights Back: The Battle over Waiver of the Attorney-Client Privilege*, 49 B.C. L. REV. 1, 7 (2008). The privilege's central role has recently been reaffirmed by new DOJ regulations, issued by Deputy Attorney General Mark Filip, which change previous policy and forbid federal prosecutors from requesting a corporation to waive the attorney client and/or work product privilege in exchange for lenient treatment. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-28.710 (2008), available at <http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf>; see also Mark R. Filip, Deputy U.S. Attorney Gen., Remarks at Press Conference Announcing Revisions to Corporate Charging Guidelines (Aug. 28, 2008) (transcript available at <http://www.usdoj.gov/archive/dag/speeches/2008/dag-speech-0808286.html>) (announcing and explaining the new guidelines).

Rule 4.2's protections extend beyond the scope of the attorney-client privilege, however. Applied strictly according to its terms, the Rule effectively insulates represented individuals from all informal interviews and investigations. Accordingly, it guards against the inadvertent or imprudent disclosures of *unprivileged* as well as privileged information—information of a kind a client may ultimately have to disclose in deposition. Courts have recognized this broad protection, speaking of the Rule as functioning to decrease the chances that a represented person will disclose harmful information.³⁶ Lawyers place a high value on this function, since a client's disclosure of any kind can seriously damage a litigation position. But granting lawyers complete professional control of information produces debatable effects—potentially protecting clients against legal responsibility for their conduct and inhibiting the search for truth.

Rule 4.2's effects are debatable in other respects as well. For example, the Rule can function to favor those who are wealthy or sophisticated enough to have a lawyer on retainer.³⁷ The Rule's protections, as well as those of the attorney-client privilege, are available to litigants as soon as they engage legal counsel. Inevitably, however, legal representation is more readily available to individuals who are sophisticated and affluent than individuals who are not.

By affording protection against disclosure of harmful information to individuals who retain counsel, Rule 4.2 enhances the practical value of legal representation and therefore the economic value of the lawyer's services. This highlights the Rule's third and less noted function—protecting lawyers' interests in their relationships with clients. An ABA opinion recognized that the Rule's prohibition is “imperative in the right and interest of the adverse party *and his attorney*,”³⁸ and the California Supreme Court explained that “[t]he rule was designed to permit an attorney to function adequately in his proper role and to prevent the opposing attorney from impeding his performance in such role.”³⁹ In granting lawyers full control over all communications, the Rule can also serve less legitimate interests of the lawyer. John Leubsdorf notes the

36. See, e.g., *Univ. Patents*, 737 F. Supp. at 327; *Polycast*, 129 F.R.D. at 625.

37. See, e.g., *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988); *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir. 1983); *United States v. Vasquez*, 675 F.2d 16, 17 (2d Cir. 1982); *United States v. Masullo*, 489 F.2d 217, 223–24 (2d Cir. 1973); see also Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 340 (1992); John Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. PA. L. REV. 683, 702 (1979).

38. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 108 (1934) (emphasis added); see also *United States v. Lopez*, 765 F. Supp. 1433, 1451–52 (N.D. Cal. 1991).

39. *Mitton v. State Bar*, 455 P.2d 753, 758 (Cal. 1969); see also *In re Doe*, 801 F. Supp. 478, 485 (D.N.M. 1992) (stating that the rule is designed “to ensure that the adverse party's attorney can function properly” (quoting *Lopez*, 765 F. Supp. at 1447–49)).

possibility of a lawyer delaying the transmittal of a settlement offer in order to prolong a case and increase fees.⁴⁰ Another possibility is a lawyer intentionally taking a position in tone or substance that prolongs or exacerbates differences that the parties could otherwise resolve.

To minimize the dangers of a no-contact rule that favors sophisticated and affluent individuals or that allows lawyers to protect their own interests at the expense of clients', we propose two changes to common conceptions of Model Rule 4.2's function. First, we propose that the Rule be understood primarily in terms of protecting the client-lawyer relationship, not the client or the lawyer individually. Comment 1 to Model Rule 4.2 currently explains that the Rule "contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer."⁴¹ While protecting the "proper functioning of the legal system" is a central purpose of all ethical rules, it is not clear that this purpose is always and necessarily served by protecting "a person . . . represented by a lawyer."⁴² To the contrary, there is no apparent justification for giving a represented person protection above and beyond the existing protections of effective representation. Accordingly, we propose modifying Comment 1 to focus clearly and unambiguously on protection of the client-lawyer relationship.

Additionally, we think that conceptions of Rule 4.2's proper function should account for the various and often competing interests implicated by the Rule. As noted in the introduction, the corpus of ethical rules has increasingly recognized the need to balance countervailing interests.⁴³ For example, the idea of absolute loyalty to the client has been qualified by duties of candor to the court and to nonclients and by an enlarged scope of self-protection for lawyers against clients who turn out to be dishonest and criminal.⁴⁴ The protection afforded client confidences, meanwhile, has been qualified to allow a lawyer to disclose information to interdict substantial unlawful injuries to third parties and to defend himself against implication in a client's wrongdoing.⁴⁵

40. Leubsdorf, *supra* note 37, at 689-90.

41. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 1 (2008).

42. *Id.*

43. See John S. Dzienkowski, *Lawyering in a Hybrid Adversary System*, 38 WM. & MARY L. REV. 45, 49 (1996). See generally John Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021 (1982). In large part, this is to respond to criticisms that a pure model subordinates truth in the hierarchy or values and leads to distributional injustice, and in recognition that loyalty to a client can sometimes impose unacceptable costs on third parties. See, e.g., Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

44. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6, 3.3, 3.4, 4.1-4.

45. In 2003, Model Rule 1.6(b) was revised to add the following additional exceptions permitting adverse disclosure of confidential information:

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in

No such qualifications have been made to Rule 4.2—either to conceptions of its proper function or to its application in practice. This is not because countervailing interests are not implicated. To the contrary, Rule 4.2 affects various interests of the adversary, third parties, and the legal system as a whole. Primary among these is an interest in informal factfinding—an alternative to formal discovery that provides several advantages to adverse parties and the legal system as a whole but that Rule 4.2 effectively precludes.⁴⁶ Informal factfinding limits the financial and time burdens placed on the parties and on courts.⁴⁷ It allows lawyers to fulfill their Rule 11 duty to substantiate claims prior to filing suit⁴⁸ when formal discovery has not yet become unavailable.⁴⁹ And it may produce more relevant and useful information, as witnesses may speak more freely in an informal *ex parte* interview than in the more intimidating atmosphere of a formal deposition. Moreover, it affords the investigating lawyer confidentiality in developing a theory of the case and producing attorney work product.⁵⁰ Rule 4.2 effectively deprives litigants of all of these benefits of informal discovery.

Rule 4.2 interferes with various third-party interests as well. An individual in danger of imminent harm at the hands of a represented person has an interest in a direct warning from that person's lawyer. A whistleblower within a represented organization has an interest in speaking with outside opposing counsel without first gaining approval from the organization's lawyer. And society has an interest in effective crime prevention and just resolution of disputes. Even the client covered by Rule 4.2 has an interest that goes unnoticed by the Rule—namely, autonomy within the client-lawyer relationship.

In reconsidering the Rule's proper formulation and application, we think that these interests should be explicitly addressed. Just as other rules of attorney conduct have been modified to account for the full range of implicated interests, so too should the obligations of Rule 4.2 be modified to account for the competing interests of the adversary, third parties, and the justice system as a whole. Accordingly, we propose replacing Model Rule 4.2's current Comment 1 with the following:

furtherance of which the client used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services[.]

MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)–(3) (2004); *cf.* MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2003).

46. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100(2) cmt. b.

47. *Id.* § 99 cmt. b.

48. FED. R. CIV. P. 11; MODEL RULES OF PROF'L CONDUCT R. 3.1 (2008).

49. *See* FED. R. CIV. P. 27(a)(1).

50. *See, e.g.,* *IBM v. Edelstein*, 526 F.2d 37, 42 (2d Cir. 1975).

This Rule contributes to the proper functioning of the legal system by protecting the client-lawyer relationship against interference by other lawyers participating in the matter. It protects against another lawyer's influence that might undermine a client's confidence in his or her lawyer, or lead a client to disclose privileged or confidential information, to refrain from pursuing claims or a course of action, to agree to a settlement, or to take other action without the advice of counsel. These interests are not unlimited and must be balanced with accommodation of the functions of informal investigation and fact-finding in limiting costs, substantiating claims, and promoting legitimate law enforcement activities.⁵¹

This articulation of Rule 4.2's purpose forms the foundation of our critique of the Rule's practical application, and our proposal for its reform is set forth in the next Part.

III. RULE 4.2'S APPLICATION

As currently articulated and applied, Rule 4.2 leads to results that are sometimes undesirable and other times unpredictable. The efforts in some decisions to accommodate competing interests have resulted in a discrepancy between the text of the Rule and the meanings it has been given.⁵² To explain and address these problems, this Part reviews eight contexts in which the proper application of Rule 4.2 is either unclear or unjust: (1) law enforcement investigations, (2) communications with government officials, (3) other communications that have been interpreted by courts as "authorized by law," (4) communications initiated by represented persons, (5) communications responding to emergencies, (6) communications by a lawyer who is a party to a matter, (7) communications with constituents of a represented organization, and (8) communications with putative members of a class. After reviewing the difficulties presented by each context, we propose modifications to the Rule to better effectuate what we consider to be its principal function—safeguarding the client-lawyer relationship, while acknowledging and balancing countervailing interests. The text of current Model Rule 4.2 is attached in Appendix 1 and the text of our proposed revision is attached in Appendix 2.

A. LAW ENFORCEMENT INVESTIGATIONS

Rule 4.2 has two exceptions to its prohibition on communication by a lawyer with a person represented by another lawyer.⁵³ Communications are allowed if (i) consented to by the represented person's lawyer, or (ii) authorized by law.⁵⁴ The first of these is merely formal; it is implausible

51. See *infra* Appendix 2 R. 4.2 cmt. 1.

52. See, e.g., Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 460 (2002) (noting problems of "implementing haphazard exceptions").

53. MODEL RULES OF PROF'L CONDUCT R. 4.2.

54. *Id.*

that a lawyer representing a client would consent to direct contact in circumstances in which the Rule's protective purpose is implicated. Operatively, therefore, the Rule has only one exception—communications “authorized by law.”

The opaque phrase “authorized by law” originally appeared in DR 7-104 of the 1970 Model Code and was adopted by the drafters of Model Rule 4.2 in 1983 with full awareness of its ambiguity.⁵⁵ The current Model Rule provides no definition of the phrase, and the only guidance it offers are two illustrations, both of which are hopelessly vague—“investigative activities of lawyers representing governmental entities” and “communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.”⁵⁶

The Rule's application in the context of investigatory activities has a long and contentious history, which gained prominence after the Second Circuit's decision in *United States v. Hammad*.⁵⁷ There, the Second Circuit held that Rule 4.2 prohibited communications with suspects of a criminal investigation prior to the initiation of formal proceedings.⁵⁸ The original opinion was withdrawn and replaced by an opinion conceding that “legitimate investigation techniques” can sometimes be “authorized by law,”⁵⁹ but the Department of Justice (DOJ) nevertheless reacted with alarm. The DOJ worried that the decision would deprive government lawyers of important tools of investigation and would chill their investigative efforts.⁶⁰ Accordingly, in June 1989, Attorney General Richard Thornburgh issued a departmental memorandum stating that the law enforcement activities of DOJ lawyers were “authorized” by federal law and therefore exempt from application of states' no-contact rules.⁶¹ The defense bar and the ABA countered that the memorandum's approach was impermissible in so far as it attempted to exempt DOJ lawyers from the ethical obligations generally applicable to lawyers.⁶²

55. See, e.g., 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 38.9 (3d ed. 2001 & Supp. 2008); Cramton & Udell, *supra* note 37, at 318–28; F. Dennis Saylor IV & J. Douglas Wilson, *Putting a Square Peg in a Round Hole: The Application of Model Rule 4.2 to Federal Prosecutors*, 53 U. PITT. L. REV. 459 (1992); Todd S. Schulman, *Wisdom Without Power: The Department of Justice's Attempt to Exempt Federal Prosecutors from State No-Contact Rules*, 71 N.Y.U. L. REV. 1067, 1074–78 (1996).

56. See MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 5.

57. 846 F.2d 854 (2d Cir. 1988), *modified*, 858 F.2d 834, 839 (2d Cir. 1988).

58. *Id.* at 858–59.

59. *Hammad*, 858 F.2d at 839.

60. See Communications with Represented Persons, 28 C.F.R. § 77 (2008).

61. Memorandum from Richard L. Thornburgh, U.S. Attorney Gen., to All Justice Department Litigators (June 8, 1989), *reprinted in In re Doe*, 801 F. Supp. 478, 489–93 ex. E (D.N.M. 1992).

62. See *ABA Adds Two Model Rules on Subpoenas, Practice Sales*, 6 Laws. Man. on Prof. Conduct Current Rep. (ABA/BNA) 25, 27 (Feb. 28, 1990) (noting ABA resolution opposing “any attempt by the Department of Justice unilaterally to exempt its lawyers from the professional conduct

In 1994, the DOJ issued a new no-contact rule, applicable to all federal prosecutors and endeavoring to carry the force of law.⁶³ Termed the Reno Regulation, its stated purpose was “to ensure that government attorneys adhere to the highest ethical standards, while eliminating the uncertainty and confusion arising from the variety of interpretations of state rules, some of which have been incorporated as local court rules in a number of federal district courts.”⁶⁴ The Reno Regulation purported to preempt and supersede state ethical rules, but unlike the Thornburgh memorandum, it gave specific guidance about what types of investigatory contacts were permissible. These included contacts occurring “up until the point at which [the contacted individuals] are arrested or charged with a crime or named as defendants in a civil law enforcement action.”⁶⁵ The Regulation explicitly stated that it “d[id] not permit federal prosecutors to attempt to negotiate plea agreements, settlements, or similar arrangements with individuals represented by counsel without the consent of their attorneys.”⁶⁶

Paralleling the negative response to the Thornburgh memorandum and notwithstanding substantial differences in the Reno version, the ABA, defense lawyers, and many commentators objected on two grounds: first, that the DOJ could not hold its attorneys to unique ethical standards; and second, that the DOJ lacked authority to promulgate regulations that preempted state ethics rules and superseded federal court rules.⁶⁷ The DOJ responded that the regulation had been adopted under its rulemaking power and carried the full force and effect of law.⁶⁸ Disagreement then centered on whether the DOJ’s rulemaking power encompassed the authority to promulgate ethical rules.⁶⁹

In 1998, Congress weighed in.⁷⁰ Explicitly rejecting the DOJ’s attempts to regulate federal prosecutors’ contacts with represented persons, it adopted what came to be known as the McDade

rules that apply to all lawyers under applicable rules of the jurisdictions in which they practice”); Tom Watson, *AG Decrees Prosecutors May Bypass Counsel*, LEGAL TIMES, Sept. 25, 1989, at 1.

63. See Communications with Represented Persons, 28 C.F.R. § 77.

64. *Id.*

65. *Id.*

66. *Id.*

67. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95-396 (1995); Jeffrey Kanige, *Ex Parte Interviews: Bright Lines, Big Debate*, N.J. L.J., June 13, 1994, at 5; Maria B. Rubin, *The Thornburgh Memo, Now the Reno Rule: A Case of Ethics*, N.Y. L.J., Sept. 23, 1994, at 1; see also Schulman, *supra* note 55, at 1093-111.

68. Communications with Represented Persons, 28 C.F.R. § 77; see also HAZARD, JR. & HODES, *supra* note 55.

69. See, e.g., *United States v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (8th Cir. 1998); *In re Howes*, 940 P.2d 159, 164-68 (N.M. 1997). For a discussion of this controversy, see Schulman, *supra* note 55, at 1093-111.

70. See 28 U.S.C. § 530B (2006).

Amendment.⁷¹ The Amendment provides: “An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”⁷² The effect of the Amendment is to apply state no-contact rules to federal prosecutors just as they apply to state prosecutors (and to all other lawyers). Commentators have noted significant differences between the activities of state and federal prosecutors, however, rendering this approach problematic.⁷³ State investigations are typically conducted by the police, who are not subject to Rule 4.2; state prosecutors become involved only after an arrest has been made.⁷⁴ Federal investigations, in contrast, are more likely to involve federal prosecutors from their inception.⁷⁵ Federal prosecutors are also more likely to prosecute complex and ongoing crimes, and rely upon coordinated investigations and complex surveillance techniques.⁷⁶

Tension is ongoing between DOJ lawyers, who want to exercise supervisory authority over investigations, and the Federal Bureau of Investigations (FBI), which seeks autonomy.⁷⁷ The tension continues notwithstanding the FBI’s nominally subordinate position to the DOJ. Classifying the FBI as an independent agency (rather than a subordinate instrument of the DOJ) would allow it to conduct more intrusive communication with suspects, because Rule 4.2 would not apply and federal investigations would therefore have fewer constraints. As the DOJ and commentators have noted, this is a perverse consequence.⁷⁸

The DOJ also notes that federal prosecutors are more likely than state prosecutors to be involved in investigations that extend across state lines.⁷⁹ The McDade Amendment could therefore subject a federal

71. *Id.* For a discussion of the McDade Amendment, see Craig S. Lerner, *Legislators as the “American Criminal Class”: Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 625, 650–56 (2004).

72. 28 U.S.C. § 530B.

73. Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 216 (2000); Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080, 2090 (2000) [hereinafter *Federal Prosecutors*].

74. HAZARD, JR. & HODES, *supra* note 55; Zacharias & Green, *supra* note 73, at 237.

75. Zacharias & Green, *supra* note 73, at 237.

76. *Id.*

77. See, e.g., Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 821–23 (2003).

78. See *id.*; see also *The Effect of State Ethics Rules on Federal Law Enforcement: Hearing Before the Subcomm. on Criminal Justice Oversight of the S. Comm. on the Judiciary*, 106th Cong. 94 (1999) (statement of Geoffrey C. Hazard, Jr., in response to questions from Sen. Leahy) (noting that it is “highly desirable that Government lawyers supervise investigations by federal agents” because the lawyers “know the rules better and the risks . . . of violating the rules”); *Federal Prosecutors*, *supra* note 73, at 2091.

79. *Federal Prosecutors*, *supra* note 73, at 2091.

prosecutor to multiple and inconsistent state standards.⁸⁰ The inevitable result, the DOJ contends, will be a chilling of investigative efforts and a decrease in effective law enforcement.⁸¹ On the one hand, this risk may be largely theoretical. The rule in effect in most states is nearly uniform in its text.⁸² On the other hand, differences in judicial interpretations may, in fact, pose problems of conflicting guidance.

In any event, the McDade Amendment does not address the key issue of what communications are “authorized by law” and therefore permissible.⁸³ Relying on this ambiguity, the DOJ continues to assert the validity of its policy that certain lawful investigatory techniques are authorized by law and permissible under the Rule. Courts, meanwhile, continue to disagree on whether Rule 4.2 applies to federal prosecutors engaged in investigations that are otherwise entirely lawful.⁸⁴

Attempting to reconcile the positions of the DOJ, Congress, and the defense bar, the ABA’s Ethics Committee and the Ethics 2000 Commission recommended substantial amendments to Model Rule 4.2 in 2002.⁸⁵ Among other changes, the amendments would have authorized (i) communications with represented persons by federal agents acting under direction of government lawyers prior to the initiation of formal law enforcement proceedings, and (ii) communications with a represented organization’s agent or employee who initiated a communication relating to a law enforcement investigation.⁸⁶ The ABA declined to adopt the proposed amendments.

The debate over the “authorized by law” exception continues. Particularly problematic is the relationship between the exception and the constitutional protections afforded to criminal defendants. There is substantial overlap between the protections of the no-contact rule and those of the Constitution, since the right-to-counsel protections of the Fifth and Sixth Amendments prohibit direct contact in some preindictment and most postindictment contexts.⁸⁷ The overlap is not

80. *Id.*; Green & Zacharias, *supra* note 52, at 459.

81. *See* Communications with Represented Persons, 28 C.F.R. § 77 (2008).

82. *See* American Legal Ethics Library, Topical Overview: Index of Narratives, <http://www.law.cornell.edu/ethics/comparative/index.htm#4.2> (last visited Mar. 23, 2009) (listing of states’ formulations of the rule).

83. Nor does it abrogate decisions holding that preindictment communications are “authorized by law.” *See* Laws. Man. on Prof. Conduct Reference Man. (ABA/BNA) 71:303 (Oct. 29, 2008) (citing cases).

84. *Id.* 71:301.

85. *See* ABA Ethics Groups Recommend Changes to Model Rule on Ex Parte Communication, 15 Laws. Man. on Prof. Conduct Current Rep. (ABA/BNA) 347, 347 (July 21, 1999).

86. *See id.*

87. Before indictment, the Fifth Amendment prohibits contact with a suspect in custody who has invoked the right to counsel. *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Edwards v. Arizona*, 451 U.S. 477 (1980). After indictment, the Sixth Amendment prohibits contact, initiated by the prosecutor, with a defendant regarding the indicted crime without the presence of counsel. *Brewer v. Williams*, 430

complete, however, and the question arises whether a prosecutor's communication with a represented person, lawful under the Constitution, is nevertheless impermissible under Rule 4.2. The policies supporting the Rule's prohibition are particularly compelling in the context of criminal law enforcement proceedings, since "[n]ot only are criminal interrogations more formidable and the potential consequences of a criminal action more severe than in civil litigation, but the criminal client seems more likely to be unsophisticated."⁸⁸ But effective law enforcement could be severely hampered by strict application of Rule 4.2. Moreover, there is a persuasive argument for deference to the constitutional standards, which were designed to strike a proper balance between the interests of the defendant and those of society.

Currently, Comment 5 to the Model Rule 4.2 offers the following guidance:

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.⁸⁹

The Comment's position—that Rule 4.2 can prohibit contacts that the Constitution would allow—does not settle the matter. It is understandable that the ABA (as official author of the Comment) did not wish to pronounce on constitutional law or on decisional law interpretations of the "authorized by law" exception. But the unfortunate result was a comment with little meaningful direction or guidance, which has created much confusion.

Comment 5's guidance has been questioned by some authorities and rejected by others.⁹⁰ Among the jurisdictions struggling with the issue is California. In the course of that state's commendable effort to harmonize its unique Rules of Professional Conduct with the ABA Model Rules, the drafters encountered the ambiguities and conflicts of Rule 4.2. An initial issue was whether "authorized" should mean "specifically permitted" (which would be unusual for legislation) or "not prohibited" (which would make the constitutional and ethical rules coextensive in scope). In the course of deliberating over this distinction, DOJ lawyers from California revealed themselves to be in a paradoxical situation. In

U.S. 387 (1976); *Massiah v. United States*, 377 U.S. 201 (1963).

88. Cramton & Udell, *supra* note 37, at 327.

89. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 5 (2008).

90. *See, e.g.*, *United States v. Balter*, 91 F.3d 427, 436 (3d Cir. 1996); *Grievance Comm. v. Simels*, 48 F.3d 640, 650-51 (2d Cir. 1995); *United States v. Powe*, 9 F.3d 68, 70 (9th Cir. 1993); *United States v. Heinz*, 983 F.2d 609, 613 (5th Cir. 1993); *United States v. Ryans*, 903 F.2d 731, 739 (10th Cir. 1990); *United States v. Hammad*, 858 F.2d 834, 840 (2d Cir. 1988); *United States v. Sutton*, 801 F.2d 1346, 1366 (D.C. Cir. 1986); *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir. 1983); *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir. 1981).

the special drafting committee, federal prosecutors advocated use of “permitted by law” as the operative phrase. But when in court to defend contact with a suspect or an accused, they have argued that “authorized” means “not prohibited.”⁹¹

The answers to three unsettled questions will be critical to resolving the issue of when and to what extent prosecutors—particularly federal prosecutors—may directly contact or arrange contact with represented suspects. First, is it permissible for a prosecuting authority governed by a no-contact rule to communicate with a represented person prior to the initiation of formal law enforcement proceedings? Second, is such communication permissible with a criminal defendant who has validly waived the right to counsel and attempted to waive the no-contact rule? Third, is direct communication with a represented defendant permissible if it addresses “unrelated” matters? And how is “unrelated” defined?

Most authorities answer the first question—whether it is permissible to communicate with a represented person prior to the initiation of formal law enforcement proceedings and therefore prior to attachment of Sixth Amendment rights—in the affirmative.⁹² In *United States v. Balter*, a Third Circuit panel reviewed case law from several circuits and concluded that “with the exception of the Second Circuit [in *Hammad*], every court of appeals that has considered a similar case has held . . . that [no-contact rules] do not apply to preindictment criminal investigations by government attorneys.”⁹³ Most state courts have drawn similar conclusions,⁹⁴ rejecting Comment 5’s position that constitutionally-permissible contacts are not necessarily ethically permissible.

The Model Rule answers the second question—whether a prosecutor can communicate with a defendant who initiates contact and

91. As observed by one of the Authors during consultations, the federal lawyers argued while in court that the term covered their activity but then changed their argument during the California Rules revision process, wanting a clear cover.

92. See, e.g., *Balter*, 91 F.3d at 436; *Simels*, 48 F.3d at 650; *Powe*, 9 F.3d at 70; *Heinz*, 983 F.2d at 612; *Ryans*, 903 F.2d at 739; *Hammad*, 858 F.2d at 840; *Sutton*, 801 F.2d at 1366; *Fitterer*, 710 F.2d at 1333; *Kenny*, 645 F.2d at 1339; see also HAZARD, JR. & HODES, *supra* note 55, § 38.10.

93. 91 F.3d at 436. The reasoning of these decisions differ. Some courts view such contacts as authorized by law. See, e.g., *id.*; *Powe*, 9 F.3d at 69. Some courts focus on the strong public interest in effective law enforcement. See, e.g., *Ryans*, 903 F.2d at 740; *Fitterer*, 710 F.2d at 1333. Some courts reason that the subject matter of the representation is undefined during the investigatory stage, such that the rule cannot be violated. See, e.g., *Ryans*, 903 F.2d at 739; *United States v. Guerrero*, 675 F. Supp. 1430, 1438 (S.D.N.Y. 1987); *United States v. Lemonakis*, 485 F.2d 941, 956 (D.C. Cir. 1973).

94. See, e.g., *State v. Wolf*, 643 P.2d 1101, 1105 (Kan. Ct. App. 1982); *State v. Miller*, 600 N.W.2d 457, 467 (Minn. 1999); *State v. Maloney*, 698 N.W.2d 583, 588 (Wis. 2005). This interpretation is not uniform, however. Some states have interpreted the rule to proscribe certain contacts that are constitutionally permissible. See *People v. White*, 567 N.E.2d 1368, 1386 (Ill. App. Ct. 1991). For a discussion of state standards, see generally Schulman, *supra* note 55, at 1069–70, and Alafair S.R. Burke, *Reconciling Professional Ethics and Prosecutorial Power: The No-Contact Rule Debate*, 46 STAN. L. REV. 1635, 1636 (1994).

waives his right to consult counsel—in the negative. Comment 3 states that “[t]he Rule applies even though the represented person initiates or consents to the communication.”⁹⁵ In addition, committee notes explain that Comment 5 was intended to “preclude the notion that an *ex parte* communication with a represented person is permitted at the time of arrest merely because the represented person waives the constitutional right to consult counsel.”⁹⁶ The DOJ strongly opposes this position, however, arguing that if a defendant is deemed capable of waiving his constitutional right to counsel, he should be deemed capable of waiving the protections of the no-contact rule.⁹⁷ Many commentators agree, contending that represented defendants—who often believe that their interests will be served by contacting a prosecutor—should be empowered to do so.⁹⁸

A majority of courts reject this position, holding that a defendant cannot waive the no-contact rule’s protections under any circumstances.⁹⁹ An often cited example is *United States v. Lopez*.¹⁰⁰ Under the facts of that case, a federal prosecutor met with an indicted defendant at the defendant’s request to discuss a plea bargain. The defendant’s lawyer had conditioned representation on the defendant foregoing plea negotiations—an agreement that precluded the defendant from requesting his lawyer’s consent. After negotiations broke down, the defense lawyer resigned and successor counsel moved to dismiss the indictment for violation of the Sixth Amendment and California’s no-contact rule.¹⁰¹ Noting that the no-contact rule applies even when a defendant willingly consents to a communication, the Ninth Circuit concluded that the communication violated the ethical rule but not the

95. MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 3 (2008); Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA’s Revision of Model Rule 4.2 (Part III)*, 70 TENN. L. REV. 643, 665 (2003) [hereinafter Pierce, *Part III*].

96. Pierce, *Part III*, *supra* note 95 (quoting MODEL RULES OF PROF’L CONDUCT R. 4.2 reporter’s observations (Public Discussion Draft, Feb. 21, 2000)).

97. 4B Op. Off. Legal Counsel 576, 581–84 (1980). The DOJ’s concern can be illustrated by a defendant, part of an organized crime ring, who wants to offer evidence in exchange for a lighter sentence. The defendant is represented by a lawyer retained by the crime ring. Fearing the repercussions, the defendant is unwilling to divulge information without the assurance of confidentiality. If the no-contact rule applies, the prosecutor will have to forego the information. See Saylor IV & Wilson, *supra* note 55, at 459–60.

98. Cramton & Udell, *supra* note 37, at 298; Pierce, *Part III*, *supra* note 95, at 666; Saylor IV & Wilson, *supra* note 55, at 471–72.

99. See, e.g., *United States v. Lopez*, 4 F.3d 1455, 1461 (9th Cir. 1993); *In re Doe*, 801 F. Supp. 478, 486–87 (D.N.M. 1992); *State v. Morgan*, 646 P.2d 1064, 1069–70 (Kan. 1982); *People v. Green*, 274 N.W.2d 448, 453 (Mich. 1979); see also HAZARD, JR. & HODES, *supra* note 55, § 38.9 illus. 38.5 (concerning prosecution’s communication with the accused outside the presence of his attorney). *But see United States v. Talao*, 222 F.3d 1133, 1140 (9th Cir. 2000) (finding defendant can willingly consent to conversation with the prosecution without his attorney’s presence).

100. 765 F. Supp. 1433 (N.D. Cal. 1991).

101. *Lopez*, 4 F.3d at 1463.

Sixth Amendment.¹⁰² In a subsequent formal opinion, the ABA acknowledged that this approach to defendant-initiated contacts may seem “paternalistic.” It nevertheless concluded that preventing uninformed waiver of the rule’s protections is necessary to protect the effectiveness of a lawyer’s representation.¹⁰³

The third issue to be addressed concerns the definition of the phrase “the subject matter of the representation.”¹⁰⁴ Comment 4 of the Model Rule reveals the significance of this phrase by explaining that “[t]his Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning *matters outside the representation*.”¹⁰⁵ The question is whether matters that are outside the scope of formal charges (and therefore subject to constitutionally permissible inquiries)¹⁰⁶ are also “outside the representation” within the definition of Rule 4.2.¹⁰⁷

The DOJ views a defendant as represented only on the pending charges and contends that communication on other matters is therefore permissible.¹⁰⁸ Some commentators agree, arguing that government lawyers should be permitted to question a defendant regarding any uncharged criminal offenses.¹⁰⁹ Courts, meanwhile, have come to divergent results. Some courts interpret the Rule to prohibit only communications concerning matters within the scope of the charge. In *United States v. Masullo*, for example, the Second Circuit concluded that federal agents had not violated Rule 4.2 when they questioned a defendant who was represented on a state narcotics charge regarding

102. *Id.*

103. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995); *see also* HAZARD, JR. & HODES, *supra* note 55, § 38.9 illus. 38.5 (“The system as a whole is well served if a lawyer is at least given the opportunity to counsel his client about waiving his rights.”).

104. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2008).

105. *Id.* cmt. 4 (emphasis added); *see also* Laws. Man. on Prof. Conduct Reference Man. (ABA/BNA) 71:306 (Oct. 29, 2008) (citing cases).

106. Prosecutorial communications with an accused are constitutionally permissible when addressing matters that are outside the scope of formal charges, even if the subject matter of the communication has some kind of transactional relationship to the matters covered in the formal charge. Specifically, the Supreme Court has held that the right to counsel attaches only regarding the particular crime charged, and that investigatory contacts regarding crimes for which the right to counsel has not attached are constitutionally permissible. *Texas v. Cobb*, 532 U.S. 162, 167–72 (2001). The Court has reasoned that to hold otherwise “would unnecessarily frustrate the public’s interest in the investigation of criminal activities.” *Maine v. Moulton*, 474 U.S. 159, 180 (1985).

107. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. d (2000) (“What matter or matters are involved in a representation depends on the circumstances.”).

108. *See* 4B Op. Off. Legal Counsel 576, 589 (1980) (“The fact that a person has retained counsel to represent him in one criminal charge would not prohibit interviews concerning unrelated matters.”); *see also* Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA’s Revision of Model Rule 4.2 (Part II)*, 70 TENN. L. REV. 321, 350–51 (2003) [hereinafter *Pierce, Part II*].

109. *See, e.g.,* Schulman, *supra* note 55, at 1079–80.

federal charges for which the defendant was not yet represented.¹¹⁰ Other courts take a broader approach, interpreting the Rule to ban communications concerning transactionally-related matters. In *United States v. Hammad*, for example, a violation was based on a prosecutorial communication regarding an arson investigation with a defendant represented on related charges of Medicare fraud.¹¹¹ Still other courts take the broadest approach possible, interpreting the Rule to ban communication regarding any and all matters, even if completely unrelated.¹¹²

Complicating these questions is the issue of Rule 4.2's proper application to investigators acting at a lawyer's direction. Comment 4 of the Model Rule currently provides that "[a] lawyer may not make a communication prohibited by this Rule through the acts of another."¹¹³ It then references Model Rule 8.4, which prohibits a lawyer from violating any ethical rule through the acts of another.¹¹⁴ Under the prevailing consensus, these provisions mean that a lawyer cannot advise or direct an associate, partner, or other agent to engage in communications that would be prohibited if engaged in by the lawyer.¹¹⁵ They do not mean, however, that a lawyer cannot advise a client regarding direct communications with another represented person in the matter.¹¹⁶

There is disagreement about communications through a third group—investigators and other law enforcement personnel acting at the direction of lawyers. Some states allow such communications, at least during the investigatory phase of a case.¹¹⁷ Other states specify that the Rule applies to indirect as well as direct communications, and effectively

110. 489 F.2d 217, 222–24 (2d Cir. 1973); see also *Johnson v. State*, 900 S.W.2d 940, 950 (Ark. 1995); *K-Mart Corp. v. Helton*, 894 S.W.2d 630, 631 (Ky. 1995); *State v. Clawson*, 270 S.E.2d 659, 669 (W. Va. 1980).

111. 858 F.2d 834, 840 (2d Cir. 1988).

112. See, e.g., *People v. Sharp*, 197 Cal. Rptr. 436, 438–39 (Cal. Ct. App. 1983); *In re Burrows*, 629 P.2d 820, 824–25 (Or. 1981) (finding that prosecutorial communication about undercover drug activities with a defendant charged with rape and robbery without his attorney's presence was a violation of the no-contact rule); Or. State Bar Op. 484 (Mar. 1983).

113. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 4 (2008); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99(2) cmt. k (2000).

114. MODEL RULES OF PROF'L CONDUCT R. 8.4(a); see also *id.* 5.3(c)(1) (prohibiting ordering or knowingly ratifying conduct by nonlawyer assistant that would be a violation if engaged in by lawyer).

115. See *Pierce*, Part II, *supra* note 108, at 338.

116. The comments to the Model Rule specifically authorize clients to communicate directly with each other and lawyers to advise clients in such communications. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 4; see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. k; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-362 (1992) (indicating lawyers have a duty to discuss communications the client desires to engage in with the opposing party). Some states' rules explicitly authorize lawyers to encourage clients to directly communicate with the adverse party. See *Laws. Man. on Prof. Conduct Reference Man. (ABA/BNA) 71:302* (Oct. 29, 2008).

117. See, e.g., *United States v. Marcus*, 849 F. Supp. 417, 418 (D. Md. 1994); *United States v. Infelise*, 773 F. Supp. 93, 95 (N.D. Ill. 1991).

precludes all investigatory contacts.¹¹⁸ The DOJ argues strenuously with this position, contending that involving government lawyers in the planning and execution of law enforcement investigations is desirable because it will ensure that the investigations comply with the law and afford sufficient respect to the rights of all involved.¹¹⁹

We believe it is poor public policy to leave these matters in continuing debate and uncertainty; doing so jeopardizes legitimacy in law enforcement. Rule 4.2 should therefore explicitly address its application to law enforcement investigations. Our proposal is to add a new subsection (c) to the Rule, which specifies (in part) that: “(c) A communication is authorized by law when it is in connection with: (1) a lawful investigation by or under authority of a public law enforcement or regulatory agency.”¹²⁰

To further clarify what constitutes “law” authorizing a communication under this exception, we propose adding a new sentence to the relevant Comment, which reads: “Communications authorized by law include communications that a lawyer is authorized to make under federal and state constitutional law, statute, agency regulation having the force of law, or decision or rule of a court of competent jurisdiction.”¹²¹ This articulation of the exception for law enforcement activities strikes an appropriate balance between the interests served by the Rule (protection of the target of an investigation), and those served by the exception (the public’s interest in effective law enforcement). It acknowledges that when government lawyers comply with constitutional standards and other law, the government’s interest in efficiently and effectively investigating crimes outweighs a represented person’s interest in protection against informal communications. And it recognizes that the no-contact rule’s proper function is not to protect a represented person against revelation of all damaging or otherwise probative evidence, or to prevent the government from acquiring relevant

118. See, e.g., CAL. RULES OF PROF’L CONDUCT R. 2-100(A) (2008) (“While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.”); LA. RULES OF PROF’L CONDUCT R. 4.2 (2008) (providing that a lawyer “shall not effect the prohibited communication through a third person, including the lawyer’s client”).

119. The DOJ has “encouraged federal prosecutors to play a larger role in pre-indictment, pre-arrest investigations,” because “greater participation of lawyers at the pre-indictment stage of law enforcement has been regarded as helpful in assuring that police investigations comply with legal and ethical standards.” Communications with Represented Persons, 28 C.F.R. § 77 (2008); see also Green & Zacharias, *supra* note 52, at 459.

120. See *infra* Appendix 2 R. 4.2(c)(1).

121. See *infra* Appendix 2 R. 4.2 cmt. 8.

information.¹²² Rather, it is to protect the client-lawyer relationship to the extent consistent with other valued interests in the legal system.

Moreover, concluding that constitutionally permissible communications are ethically permissible recognizes that constitutional standards emerge from a more rigorous process than do rules of attorney conduct.¹²³ As one commentator explained:

The cases deciding when suspects are entitled to counsel under the Sixth Amendment have emerged from the crucible of constitutional litigation. They are hard cases, requiring the courts to decide, in the context of murder, kidnapping, sex offenses, organized crime and other serious anti-social activity, where to draw the line between the [sic] protecting the rights of suspects, on the one hand, and detecting and punishing crime, on the other. . . . In those cases, courts face the fact that the price to be paid for respecting the constitutional rights of citizens is that, on occasion, a crime will go unpunished, perhaps forever. . . . [Courts create rules that] explicitly strike a balance between protecting individual rights and punishing criminals.¹²⁴

Ethical rules of attorney conduct, although crafted with careful deliberation, are the product of a less searching process. They are the product of committees of lawyers and scholars and of judicial approval.¹²⁵ When it comes to striking a proper balance between the rights of criminal defendants and the interests of society, a persuasive case can be made that they should be afforded less weight.

As applied, our proposed language will mean that lawful communications are permissible prior to the initiation of formal proceedings. After such time, communications will be permissible with a defendant who has initiated the contact and executed a valid waiver of the right to counsel. Communications will also be permissible regarding matters outside the scope of the charges. All such communications will be subject to the safeguards of proposed Rule 4.2(b), discussed below.

Where government lawyers are prohibited from directly communicating with a represented person, they should also be prohibited from communicating through an investigative agent. However, not all indirect communications should be prohibited. Where an investigator,

122. See, e.g., *Humco, Inc. v. Noble*, 31 S.W.3d 916, 920 (Ky. 2000) (“The purpose of Rule 4.2 is ‘not to prevent the flow of information, even if damaging to a party in a suit.’ Rather, it is to preserve the positions of the parties in an adversarial system and thereby to maintain the protections obtained by employing counsel and prevent disruption of the attorney-client relationship.” (quoting Aiken v. Bus. & Indus. Health Group, Inc., 885 F. Supp. 1474, 1479 (D. Kan. 1995))).

123. Martin S. Murphy, *The “No-Contact” Rule and the Sixth Amendment: A Dilemma for the Ethical Prosecutor*, BOSTON B.J., Mar.-Apr. 1994, at 8.

124. *Id.*

125. See, e.g., GEOFFREY HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 13-18 (4th ed. 2005); Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA’s Revision of Model Rule 4.2 (Part I)*, 70 TENN. L. REV. 121, 123-38 (2002) [hereinafter Pierce, *Part I*] (describing the amendment process to Rule 4.2).

with advice from a lawyer, contacts a represented person in connection with an undercover sting operation, the Rule's proper purpose is not implicated. Applying the Rule in this situation would only serve to protect the represented person against the disclosure of harmful information, not against lawyer overreaching or interference with the lawyer-client relationship. Moreover, as noted by the DOJ, lawyers' involvement in investigations may actually safeguard the rights of represented persons because government lawyers are governed by the special ethical duties prescribed in Model Rule 3.8, which include making "reasonable efforts to assure that the accused... has been given reasonable opportunity to obtain counsel."¹²⁶ Decisional law reinforces these obligations.¹²⁷

B. COMMUNICATIONS WITH PUBLIC OFFICIALS

Clarifying the "authorized by law" exception in the context of law enforcement investigations is an important first step in reforming Model Rule 4.2; a second is clarifying Comment 5's second illustration of a communication authorized by law: "communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government."¹²⁸ The *Restatement (Third)* and most states' no-contact rules include this exception.¹²⁹ But here again, there is no agreement as to the exception's proper scope.

The primary rationale for the public officials exception derives from the First Amendment right to petition the government for redress of grievances and the related public interest in open access to government.¹³⁰ However, access would be equally "open" (or even more so) if the Rule required that a government lawyer be notified of any planned communication with a government official and allowed to be a party to such communication. A supporting rationale for the exception is the presumed sophistication of government actors, rendering the Rule's protections unnecessary. The *Restatement (Third)* describes the

126. MODEL RULES OF PROF'L CONDUCT R. 3.8(b) (2008).

127. *United States v. Butler*, 567 F.2d 885, 894 (9th Cir. 1978) (Ely, J., concurring); H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1176-83 (1987) (noting the prosecutor has "the paramount professional obligation . . . to promote a just outcome, not a partisan victory").

128. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 5.

129. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 99(1)(a), 101 & annots. (2000).

130. *See, e.g.*, *Am. Canoe Ass'n v. St. Albans*, 18 F. Supp. 2d 620, 622 (S.D. W. Va. 1998) (noting that the right to contact and communicate with government officials is right of citizenship); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-408 n.9 (1997) (noting that Model Rule 4.2 is modified by the First Amendment right to petition the government for redress of grievances); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 101 cmt. b (explaining that without the exception, the no-contact rule's application could "compromise the public interest in facilitating direct communication between representatives of citizens and government officials reflected in open government open-file, freedom of information, and similar enactments").

government's need for the rule's protection as "dubious,"¹³¹ and the D.C. Bar Association, in explaining the exception's origins, has said:

'Government officials, especially those who have significant decision making authority, are almost always capable of resisting any arguments or other suggestions that are not proper and genuinely persuasive. Moreover, any government official who is in a high enough position to make binding decisions can surely be relied upon to exercise . . . individual judgment as to whether to engage in such direct communications at all'¹³²

This may be true in some circumstances, but the argument does not hold for all government officials. A part-time local school board or zoning board member might need the rule's protection as much as any other represented individual.¹³³ As the New York City Bar Association explained, any given public official "may not know exactly what cases are pending against them, the status of those cases, the consequences of those cases, or the consequences their statements may have in those cases."¹³⁴

The variety of legal contexts in which the exception may apply complicates the task of articulating its contours. A lawyer representing a private party in a contract dispute may seek to communicate directly with the government contracting officer who has the authority to resolve or settle the dispute.¹³⁵ A lawyer for a private party named as a co-defendant with a municipality may want to interview city employees to gather information informally.¹³⁶ A lawyer representing an individual before a licensing board may seek to contact board members directly to present a position.¹³⁷ In these and other scenarios, the public's interest in open access to government, implicated to varying extents, must be balanced with the government's interest in protection against lawyer overreaching.

Various approaches to this balancing task have been suggested. As noted, Comment 5 of the Model Rule characterizes communications that

131. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 101 cmt. b.

132. D.C. Bar Legal Ethics Comm., Op. 340 (2007) (omission in original) (quoting PROPOSED RULES OF PROFESSIONAL CONDUCT AND RELATED COMMENTS 187 (1986)).

133. *But see* Ala. State Bar Gen. Council, Op. 2003-03 (2003) (holding that a lawyer defending state board of education in suit by county board of education may communicate directly with members of county board of education to discuss settlement); Kan. Bar Ass'n Ethics Advisory Comm., Op. 00-06 (2002) (lawyer permitted to contact city officials regarding client's zoning application notwithstanding city lawyer's directive to the contrary because "a citizen must always have access to his or her government").

134. N.Y. City Bar Ass'n Prof'l Ethics Comm., Formal Op. 1991-4 (1991).

135. D.C. Bar Legal Ethics Comm., Op. 340 (holding contact did not violate D.C. Rules of Professional Conduct R. 4.2).

136. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1377 (1977).

137. D.C. Bar Legal Ethics Comm., Op. 280 (1998) (holding proposed contacts did not violate D.C. Rules of Professional Conduct Rule 4.2).

are made by lawyers “exercising a constitutional or other legal right to communicate with the government,” as falling within the “authorized by law” exception to the Rule’s prohibition.¹³⁸ This vague comment highlights a substantial lack of clarity regarding the constitutional right to petition for redress of grievances and other legal rights to communicate with the government. Ultimately, it raises more questions than it answers.

An ABA formal opinion in 1997 concluded that a lawyer representing a private party in a suit against the government can communicate directly with a public official who has authority “to take or recommend action in the matter of communication” if two conditions are met: (i) the communication is for the purpose of addressing a policy issue, and (ii) government counsel is given reasonable advance notice of the intent to communicate.¹³⁹ The ABA opinion concluded that notwithstanding this exception, Rule 4.2 applies in full force in contexts “where the right to petition has no apparent applicability, either because of the position and authority of the official sought to be contacted or because of the purpose of the proposed communication.”¹⁴⁰

The *Restatement (Third)* articulates an exception, independent from the “authorized by law” exception, which permits direct communications “with employees of a represented governmental agency or with a governmental officer being represented in the officer’s official capacity.”¹⁴¹ But the *Restatement (Third)* then articulates an exception to this exception: the no-contact rule continues to apply “[i]n negotiation or litigation by a lawyer of a specific claim of a client against a governmental agency or against a governmental officer in the officer’s official capacity.”¹⁴² The coherence of this formulation depends on definitions of “specific claim” and “official capacity.” The *Restatement (Third)*’s comment offers little additional guidance regarding the intended meanings of these phrases, but observes that “[w]hen the government is represented in a dispute involving a specific claim, the status of the government as client may be closely analogous to that of any other organizational party.”¹⁴³

Following the Model Rule’s approach, most state bar associations and courts have accommodated communications with government actors by recognizing exceptions for communications encompassed by the vaguely defined constitutional right to petition for redress of

138. MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 5 (2008).

139. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 97-408 (1997).

140. *Id.*

141. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 101(1) (2000).

142. *Id.* § 101(2) (unless the communication relates to an issue of general policy).

143. *Id.* § 101 cmt. c.

grievances.¹⁴⁴ Where the purpose of a communication is not supported by this constitutional right or by the derivative public policy of open access to government—for example, where a communication is intended to elicit admissions from government officials whose alleged conduct forms the basis for a liability claim—the Rule’s prohibition continues to apply.¹⁴⁵

In contrast to this majority approach, two jurisdictions—California and the District of Columbia—have created broad exceptions that cover virtually any communication with a government officer or entity.¹⁴⁶ The California rule provides that “[t]his rule shall not prohibit . . . communications with a public officer, board, committee, or body.”¹⁴⁷ In similarly broad language, the D.C. rule provides that “[t]his rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer’s client, whether or not those grievances or the lawyer’s communications relate to matters that are the subject of the representation.”¹⁴⁸ Recently, the D.C. Bar Ethics Committee clarified that its exception is not limited to communications regarding government policy; the exception also encompasses communications regarding substantive legal issues.¹⁴⁹

The California and D.C. rules have the advantage of providing clear guidance. In doing so, however, they strike a seemingly improper balance between the implicated interests. They protect an interest in direct access to government actors at great cost to other implicated interests. An equally clear rule would be the one suggested in the ABA opinion referenced above—contact is permissible on notice to the government attorney.

144. See, e.g., *Brown v. Or. Dep’t of Corrs.*, 173 F.R.D. 265, 267–68 (D. Or. 1997); Alaska Bar Ass’n Ethics Comm., Op. 94-1 (1994); Ill. State Bar Ass’n Prof’l Ethics Comm., Op. 92-3 (1992); N.Y. City Bar Ass’n Prof’l Ethics Comm., Formal Op. 1991-4 (1991); N.C. State Bar Ethics Comm., Op. 202 (1995); S.D. State Bar Ethics Comm., Op. 92-15 (1993); S.D. State Bar Ethics Comm., Op. 90-70 (1990); Tex. State Bar Prof’l Ethics Comm., Op. 474 (1991); Utah State Bar Ethics Comm., Op. 115 (1993).

145. *Brown*, 173 F.R.D. at 267–68; see also ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 97-408 n.15 (1997) (noting that the purpose of the contact must be to petition the government, and cannot be “to elicit admissions or confessions from a low-level government employee who is in no position to resolve a controversy”).

146. CAL. RULES OF PROF’L CONDUCT R. 2-100(C)(1) (2008); D.C. RULES OF PROF’L CONDUCT R. 4.2(d) (2007); see also Utah State Bar Ethics Comm., Op. 115.

147. CAL. RULES OF PROF’L CONDUCT R. 2-100(C)(1).

148. D.C. RULES OF PROF’L CONDUCT R. 4.2(d). The rule adds the condition that the lawyer disclose the lawyer’s identity and role in representing an adverse party. See *id.* cmt. 11 (explaining that the rule “is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other scheduling matters, or similar routine aspects of the resolution of disputes”).

149. D.C. Bar Legal Ethics Comm., Op. 340 (2007); see Julia E. Fish, *A Practical Solution to the Government Contacts Problem: Opinion 340 Updates the D.C. Exception to the No-Contact Rule*, 21 GEO. J. LEGAL ETHICS 739, 743 (2008).

We propose a slight variation on this approach. Acknowledging the lack of clarity as to what contacts are authorized by independent law, we would create an exception for contact with public officials that is independent from the “authorized by law” exception and is qualified by certain procedural safeguards. Specifically, we would allow communications if one of two conditions is met: (i) the public officer consents to the communication, or (ii) the communication is written and a copy is sent to the government lawyer. To effectuate this change, we propose adding a new paragraph (a) to the text of the Model Rule, which would state the general prohibition and then list the exceptions. It would explain that communications are permissible where “the represented person is a public officer or agency and the communication is either consented to by the public officer or agency or is in writing with a copy sent to the other lawyer.”¹⁵⁰ This language strikes an appropriate balance between implicated interests. On the one hand, it facilitates certain direct communications and prevents government actors from hiding behind the rule to avoid accountability. It thereby recognizes that a rule of ethics cannot interfere with the public’s right to petition the government. On the other hand, it contains procedural safeguards, allowing the public official an opportunity to consult with counsel before responding to any direct communication. It thereby accounts for the fact that in some contexts, public officials need and deserve the rule’s protections as much as any private actor.

When a state or local government agency is involved, reference should be made to state constitutional law, instead of or in addition to federal constitutional law. We therefore propose adding language to the relevant comment to explain that communications permitted “include those by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government under Federal or state law.”¹⁵¹ We also propose adding language to explain that “[t]his exception does not encompass communications regarding imminent or pending litigation, nor does it apply to a public official who is potentially personally liable in the matter in question.”¹⁵²

C. OTHER COMMUNICATIONS “AUTHORIZED BY LAW”

As noted, Comment 5 to Model Rule 4.2 offers two illustrations of communications that may be authorized by law: those in connection with “certain investigative activities of lawyers representing governmental entities” and those “by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the

150. See *infra* Appendix 2 R. 4.2(a)(4).

151. See *infra* Appendix 2 R. 4.2 cmt. 11.

152. See *infra* Appendix 2 R. 4.2 cmt. 11; see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 408 n.2 (1997).

government.”¹⁵³ Other authorities have recognized additional communications that may be “authorized by law” and therefore permissible under the no-contact rule.¹⁵⁴ For example, the *Restatement (Third)* interprets the exception as allowing a lawyer “to assist a client in complying with a legal right or responsibility to communicate directly with a represented person.”¹⁵⁵ Under this approach, a lawyer would be permitted to cause a summons, complaint, or subpoena to be delivered to a represented person, to make a formal demand on a represented person as a prerequisite to filing suit, or to deliver notice to a represented person under a private contractual provision.¹⁵⁶ The *Restatement (Third)* notes that in all of these situations, requiring a communication to be delivered through the represented person’s lawyer could give rise to disputes over the effectiveness of delivery.¹⁵⁷ Some states include similar provisions in the text of their rules. Florida’s rule permits communication “in order to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on the adverse party,”¹⁵⁸ and Oregon’s rule permits communication if “a written agreement requires a written notice or demand be sent to such other person.”¹⁵⁹ Both states’ rules require that in such circumstances, a copy be sent to the adverse party’s lawyer.

Some authorities have suggested that undercover communications made at the direction of a lawyer to test for illegal practices (“testing”) should also be considered authorized by law and therefore permissible.¹⁶⁰

153. See MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 5 (2008).

154. See, e.g., *Smith v. Johnson*, 711 N.E.2d 1259, 1263 (Ind. 1999) (permitting communication where rule provided for service of complaint); RULES REGULATING THE FLA. BAR R. 4-4.2 (2008) (permitting communication “in order to meet the requirements of any ‘court rule,’ statute or contract requiring notice or service or process directly on the adverse party”); OR. CODE OF PROF’L RESPONSIBILITY DR 7-104(A)(1)(c) (2003) (permitting communication if “a written agreement requires a written notice or demand be sent to such other person”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. g (2000); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 92-362 (1992); HAZARD, JR. & HODES, *supra* note 55, § 38.4 (noting “many situations in which clients must or may communicate directly with each other”); see also Ariz. State Bar Rules of Prof’l Conduct Comm., Op. 2003-02 (2003) (permitting communication where bankruptcy rules required certain notices be sent directly to parties); *Contractual Notice Isn’t ‘Communication’ That Must Go Through Adversary’s Counsel*, 19 Laws. Man. on Prof. Conduct Current Rep. (ABA/BNA) 456, 456 (2003) (permitting communication as provided under private contract).

155. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. g. Comment 4 to the Model Rule may intend to incorporate this approach. See MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 4 (“Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.”).

156. HAZARD, JR. & HODES, *supra* note 55, § 38.4.

157. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. g; HAZARD, JR. & HODES, *supra* note 55, § 38.4.

158. RULES REGULATING THE FLA. BAR R. 4-4.2(a).

159. OR. RULES OF PROF’L CONDUCT 4.2(c) (2006).

160. See generally, e.g., Julian J. Moore, *Home Sweet Home: Examining the (Mis)Application of the Anti-Contact Rule to Housing Discrimination Testers*, 25 J. LEGAL PROF. 75 (2001).

A tester poses as an applicant to gather evidence of employment, housing, or public accommodations discrimination.¹⁶¹ For example, testers of different races might express interest in purchasing an apartment to determine whether a prospective seller selects one applicant over the other on the basis of race. Testing can be used to detect other types of illegal activity as well, such as unfair competition practices.¹⁶² Notwithstanding testers' misrepresentation of their identity and purpose, courts have upheld the legality of their practices and the admissibility of their evidence.¹⁶³ Courts have also concluded that lawyer direction and involvement in the process is authorized by law and therefore permissible under the no-contact rule.¹⁶⁴ These courts recognize that while legitimating deception is disagreeable, it may sometimes be necessary. They also recognize that testing practices do not threaten the interests that the no-contact rule seeks to protect.¹⁶⁵ Testers pose as consumers to gather information that is available to the general public; they do not interfere with the attorney-client relationship.¹⁶⁶

We think Model Rule 4.2 should explicitly recognize that both of these categories of communications—communications in connection with a legal right or responsibility, and testing communications—may be authorized by law and therefore permissible. Accordingly, we propose adding language to new subsection (c), explaining that:

(c) A communication is authorized by law when it is in connection with:

....

(2) transmittal of legally required or permitted notice, such as service of process; [or]

(3) an investigative procedure permitted by public policy,

161. For a discussion of testing in various contexts, see David B. Isbell and Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers*, 8 GEO. J. LEGAL ETHICS 791, 793 (1995).

162. See *Gidatex, S.r.L. v. Campaniello Imps.*, 82 F. Supp. 2d 119, 120 (S.D.N.Y. 1999); *Apple Corps. v. Int'l Collectors Soc'y*, 15 F. Supp. 2d 456, 476 (D.N.J. 1998).

163. See Isbell & Salvi, *supra* note 161, at 799 nn.23–25 (listing cases in which courts upheld the use of testing in employment, housing, and other contexts).

164. See *Hill v. Shell Oil Co.*, 209 F. Supp. 2d 876, 880 (N.D. Ill. 2001); *Gidatex*, 82 F. Supp. 2d at 120. *But see In re Gatti*, 8 P.3d 966 (Or. 2000) (upholding ban of all undercover operations involving lawyers).

165. See *Richardson v. Howard*, 712 F.2d 319, 321–22 (7th Cir. 1983) (observing that the evidence provided by testers is frequently indispensable and that the requirement of deception is a relatively small price to pay to defeat racial discrimination); *Hamilton v. Miller*, 477 F.2d 908, 909–10 n.1 (10th Cir. 1973) (“It would be difficult indeed to prove discrimination in housing without [the tester’s] means of gathering evidence.”); see also *Apple Corps*, 15 F. Supp. 2d at 475.

166. As one court explained in the context of testing for trademark infringement, “[t]he use of investigators, posing as consumers and speaking to nominal parties who are not involved in any aspect of the litigation, does not constitute an end-run around the attorney/client privilege.” *Gidatex*, 82 F. Supp. 2d at 126.

notwithstanding that it involves an element of deception, such as by discrimination testers.¹⁶⁷

New subparagraph (c)(2) follows the lead of the *Restatement (Third)* in acknowledging that law and private agreement may not only allow, but may actively require, direct communication with a represented person. The no-contact rule should respect this and allow lawyers to assist parties in exercising any such right or complying with any such responsibility. For example, a lawyer should be able to assist a client to comply with a responsibility to deliver notice directly to a represented person.

New subparagraph (c)(3) recognizes that in certain situations, deception by a lawyer or a lawyer's agent is desirable on public policy grounds. As noted in the proposed text, the most prominent example of a communication that will be permitted under this exception is a communication made in connection with testing.¹⁶⁸ These communications, authorized by case law, pose no threat to the client-lawyer relationship. Rather, they serve the important public policy of detecting illegal practices.

D. WAIVER

A represented person's lawyer, but not a represented person himself, can waive the protections of Model Rule 4.2.¹⁶⁹ If represented persons have the authority to waive the protections of other ethical rules,¹⁷⁰ the question arises why the same is not true with respect to the no-contact rule. The answer lies in the logic of the no-contact rule, which is premised on the notion that a layperson is fatally vulnerable to an opposing lawyer's importunities.¹⁷¹

Accordingly, the rule's protections cannot be waived by a client, even if the client is sophisticated,¹⁷² and even if the client has good reason for wanting to communicate with another lawyer involved in a matter.¹⁷³ One can envision many such situations. A high-level whistleblower might want to contact a government lawyer to offer information about the corporate target of a government investigation. A spouse in a domestic relations matter might be dissatisfied with counsel and interested in other or joint representation. A criminal co-defendant, mistrustful of counsel,

167. See *infra* Appendix 2 R. 4.2(c)(2)-(3).

168. See Moore, *supra* note 160.

169. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2008); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99(1)(e) (1998).

170. Most notably, this is the case with certain conflicts of interest. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4).

171. See *In re Waldron*, 790 S.W.2d 456, 459 (Mo. 1990) (en banc).

172. See, e.g., *Estate of Vafiades v. Sheppard Bus Serv., Inc.*, 469 A.2d 971, 978 (N.J. Super. Ct. Law Div. 1983); *In re Illuzzi*, 616 A.2d 233, 236 (Vt. 1992).

173. See e.g., *United States v. Lopez*, 4 F.3d 1455, 1461 (9th Cir. 1993).

might want to initiate a conversation with the prosecutor regarding possible cooperation.

The Model Rule, the *Restatement (Third)*, and case law prohibit communication in all these situations. Comment 3 to the Model Rule explains that “[t]he Rule applies even though the represented person initiates or consents to the communication.”¹⁷⁴ The Comment then instructs a lawyer who is contacted by a represented person to immediately terminate the communication.¹⁷⁵ The *Restatement (Third)*’s comments definitively state that the general exception for consent “requires consent of the opposing lawyer; consent of the client alone does not suffice.”¹⁷⁶

The majority of courts and bar associations hold similarly.¹⁷⁷ In *United States v. Chavez*, a defendant wanted to cooperate with the government and believed that his lawyer was not acting in his best interests.¹⁷⁸ The defendant repeatedly contacted an FBI agent who told the defendant he needed to inform an attorney or the court if he wanted to speak with the government.¹⁷⁹ The Fourth Circuit suggested that in the course of these conversations, the agent, acting under a lawyer’s supervision, had violated the Rule.¹⁸⁰ The proper course of action, the court explained, would have been to terminate the conversation immediately.¹⁸¹

By placing complete control of communications in the lawyer’s hands, this approach presumes the role of the traditional, faithful lawyer. But fulfillment of this role is contradicted by the very initiative the client is undertaking—contacting another lawyer after deciding a retained lawyer is not serving the client’s best interests. The lawyer in such a case may well “understand” the situation better than the client, but that could

174. MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 3 (2008). This comment “makes clear that the protections accorded by Rule 4.2 may not be waived by the client.” Laws. Man. on Prof. Conduct Reference Man. (ABA/BNA) 71:309 (Oct. 29, 2008) (quoting ABA REPORT TO THE HOUSE OF DELEGATES, No. 401, MODEL RULE 4.2, REPORTER’S OBSERVATIONS ¶ 5 (2002)).

175. MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 3; *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. f (2000).

176. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. b; *see also id.* cmt. j.

177. *See, e.g.,* Monceret v. Bd. of Prof’l Responsibility, 29 S.W.3d 455, 461 (Tenn. 2000); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95-396 (1995); *see also* ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 108 (1934); Ass’n of the Bar of the City of N.Y. Comm. on Prof’l and Judicial Ethics, Op. No. 80-46, at 14 (1980).

178. 902 F.2d 259, 262 (4th Cir. 1990).

179. *Id.*

180. *Id.* at 266.

181. *Id.*; *see also In re Chan*, 271 F. Supp. 2d 539, 543-44 (S.D.N.Y. 2003). *See generally* Brenna K. DeVaney, *The “No-Contact” Rule: Helping or Hurting Criminal Defendants in Plea Negotiations?*, 14 GEO. J. LEGAL ETHICS 933, 933 (2001).

be the essence of the client's quandary, as the lawyer could be exploiting the situation to his own advantage, rather than serving the client.¹⁸²

Concluding that a client cannot make a reasonably reliable estimate of two lawyers' relative trustworthiness (the client's and the adversary's) is, as commentators have noted, paternalistic.¹⁸³ It deprives the client of meaningful choice and, in some representations, of effective representation. Accordingly, some commentators propose an approach that would permit client waiver and subsequent direct contact as long as the represented person's lawyer is given notice. Even this could be problematic however, as illustrated by the defendant who is a low-level participant in a criminal conspiracy, in which the principals hired the defense lawyer. The defendant would be ill-advised to waive the rule's protections and talk to the prosecutor if the defense lawyer would be informed of the contact. The prototypical example is the "mule" carrier of drugs whose lawyer has been provided by higher-ups in the drug ring and who would put himself at great danger if knowledge that he cooperated with the prosecutor passed back through the defense lawyer to those who retained the lawyer.¹⁸⁴

In the more prosaic context of civil matters, John Leubsdorf describes how the lack of a client waiver provision offers unwarranted protection of lawyers' interests:

If the lawyer is paid by the hour, he will profit if all communications go through him. In addition, direct communication with opposing counsel may reveal to a client that his lawyer is lazy or uninformed, or that the client's prospects of success differ from what his lawyer has led him to believe. These possibilities may well bias the lawyer against consenting to direct communications with his client.¹⁸⁵

Leubsdorf suggests that the primary way in which the rule elevates lawyers' interests above clients' is by enabling a lawyer to prolong a case by withholding a settlement offer.¹⁸⁶ Doing so would constitute a violation of other ethical duties,¹⁸⁷ but bar associations and courts have held that it does not justify direct contact with a represented person.¹⁸⁸ It is difficult to defend such a prohibition, particularly if the communication

182. See Judith L. Maute, *Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct*, 17 U.C. DAVIS L. REV. 1049 (1984); Mark Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decisionmaking and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 AM. B. FOUND. RES. J. 1003, 1003-04 (1980).

183. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. b; Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 321 (1987).

184. See Saylor IV & Wilson, *supra* note 55, at 459-60.

185. Leubsdorf, *supra* note 37, at 689-90.

186. *Id.* at 690.

187. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2008).

188. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. f; see also ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1348 (1975).

is initiated by the represented person or if a copy is sent to the represented person's lawyer.

Some commentators would specially exempt corporate whistleblowers from the rule's prohibition, so as to encourage their actions.¹⁸⁹ The Ninth Circuit followed this approach where an employee of a corporate defendant approached the government lawyer to report she was being pressured to testify falsely. The court noted that "it would be a perversion of the rule against *ex parte* contacts to extend it to protect corporate officers who would suborn perjury by their employees."¹⁹⁰ Other commentators would exempt communications by criminal defendants who initiate contact with a prosecutor,¹⁹¹ since prosecutors have special professional obligations that would serve as a safeguard to the defendant's legal rights.¹⁹² Still others would exempt communications by any litigant in a civil or criminal law enforcement proceeding who initiates contact with a government lawyer.¹⁹³ If any or all of these proposals are appropriate and desirable, it is difficult to justify the absence of a general exception for client-initiated contact. Stated otherwise, if the argument for client autonomy is persuasive in some contexts, why is it not persuasive in all contexts?

Finding no convincing answer to this question, and notwithstanding the majority interpretation to the contrary, we would add a general exception to Model Rule 4.2 for client waiver. But we would qualify it with the safeguard that the lawyer must memorialize in writing the client's initiation of the communication. Accordingly, we propose specifying in new paragraph (a) that the Rule's prohibition does not apply where "the represented person initiates the communication, a fact that is confirmed in writing."¹⁹⁴

Allowing clients to waive the Rule's protections by initiating communication is desirable for a number of reasons. It serves client autonomy. It allows informal contacts where a represented person wants to cooperate with the adversary, and thereby facilitates fact-finding, truth-seeking, and dispute resolution. And it limits the extent to which lawyers can use the Rule to serve their own interests at the expense of their clients'.

E. EMERGENCIES

Neither Model Rule 4.2 nor typical state formulations of the no-contact rule includes an exception for emergency situations—situations

189. See *Pierce, Part III, supra* note 95, at 645–46.

190. *United States v. Talao*, 222 F.3d 1133, 1140 (9th Cir. 2000).

191. See *Pierce, Part III, supra* note 95, at 645–46.

192. See *Uviller, supra* note 127.

193. See *Pierce, Part III, supra* note 95, at 645–46.

194. See *infra* Appendix 2 R. 4.2(a)(5).

where direct communications could protect against imminent harm. Ethical rules addressing attorney-client confidentiality, in contrast, acknowledge the overriding importance of certain interests in emergency situations.¹⁹⁵ The Comment to Model Rule 1.6, for example, explains that the duty of confidentiality recognizes, in limited situations “the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm.”¹⁹⁶ And the prevailing exceptions to Rule 1.6 allow the lawyer to interdict financial harm where the lawyer’s assistance was involved.¹⁹⁷

One can envision several situations in which a lawyer might want to contact a represented person directly in order to avert imminent harm. A lawyer might want to warn a represented person that the lawyer’s client is likely to engage in violent acts. Or a lawyer might want to communicate directly with a represented spouse or partner regarding a child’s whereabouts or health emergency. Recognizing such exigencies, the *Restatement (Third)* includes an exception “to protect life or personal safety and to deal with other emergency situations . . . to the extent reasonably necessary to deal with the emergency.”¹⁹⁸ Model Rule 4.2 has no such express qualification. Rather, it addresses the issue in Comment 6, which states that an emergency may justify a court order authorizing communication.¹⁹⁹ Obtaining such an order may of course be appropriate in some situations, but it is insufficient for addressing an immediate risk of harm.

One would like to think that a conscientious lawyer’s response to serious emergency would deflect complaint or disciplinary grievance and that an exception is therefore unnecessary. But the very existence of a rule that prohibits emergency communications may have a chilling effect. An express exception should therefore be made. We propose that new paragraph (a) of the Rule specify that the general prohibition does not apply where “the communication is necessary in light of what the lawyer reasonably believes to be an emergency.”²⁰⁰

In a comment, we propose to elaborate on this exception as follows:

Communications necessary in light of what the lawyer reasonably believes to be an emergency include communications that the lawyer believes necessary to address an imminent and reasonably certain risk of death, substantial bodily harm or compromised personal safety.

195. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2008).

196. *Id.* cmt. 6.

197. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.6(b).

198. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. i (2000); *see also id.* § 99(1)(d).

199. MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 6.

200. *See infra* Appendix 2 R. 4.2(a)(3).

They may also include communications that the lawyer believes necessary to address an imminent risk of harm to the financial interests or property of another, in furtherance of which the lawyer's client used the lawyer's services. See Rule 1.6. Where the risk of harm is not imminent, a lawyer should seek a court order prior to engaging in the communication.²⁰¹

To the end of establishing ethical rules that reflect the fundamental values of our justice system, this exception would acknowledge that when in imminent danger, a person's life and safety outweigh protection of the client-lawyer relationship. So too does the legal system's interest in allowing lawyers to prevent or rectify substantial financial harm created with their unknowing assistance. This exception would also align Rule 4.2's exceptions with Rule 1.6's, creating consistent and mutually reinforcing ethical standards.

F. LAWYER WHO IS A PARTY TO A MATTER

Model Rule 4.2 applies when a lawyer is "representing a client."²⁰² It does not specify whether it applies to a lawyer who is acting pro se, such as a lawyer communicating directly with his landlord in a dispute over a lease or a lawyer communicating directly with a spouse in a divorce proceeding.²⁰³ In these and similar situations, lawyers have legitimate interests in being treated like any other party to a matter. Opposing parties, meanwhile, have legitimate interests in the Rule's protections.

There is little consensus about the proper approach to these situations. Model Rule 4.2 is silent on the issue, while the *Restatement (Third)* includes an exception for a "lawyer [who] is a party [to the matter] and [who] represents no other client in the matter."²⁰⁴ State courts and ethics committees have split on the issue, some holding that the Rule does not apply in such situations,²⁰⁵ some holding that it does,²⁰⁶ and some adopting an intermediate approach. Minnesota, for example, provides that "a party who is a lawyer may communicate directly with another party unless expressly instructed to avoid communication by the

201. See *infra* Appendix 2 R. 4.2 cmt. 10.

202. MODEL RULES OF PROF'L CONDUCT R. 4.2.

203. See generally Stephen J. Langa, Note, *Legal Ethics—The Question of Ex Parte Communications and Pro Se Lawyers Under Model Rule 4.2—Hey, Can We Talk?*, 19 W. NEW ENG. L. REV. 421, 423 (1997); Pierce, *Part III*, *supra* note 95.

204. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99(1)(b) (2000); *id.* § 99 cmt. e.

205. See, e.g., *Pinsky v. Statewide Grievance Comm.*, 578 A.2d 1075, 1079 (Conn. 1990); CAL. RULES OF PROF'L CONDUCT R. 2-100 annots. (2008) ("[T]he rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party."); Bar Ass'n of N.Y. City, Op. No. 81-8 (1981).

206. See, e.g., *Runsvold v. State Bar*, 925 P.2d 1118, 1119-20 (Idaho 1996); *In re Segall*, 509 N.E.2d 988, 990, (Ill. 1987); *In re Shaefer*, 25 P.3d 191, 199-202 (Nev. 2001); *In re Smith*, 861 P.2d 1013, 1016-17 (Or. 1993); *Vickery v. Comm'n for Lawyer Discipline*, 5 S.W.3d 241, 259-60 (Tex. App. 1999); *In re Haley*, 126 P.3d 1262, 1269, 1275 (Wash. 2006); *Comm. on Legal Ethics v. Simmons*, 399 S.E.2d 894, 897 (W. Va. 1990); *Sandstrom v. Sandstrom*, 880 P.2d 103, 108-09 (Wyo. 1994).

other lawyer[], or unless the other party manifests a desire to communicate only through counsel.”²⁰⁷ One court has explained that when proceeding pro se, “[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.”²⁰⁸ We agree. A lawyer poses the same threat to the adverse party whether representing a client, proceeding pro se, or being represented by another lawyer. In all cases, the lawyer can use her training in the law to influence or even intimidate the adverse party and to interfere with the adversary’s client-lawyer relationship. We therefore propose changing the text of the Rule from “In representing a client, a lawyer shall not . . .” to “A lawyer participating in a matter shall not . . .”²⁰⁹ We also propose a comment that states: “This Rule applies to a lawyer who is a party to a proceeding in the same manner as it does to a lawyer representing a client.”²¹⁰

Potential concerns about limiting a lawyer’s routine interactions—for example, communications with a landlord regarding repairs to an apartment—are unwarranted. Courts, bar associations and commentators agree that the Rule applies only when a person is represented in a particular matter. Accordingly, a global claim of representation in all matters by a lawyer on retainer is insufficient to trigger the Rule’s protection.²¹¹

G. ORGANIZATIONAL REPRESENTATION

Proper application of the no-contact rule to a represented organization has been the source of much confusion and debate. The difficulty stems from an organization’s status as an artificial legal entity that acts only through its constituents. If the no-contact rule is to afford protection to organizations, some constituents must qualify as “represented persons” with whom communication is barred.²¹² But if every constituent is a represented person, the rule will not only offer organizations far greater protection than it offers individuals, it will impede public law enforcement and private lawsuits.

The basic issue—determining who personifies the “represented person”—can arise in any dispute involving a represented organization, be it a corporation, partnership, proprietorship, or any other legal entity.

207. MINN. RULES OF PROF’L CONDUCT R. 4.2 (2007).

208. *In re Schaefer*, 25 P.3d at 199.

209. *See infra* Appendix 2 R. 4.2(a).

210. *See infra* Appendix 2 R. 4.2 cmt. 5.

211. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. c (2000); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95-396, at 13–15 (1995).

212. *Niesig v. Team I*, 558 N.E.2d 1030, 1035 (N.Y. 1990); *see also* Stephen A. Saltzburg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, 12 HOFSTRA L. REV. 279, 279–85 (1984).

For example, when the government investigates a corporation, agency lawyers may want to interview employees informally about possible civil or criminal violations. The corporation, which will most likely have in-house and/or outside counsel, will claim that these employees constitute represented persons and that the interviews are therefore impermissible. The rule's task is to draw an appropriate line between those constituents who can be contacted and those who cannot. Some corporate counsel have attempted to claim that they always represent all corporate employees, but courts have rejected such claims.²¹³

Similar disputes arise in the course of private-party disputes. For example, a lawyer may want to informally contact witness-employees in a personal injury action against an employer. If there are no nonemployee witnesses, informal interviews may be a necessary means of substantiating the claim before filing suit. The defendant corporation, however, may contend that the employees are represented persons and that contact is impermissible. Again, the task is to draw an appropriate line between those employees who can be contacted and those who cannot.

The rule should offer corporations the same protection offered to individuals—protection of the client-lawyer relationship, including the attorney-client privilege. Corporations and corporate counsel contend that to do so, the rule must prohibit contact with a broad scope of corporate constituents.²¹⁴ But organizational clients are generally more sophisticated than individual clients and less susceptible to overreaching by opposing counsel. These considerations weigh in favor of a narrower scope of covered constituents.²¹⁵ Also weighing in favor of a narrow scope is the heightened importance of informal fact-finding in an organizational context. Informal interviews with employees may be the only means for a party opposing a represented person to obtain key facts and information.²¹⁶ Much information will be in the “exclusive control” of the organization and its employees, and may not be produced through formal discovery.²¹⁷ Moreover, employees who would have offered

213. See, e.g., *Harry A. v. Duncan*, 330 F. Supp. 2d 1133, 1137–38 (D. Mont. 2004); *Banks v. Office of Senate Sergeant-at-Arms*, 222 F.R.D. 1, 6 (D.D.C. 2004); *Michaels v. Woodland*, 988 F. Supp. 468, 472 (D.N.J. 1997); see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995).

214. See, e.g., *Samuel R. Miller & Angelo J. Calfo, Ex Parte Contact with Employees and Former Employees of a Corporate Adversary: Is It Ethical?*, 42 BUS. LAW. 1053 (1987).

215. See, e.g., *Johnson v. Cadillac Plastic Group*, 930 F. Supp. 1437, 1440–42 (D. Colo. 1996); *Weider Sports Equip. Co. v. Fitness First, Inc.*, 912 F. Supp. 502, 508–09 (D. Utah 1996).

216. See *Hanantz v. Shiley, Inc.*, 766 F. Supp. 258, 258 (D.N.J. 1991); *Niesig v. Team I*, 558 N.E.2d 1030 (N.Y. 1990) (noting that prohibiting communication with employees “closes off avenues of informal discovery of information that may serve both the litigants and the entire justice system by uncovering relevant facts”); Sinaiko, *supra* note 27, at 1477–79.

217. See *Wright ex rel. Wright v. Group Health Hosp.*, 691 P.2d 564, 568 (Wash. 1984).

prejudicial information in an informal private environment may be hesitant to do so in front of the corporation's lawyer for fear of retaliation. Accordingly, as the New York Court of Appeals explained, "[t]he broader the definition of 'party' in the interests of fairness to the corporation, the greater the cost in terms of foreclosing vital informal access to facts."²¹⁸

Moreover, limiting informal discovery imposes additional burdens in the organizational context. By increasing the costs of litigation through formal discovery, it may preclude the possibility of suit for individual plaintiffs who often have comparatively fewer resources.²¹⁹ And by precluding individual plaintiffs' access to vital sources of information, it may discourage lawsuits, frustrating private litigation's role as an "important means of controlling abuses of corporate power and restraining abuses of law."²²⁰

The interests of the organization's constituents further complicate the issue. An employee's interests may well diverge from those of the organization. For example, an employee may determine that it is in his best interest to cooperate with a government lawyer investigating possible corporate wrongdoing. If the employee qualifies as a represented person, he will not be able to contact the government lawyer without the consent of the corporation's lawyer.²²¹ Nor will he have the escape valve of firing his lawyer—an option, albeit it extreme, that represented individuals can make use of if their lawyers unreasonably withhold consent. In the end, neither the employee's interest in cooperating, nor the legal system's interest in addressing corporate wrongdoing, will be served.

Prior to the 1995 amendments, the Model Rule did not offer guidance as to how to balance these interests and determine the proper scope of the Rule in the organizational context. The text of the Model Rule still does not do so, but Comment 7 identifies three classes of an organization's constituents with whom direct contact is prohibited:

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

218. *Niesig*, 558 N.E.2d at 1033; *see also* *Bouge v. Smith's Mgmt. Corp.*, 132 F.R.D. 560, 565 (D. Utah 1990).

219. *See* *Frey v. Dep't of Health & Human Servs.*, 106 F.R.D. 32, 36 (E.D.N.Y. 1985) ("[It] may well frustrate the right of an individual plaintiff with limited resources to a fair trial and deter other litigants from pursuing their legal remedies.").

220. *Bouge*, 132 F.R.D. at 565.

221. *See, e.g.*, John G. Douglass, *Jimmy Hoffa's Revenge: White-Collar Rights Under the McDade Amendment*, 11 WM. & MARY BILL RTS. J. 123, 148 (2002) (explaining that in plea negotiations between the government and a corporate target of an investigation, the price of the bargain is often a waiver of corporate privilege; individual constituents who had confidential communications with corporate counsel are then "left out in the cold").

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.²²²

The first category of constituents, which is also incorporated in the *Restatement (Third)*'s version,²²³ covers those individuals who regularly interact with the corporation's lawyer and are therefore likely to be privy to privileged and confidential information.²²⁴ The second category, which may substantially overlap with the first, covers those individuals who can commit the organization to settlement and other major decisions with respect to the matter. Both of these categories can be difficult to apply, particularly for an outside lawyer who will not know at the time of an interview whether a constituent has the authority to obligate the organization.²²⁵

The third category of constituents, also included in the *Restatement (Third)*'s formulation,²²⁶ includes those whose actions may be imputed to the organization for purposes of liability. This category appropriately includes individuals who have "acted in the matter on behalf of the organization, and save for the separate legal character of the organizational form, would often be directly named as a party in a lawsuit involving the matter."²²⁷ In the out-of-court context, this category may be as difficult to apply as the first two. A lawyer may not know the legal theory of the case at the time of the interview, making it impossible to determine whose conduct might be imputed to the organization for purposes of liability.²²⁸ A further shortcoming of this category is its potentially great breadth, since "things that are wholly innocent, such as record keeping, may be imputed to the organization in order to establish its liability for the conduct of other employees."²²⁹

The pre-2002 version of the Model Rule extended protection to employees whose statements could "constitute an admission on the part of the organization."²³⁰ This standard was ambiguous because of

222. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2008).

223. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100 & cmt. c (2000).

224. See Pierce, *Part I*, *supra* note 125, at 156.

225. HAZARD, JR. & HODES, *supra* note 55, § 38.26; Ernest F. Lidge III, *The Ethics of Communicating with an Organization's Employees: an Analysis of The Unworkable "Hybrid" of "Multifactor" Managing-Speaking Agent, ABA, and Niesig Testis and a Proposal for a "Supervisor" Standard*, 45 ARK. L. REV. 801, 830-31 (1993).

226. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100(2)(b) cmt. d. While adopting this prong, the *Restatement (Third)* also criticizes it, noting its meaning "is unclear and has been variously interpreted. Any employee's or agent's act may be 'imputed' to the organization for many legal purposes." *Id.*

227. *Id.*; see also Pierce, *Part I*, *supra* note 125, at 167.

228. HAZARD, JR. & HODES, *supra* note 55, § 38.26; Lidge III, *supra* note 225, at 848.

229. This position is summarized in Pierce, *Part I*, *supra* note 125, at 167-68.

230. Compare MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 4 (1995) (specifying that consent of an

uncertainty in the evidentiary rule to which it referred. It was likely intended to refer to evidentiary rules of some jurisdictions that provided that statements by certain employees were admissible against the organization and could not be controverted, i.e., were “binding.”²³¹ Many courts, however, read it as referencing the party admission exception to the hearsay rules.²³² The common law hearsay rule provides that an employee’s statement, although not “binding” on the employer, is admissible against an employer to prove the truth of the matter asserted “if the agent was authorized to make the statement or was authorized to make, on the principal’s behalf, any statements concerning the subject matter.”²³³ The federal evidentiary rule and those in many states liberalized this common law test, allowing the admission of a statement by an employee if it involved a matter within the scope of employment.²³⁴ Depending on a jurisdiction’s rules of evidence, this provision can therefore create an extremely broad prohibition on informal communications.²³⁵ The Model Rule now rejects this approach.²³⁶ The *Restatement (Third)*, meanwhile, adopts the “binding admission” version, phrasing the rule as prohibiting communication “if a statement of the employee or other agent, under applicable rules of evidence, would have the effect of binding the organization with respect to proof of the matter.”²³⁷ The *Restatement (Third)*’s comment explains this standard is designed to preclude communications by constituents who have the power to make statements the principal cannot thereafter contradict, but not communications with individuals solely because their statements are admissible under the hearsay rule.²³⁸

Neither the Model Rule’s nor the *Restatement (Third)*’s approach have been uniformly adopted by states. In fact, state standards vary significantly. Some states continue to follow approaches developed prior to the Model Rule and the *Restatement (Third)*, while others have

organization’s lawyer was required for communication with a person “whose statement may constitute an admission on the part of the organization”), with MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 7 (2002) (eliminating such provision).

231. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100(2)(b) cmt. e.

232. See, e.g., *Weibrech v. S. Ill. Transfer Inc.*, 241 F.3d 875, 883 (7th Cir. 2001); *Paulson v. Plainfield Trucking, Inc.*, 210 F.R.D. 654, 656 (D. Minn. 2002); *Midwest Motor Sports, Inc. v. Arctic Cat Sales, Inc.*, 144 F. Supp. 2d 1147, 1155–57 (D.S.D. 2001); *Brown v. St. Joseph County*, 148 F.R.D. 246, 254 (N.D. Ind. 1996); *Cole v. Appalachian Power Co.*, 903 F. Supp. 975, 976 (S.D. W. Va. 1995).

233. RESTATEMENT (SECOND) OF AGENCY § 286 (1958).

234. FED. R. EVID. 801(d)(2)(D) (employee’s statement constitutes an admission if it is “concerning a matter within the scope of the agency or employment, made during the existence of the relationship”).

235. *Messing, Rudavsky & Weliky, P.C. v. Pres. & Fellows of Harvard Coll.*, 764 N.E.2d 825, 833 (Mass. 2002) (noting test would “effectively prohibit the questioning of all employees who can offer information helpful to the litigation”).

236. See MODEL RULES OF PROF’L CONDUCT R. 4.2 cmt. 7 (2008)

237. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100(2)(c) (2000).

238. *Id.* § 100(2) cmt. e.

rejected the Model Rule and *Restatement (Third)* and developed different standards. All formulations have shortcomings. At one end of the spectrum of state approaches is the “control group” test, which prohibits communications only with “those top management persons who had the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons’ advice or opinion or whose opinions in fact form the basis of any final decision.”²³⁹ Correlatively, informal contacts and interviews are permissible with all employees who are not part of upper level management. This test has been heavily criticized for providing corporations with insufficient protection²⁴⁰ and for lacking predictability.²⁴¹ Prior to an interview, it will often be difficult for opposing counsel to determine which employees fall within a corporation’s control group.²⁴²

At the opposite end of the spectrum of state approaches is a blanket rule that bans communication with all corporate employees.²⁴³ This test provides certainty and absolute protection to the corporation, but at the expense of all informal fact-finding and resulting access to information.²⁴⁴ Virtually all authorities now reject this approach.²⁴⁵

Some courts have concluded that it is impossible to formulate a test to differentiate between employees who can and cannot be contacted.²⁴⁶ In *Mompoint v. Lotus Development Corporation*, a district court balanced a variety of factors, including the corporation’s interest in protecting itself and the opposing parties’ interest in discovering the facts of the case.²⁴⁷ This approach, which the court labeled a case-by-case balancing test, provides flexibility to be sure. But “flexibility” is a soft word for “ambiguity,” and it remains uncertain which corporate constituents can be contacted.

239. *Fair Auto. Repair, Inc. v. Car-X Serv. Sys., Inc.*, 471 N.E.2d 554, 560 (Ill. 1984); *see also* B.H. *ex rel. Monahan v. Johnson*, 128 F.R.D. 659, 663 (N.D. Ill. 1989).

240. *Niesig v. Team I*, 558 N.E.2d 1030, 1032–35 (N.Y. 1990); Hume, *supra* note 27, at 980–81; *Lidge III, supra* note 225, at 815; *Saltzburg, supra* note 212; *Sinaiko, supra* note 27, at 1483.

241. N.Y.C. Bar Inquiry Ref. No. 80-46, *supra* note 17; *see also* Hume, *supra* note 27, at 980–81; *Krulewitch, supra* note 33, at 1287.

242. *See* *Upjohn v. United States*, 449 U.S. 383, 393 (1981) (“Disparate decisions in cases applying this test illustrate its unpredictability.”).

243. *See, e.g.*, *Tucker v. Norfolk & W. Ry.*, 849 F. Supp. 1096, 1099–101 (E.D. Va. 1994); *McCallum v. CSX Transp., Inc.*, 149 F.R.D. 104, 110 (M.D.N.C. 1993); *Public Serv. Elec. & Gas. Co. v. Assoc. Elec. & Gas Ins. Serv., Ltd.*, 745 F. Supp. 1037, 1042 (D.N.J. 1990).

244. *Niesig*, 558 N.E.2d at 1039; *Miller & Calfo, supra* note 214, at 1072.

245. *See Niesig*, 558 N.E.2d at 1039; RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100(2) cmt. b (2000); Hume, *supra* note 27, at 973.

246. *See, e.g.*, *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 15 (D. Mass. 1989); *Mompoint v. Lotus Dev. Corp.*, 110 F.R.D. 414, 418 (D. Mass. 1986).

247. *Mompoint*, 110 F.R.D. at 418.

A standard that has gained much support is the “managing-speaking agent” test. This test defines the constituents who cannot be contacted as those who are managers or who are authorized to speak on behalf of the corporation in the matter in question,²⁴⁸ and extends the rule’s coverage beyond the control group but not to lower level employees. In adopting this formulation, the Supreme Court of Washington explained that it “served both to protect represented parties from the dangers of dealing with adverse counsel and to preserve the accessibility of testimony of employee witnesses.”²⁴⁹

Some variation of the managing-speaking agent test may be the best means of differentiating between employees who can and cannot be contacted.²⁵⁰ This test acknowledges and balances competing interests, while offering more predictable guidance than a case-by-case balancing approach. Like the other approaches, however, it has deficiencies. Some commentators contend that it fails to provide the corporation sufficient protection, since middle and lower level employees often have information that can be highly damaging,²⁵¹ and statements of those whose acts or omissions gave rise to litigation, regardless of their position, might constitute evidentiary admissions against the corporation. Also, it may be difficult to apply, as it will often be difficult for a lawyer to determine prior to an interview whether a particular constituent is in a forbidden category.²⁵²

Addressing some of these concerns is a test adopted by the New York Court of Appeals in *Niesig v. Team I*, which prohibits communication with those constituents whose acts or omissions in the matter are binding on the corporation, who are responsible for implementing the advice of counsel, or whose interests are directly at stake.²⁵³ All other employees may be interviewed informally.²⁵⁴ Another approach that addresses some of these concerns is that adopted by the Massachusetts Supreme Judicial Court in *Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard College*.²⁵⁵ The court set forth three categories of employees with whom a lawyer cannot communicate directly: those who exercise managerial responsibility with regard to the subject matter of the litigation, those who are alleged to have committed

248. See *Wright ex rel. Wright v. Group Health Hosp.*, 691 P.2d 564, 569 (Wash. 1984); see also *Palmer v. Pioneer Inn Assoc., Ltd.*, 59 P.3d 1237, 1247 (Nev. 2002).

249. *Wright*, 691 P.2d at 564.

250. See, e.g., *Krulewitch*, *supra* note 33, at 1298; *Lidge III*, *supra* note 225, at 804 (noting the emerging trend of adopting a multifactor test such as the managing speaking agent test); *Sinaiko*, *supra* note 27, at 1486.

251. *Sinaiko*, *supra* note 27, at 1487.

252. *Lidge III*, *supra* note 225, at 830–31.

253. 558 N.E.2d 1030, 1035 (N.Y. 1990).

254. *Id.*

255. 764 N.E.2d 825 (Mass. 2002).

the wrongful acts at issue in the litigation, and those who have the authority to make decisions about the course of the litigation.²⁵⁶ The approaches of both *Niesig* and *Fellows of Harvard College* recognize Rule 4.2's role in protecting the client-lawyer relationship by focusing attention on the employee's relationship with the organization's lawyer. They also offer the corporation somewhat more protection than the "managing-speaking agent" test by extending coverage to employees who have no power to bind the organization and no direct role in the client-lawyer relationship, but who nevertheless could severely impair the effectiveness of representation through conversations with opposing counsel.

The revisions to the Model Rule in 1995 to address these issues in a comment, and in 2002 to eliminate the reference to admissions, were positive steps. However, the text itself should address the issue. We believe it should do so in a manner that adopts the strengths of the *Niesig* and *Fellows of Harvard College* approaches. Accordingly, we propose to add the following paragraph to the text of Model Rule 4.2:

(d) Where an organization is represented by a lawyer in a matter, this Rule applies to communication with a current constituent of the organization:

- (1) who supervises or directs the organization's lawyer;
- (2) who substantially participates in, or has authority to obligate the organization with respect to, the representation; or
- (3) whose acts or omissions materially contributed to the matter underlying the representation.²⁵⁷

In articulating this standard, we are mindful that the Rule's proper function is not to protect the organization against disclosure of harmful but nonprivileged information.²⁵⁸ Rather, it is to protect the client-lawyer relationship and the attorney-client privilege that is at the core of that relationship.²⁵⁹ Accordingly, the first two proposed prongs focus on constituents who will have regular and substantial interaction with the organization's lawyer and who embody the organization in dealing with the lawyer—those who supervise or direct the lawyer, and those who substantially participate in the representation or have the authority to obligate the organization in the representation.

Leaving the Rule's coverage at those constituents who regularly interact with the organization's lawyer would exclude a set of constituents covered by some current formulations of the Rule—those

256. *Id.* at 833.

257. *See infra* Appendix 2 R. 4.2(d).

258. *See Wright ex rel. Wright v. Group Health Hosp.*, 691 P.2d 564, 569 (Wash. 1984) ("It is not the purpose of the rule to protect a corporate party from the revelation of prejudicial facts.").

259. *Id.*

who played a role in the matter underlying the representation. Initially, this exclusion seems consistent with the Rule's purpose of protecting the client-lawyer relationship. That the constituent's conduct provided the basis for the legal matter does not, by itself, mean that communication with that person will threaten the organization's client-lawyer relationship. But the difficulties of organizational representation—of the entity as an artificial construct—and the goal of approximating the protection offered by the Rule to individuals necessitate including individuals who were directly involved in the underlying matter. These constituents may not regularly interact with the lawyer, but they play a key role in the lawyer's strategy and effective representation. Allowing informal communications with such individuals could allow opposing counsel to exert inappropriate influence, leading the individual to make damaging statements and to undermine the lawyer's legal representation or strategy without the lawyer's knowledge.

As discussed, the Model Rule's current standard includes these individuals within the Rule's scope by including those constituents whose acts "may be imputed to the organization for purposes of civil or criminal liability."²⁶⁰ Also as discussed, this formulation is problematic because of the difficulty of determining whose conduct may be imputed for purposes of the applicable legal theory of liability. To signal that the test is not a precise legal inquiry, but rather asks a lawyer to exercise common sense in determining which individuals likely played a substantial role in the underlying matter, we use the language: "whose acts or omissions materially contributed to the matter underlying the representation."²⁶¹

Crucial to the effectiveness of this inquiry will be clarifying the relevant knowledge standard.²⁶² Neither the text nor the relevant comment specifies a knowledge standard, but the implication is that of "actual knowledge" that the person is represented in the matter.²⁶³ That standard may diminish the Rule's protections, since it will rarely be the case that prior to an interview, a lawyer will have actual knowledge that a constituent has authority to obligate an organization or that a constituent's conduct will be imputed to the organization for purposes of liability. One means of addressing this problem is to impose a duty to inquire about an employee's status within the organization before a

260. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2008).

261. See *infra* Appendix 2 R. 4.2(d)(3).

262. See, e.g., Susan J. Becker, *Discovery of Information and Documents from a Litigant's Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles*, 81 NEB. L. REV. 868, 896-97 (2003).

263. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 8 ("The prohibition . . . only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed.").

lawyer may communicate with the employee directly. A California court, for example, has explained:

[I]n cases where an attorney has reason to believe that an employee of a represented organization might be covered by [the no-contact rule], that attorney would be well advised to either conduct discovery or communicate with opposing counsel concerning the employee's status before contacting the employee. A failure to do so may, along with other facts, constitute circumstantial evidence that an attorney had actual knowledge²⁶⁴

Another means of addressing the problem is to relax the actual knowledge standard for determining covered constituents. New Jersey's rule, for example, prohibits communication with anyone the lawyer "knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter."²⁶⁵ The rule further specifies that "[r]easonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel."²⁶⁶ Following this approach, we propose to clarify the knowledge standard in the relevant comment as follows:

In the context of organizational representation, the prohibition on communications applies where the lawyer knows or reasonably should know that a constituent is in a position within the organization to be classified as a represented person. This means that the lawyer has actual knowledge of the constituent's position or that a lawyer of reasonable prudence and competence would have actual knowledge in the same circumstances. See Rule 1.0(j).²⁶⁷

The discussion thus far has not distinguished between current and former employees. A few states have concluded that Rule 4.2's prohibition applies to former employees,²⁶⁸ but the weight of authority holds that former employees are outside the scope of the Rule. The Model Rule,²⁶⁹ the *Restatement (Third)*,²⁷⁰ and most courts²⁷¹ permit

264. *Snider v. Superior Court*, 7 Cal. Rptr. 3d 119, 139 (Cal. Ct. App. 2003).

265. *Laws. Man. on Prof. Conduct Reference Man. (ABA/BNA)* 71:302 (Oct. 29, 2008).

266. *Id.*

267. *See infra* Appendix 2 R. 4.2 cmt. 13.

268. *See, e.g., Public Serv. Elec. & Gas Co. v. Assoc. Elec. & Gas Ins. Serv., Ltd.*, 745 F. Supp. 1037, 1039 (D.N.J. 1990); *Amarin Plastics, Inc. v. Md. Cup Corp.*, 116 F.R.D. 36, 40 (D. Mass. 1987); *Porter v. Arco Metals Co.*, 642 F. Supp. 1116, 1118 (D. Mont. 1986); *Kan. Bar Ass'n, Formal Advisory Op. 92-07* (1991).

269. MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2008) (amended in 2002 to specify that consent of an organization's lawyer is not required for communications with former constituents).

270. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 100, cmt. g (2000). *But see id.* (noting that direct communication may not be appropriate in certain circumstances, such as if the former employee continues to consult with the entity's attorney).

271. *See, e.g., Valassis v. Samuelson*, 143 F.R.D. 118, 123 (E.D. Mich. 1992); *Curley v. Cumberland Farms, Inc.*, 134 F.R.D. 77, 83 (D.N.J. 1991); *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 629 (S.D.N.Y. 1990); *H.B.A. Mgmt. Inc. v. Estate of Schwartz*, 693 So. 2d 541, 544 (Fla. 1997); *Humco, Inc. v. Noble*, 31 S.W.3d 916, 920 (Ky. 2000); *Clark v. Beverly Health & Rehab. Servs., Inc.*, 797 N.E.2d 905, 908 (Mass. 2003); *Muriel Siebert & Co. v. Intuit, Inc.*, 868 N.E.2d 208, 210-11 (N.Y. 2007);

communications with former employees. These authorities generally assert that once a constituent's affiliation with an organization ceases, there is a greatly diminished risk that communications with that person will harm the organization's client-lawyer relationship.²⁷² This is only partially true, however. A former employee could make damaging statements that weaken the scope of the attorney-client privilege and undermine the lawyer's strategy without the lawyer's knowledge—for example, if a former employee is in regular contact with corporate counsel and holds confidential information, or if a former employee's conduct is at the base of the dispute.²⁷³ Moreover, there is little principled reason, and little support in the language of Rule 4.2, for distinguishing between current and former employees whose conduct may be imputed to the organization for purposes of liability. Recognizing this, some courts have qualified or restricted communication with former employees in certain respects. Some courts allow direct communications, but with the reminder that the lawyer should not seek to acquire privileged information.²⁷⁴ Other courts prohibit communication if the former employee had been privy to confidential or privileged information,²⁷⁵ or if the former employee's conduct could be imputed to the organization for purposes of liability.²⁷⁶

We agree with the majority position that communications with former employees should generally be permissible. Once an employee ceases association with an organization, there is diminished risk of interference with the organization's client-lawyer relationship. But we recognize that in certain situations, informal communications with former employees could threaten the policies underlying the Rule no less than communications with current employees. If Model Rule 4.2 is to approximate the protection it affords to an individual when it is applied to an organization, it should acknowledge this potential threat. Accordingly, we propose replacing the sentence in current Comment 7, explaining that communications with former employees are permitted, with the following:

Wright *ex rel.* Wright v. Group Health Hosp., 691 P.2d 564, 570 (Wash. 1984); *see also* Becker, *supra* note 262, at 898 n.147 (citing cases).

272. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 359 (1991); Benjamin Lloyd Lindquist, *Ethical Considerations in Model Rule 4.2's Application to the Corporate Litigant*, 20 J. LEGAL PROF. 267, 272-74 (1996).

273. HAZARD, JR. & HODES, *supra* note 55, § 38.7.

274. *See, e.g.*, Smith v. Kalamazoo Ophthalmology, 322 F. Supp. 2d 883, 890 (W.D. Mich. 2004); FleetBoston Robertson Stephens, Inc. v. Innovex, Inc., 172 F. Supp. 2d 1190, 1195 (D. Minn. 2001); P.T. Barnum's Nightclub v. Duhamell, 766 N.E.2d 729, 737 (Ind. 2002).

275. *See, e.g.*, Kaiser v. AT&T, No. CIV 00-724-PHX JWS, 2002 WL 1362054, at *6 (D. Ariz. Apr. 5, 2002); Camden v. State of Md., 910 F. Supp. 1115, 1121 (D. Md. 1996); Rentclub, Inc. v. Transamerica Rental Fin. Corp., 811 F. Supp. 651, 658 (M.D. Fla. 1992); Polycast Tech. Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 629 (S.D.N.Y. 1990).

276. *See, e.g.*, Chancellor v. Boeing Co., 678 F. Supp. 250, 253 (D. Kan. 1988).

In the case of a represented organization, consent of the organization's lawyer is not required for communication with a former constituent unless the former constituent is represented by the organization's lawyer through an independent engagement or unless a lawyer knows or reasonably should know that the former constituent's conduct materially contributed to the matter underlying the representation. In communicating with a former constituent, a lawyer shall not seek to elicit privileged or confidential information.²⁷⁷

H. CLASS ACTIONS

A final context in which Rule 4.2's proper application is unclear is class action lawsuits. The Model Rule does not mention class actions, but the *Restatement (Third)* summarizes the prevailing consensus that once a class has been certified, an opposing lawyer cannot contact a class member directly without the consent of class counsel.²⁷⁸ This is based on the notion that like any represented individual, a represented class member deserves the protection of the no-contact rule. The *Restatement (Third)* does not address the more difficult question of application of the rule after a class action has been filed but prior to certification.²⁷⁹ During such period, a lawyer for the "target" of the suit may want to contact putative class members to gather information, to try to initiate settlement, or to communicate on a related subject where the target and the class members have a continuing relationship such as employer-employee. A lawyer for a competing putative class may want to contact putative class members to recruit them.

Courts and commentators that have addressed postfiling/precertification scenarios have drawn divergent conclusions. Most argue that until a class is certified, application of the rule cannot be justified. Applying the rule would grant class counsel control over the communications of individuals who did not choose to be represented by class counsel, did not consent to membership in the class, and may not even know about the class.²⁸⁰ Others contend that a lawyer filing a class action has fiduciary duties to unnamed and even unknown putative

277. See *infra* Appendix 2 R. 4.2 cmt. 6.

278. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. 1 (2000); HAZARD, JR. & HODES, *supra* note 55, § 38.4 illus. 38-1; Debra Lyn Bassett, *Pre-Certification Communication Ethics in Class Actions*, 36 GA. L. REV. 353, 355 (2002) (summarizing consensus); Vincent R. Johnson, *The Ethics of Communicating with Putative Class Members*, 17 REV. LITIG. 497, 505-06 (1998).

279. Bassett, *supra* note 278, at 355-56 (contending that prior to certification, it is "less well clear" whether a lawyer-client relationship exists between class counsel and all class members, but noting the majority view in the negative).

280. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. 1; Johnson, *supra* note 278, at 507. For a discussion of the difficulties of defining the attorney client relationship in the context of class action representations, see ALI, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.05, cmts. f-h (Tentative Draft No. 1, 2008).

members of the class, which form the basis of a quasi-client-lawyer relationship that should be protected by the rule.²⁸¹

Another difficult question is proper application of the rule after certification of a class but prior to expiration of the opt-out period. Some courts have allowed communications in these situations.²⁸² Some commentators contend that allowing opposing counsel to contact putative class members during this period may benefit the putative class members, who have an interest in any information that will aid in their decision whether to opt out of the class. One commentator argues that the court's certification of a class should be analogized to "a judicially approved offer from the lawyer to the class members to maintain the lawsuit on their behalf."²⁸³ Accordingly, "given that the choice with respect to membership in the class is left to the class member until the expiration of the exclusion period, the right to control communication about the class action should be left to that individual class member."²⁸⁴ Others have suggested that communications should not be permitted during the opt-out period.²⁸⁵ They note the frequency of "abusive communications" by defense counsel, including "misrepresentations concerning the class action's purpose, status, or effects, as well as threats or other forms of coercion."²⁸⁶

Model Rule 4.2, currently silent on these issues, should offer guidance. We propose to clarify that the Rule does not apply prior to certification or after certification but prior to expiration of an opt-out period. Prior to certification, putative class members should be in full control of their communications with both appointed class counsel and any other lawyers who are involved in the matter. We find the same reasoning persuasive with respect to the period after certification but prior to the expiration of an opt-out period. At such time, class members should be in full control of their communications.

In order to implement these proposed applications of Rule 4.2 to class action lawsuits, we propose a comment that states:

Once a proceeding has been certified as a class action and any opt-out period has expired, members of the class are considered represented persons for purposes of this Rule. Prior to that time, only those members of the class with whom the class's lawyer maintains a personal client-lawyer relationship are considered represented persons.²⁸⁷

281. See, e.g., Bassett, *supra* note 278, at 410.

282. See, e.g., St. Bar of Mich. Standing Comm. on Prof'l and Judicial Ethics, Op. RI-219 (1994).

283. Pierce, *Part I*, *supra* note 125, at 189.

284. *Id.*

285. See, e.g., *Impervious Paint Ind., Inc., v. Ashland Oil*, 508 F. Supp. 720, 724 (W.D. Ky. 1981).

286. Bassett, *supra* note 278, at 403-04.

287. See *infra* Appendix 2 R. 4.2 cmt. 7.

I. GUIDANCE FOR COMMUNICATIONS THAT ARE PERMITTED

Our proposed modifications will increase the number of direct communications that are permitted under Rule 4.2. Our final proposed change to the Rule's text emphasizes that in the course of all permissible communications, a lawyer is prohibited from taking any action that will undermine the effectiveness of the represented person's client-lawyer relationship, such as seeking information covered by the attorney-client privilege, causing the represented person to doubt a lawyer's effectiveness, or negotiating a settlement with the represented person.²⁸⁸ Already, Rule 4.4 requires attorneys to refrain from "using methods of obtaining evidence that violate the rights of third persons."²⁸⁹ Case law has interpreted this provision as requiring attorneys engaging in ex parte communication to take precautions against disclosures of privileged information.²⁹⁰ In addition, we propose adding the following new paragraph to Model Rule 4.2's text:

(b) A lawyer engaged in communication permitted by this Rule shall not seek or obtain information protected by the attorney-client privilege or work-product immunity, and shall comply with the standard of conduct set forth in Rule 4.3.²⁹¹

Model Rule 4.3, which addresses communications by unrepresented persons, requires a lawyer to identify her role in a matter and her client if doing so is necessary to avoid a misunderstanding.²⁹² In a comment, we propose to clarify that this identification requirement will not apply in certain undercover investigatory activities, to ensure that this provision does not conflict with certain investigatory communications that are authorized by law and therefore permissible under the Rule.²⁹³

CONCLUSION

As the foregoing discussion demonstrates, the dominant formulation of the no-contact rule, represented by Model Rule 4.2, is inadequate to address many situations that arise in modern legal practice. Some of these problems arise because the rule's proper application is unclear; others because the rule's application is undesirable. All of these

288. See, e.g., *Orlowski v. Dominick's Finer Foods, Inc.*, 937 F. Supp. 723, 728 (N.D. Ill. 1996); S.C. Ethics Op. 01-01 (2001); *District of Columbia's Lawyers May Contact Opponent's Unrepresented Former Employees*, 15 *Laws. Man. on Prof. Conduct Current Rep. (ABA/BNA)* 67, 67-68 (1999); *Ex Parte Interview of Former Employee May Not Probe Talks with Corporate Counsel*, 17 *Laws. Man. on Prof. Conduct Current Rep. (ABA/BNA)* 256, 256 (2001).

289. MODEL RULES OF PROF'L CONDUCT R. 4.4 (2008).

290. *Dubois v. Gradco Sys., Inc.*, 136 F.R.D. 341, 347 (D. Conn. 1991); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 91-359 (1991).

291. See *infra* Appendix 2 R. 4.2(b).

292. MODEL RULES OF PROF'L CONDUCT R. 4.3.

293. See *infra* Appendix 2 R. 4.2 cmt. 14.

problems are rooted in the breadth of Model Rule 4.2's prohibition and the open-ended terms of its exceptions.

Just as other ethical rules have been modified and qualified to acknowledge and balance competing duties and interests, so too should the no-contact rule be reformed. In furtherance of this goal, this Article has proposed modifications to the text and comments of Model Rule 4.2, the full amended version of which can be found in Appendix 2. The proposed changes to the text: (1) clarify the meaning of the "authorized by law" exception, (2) articulate new exceptions to the Rule to avoid unjust applications, (3) revise the test for application of the Rule in the organizational context, and (4) offer guidelines for communications that occur under any of the Rule's exceptions. The proposed changes to the comments clarify these modifications to the Rule's text and, among other things, offer guidance as to the Rule's application to lawyers who are parties to a matter and to class actions. Together, these changes aim to implement the no-contact rule's proper purpose—protecting the client-lawyer relationship to the greatest extent consistent with legitimate implicated interests—those of the client, the adversary, the court, and the legal system as a whole.

APPENDIX I: ABA MODEL RULE 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 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.

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 uncounseled 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 the 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 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.

APPENDIX 2: PROPOSED RULE 4.2

COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) A lawyer participating in a matter shall not communicate about the matter with a person the lawyer knows to be represented by another lawyer in the matter, unless:

- (1) the other lawyer consents to the communication;
- (2) the communication is authorized by law or a court order;
- (3) the communication is necessary in light of what the lawyer reasonably believes to be an emergency;
- (4) the represented person is a public officer or agency and the communication is either consented to by the public officer or agency or is in writing with a copy sent to the other lawyer; or
- (5) the represented person initiates the communication, a fact that is confirmed in writing.

(b) A lawyer engaged in communication permitted by this Rule shall not seek or obtain information protected by the attorney-client privilege or work-product immunity, and shall comply with the standard of conduct in Rule 4.3.

(c) A communication is authorized by law when it is in connection with:

- (1) a lawful investigation by or under authority of a public law enforcement or regulatory agency;
- (2) transmittal of legally required or permitted notice, such as service of process;
- (3) an investigative procedure permitted by public policy, notwithstanding that it involves an element of deception, such as by discrimination testers.

(d) Where an organization is represented by a lawyer in a matter, this Rule applies to communication with a current constituent of the organization:

- (1) who supervises or directs the organization's lawyer;
- (2) who substantially participates in, or has authority to obligate the organization with respect to, the representation; or
- (3) whose acts or omissions materially contributed to the matter underlying the representation.

COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting the client-lawyer relationship against interference by other lawyers participating in the matter. It protects against another lawyer's influence that might undermine a client's confidence in his or her lawyer and lead a client to disclose privileged or confidential

information, to refrain from pursuing certain claims, to agree to a settlement, or to take other action without the advice of counsel. This Rule's protections are not unlimited, however, and must be balanced with the role of informal investigation and fact-finding in limiting costs, substantiating claims, and promoting legitimate law enforcement activities within the legal system.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the scope of 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 unrelated matters or matters outside of the scope of the representation. 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.

[4] A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Where authorized by law, however, government lawyers may advise law enforcement officials about communications with a represented person prior to the filing of a formal criminal charge or civil complaint against or the arrest of the person in the matter. Non-lawyer 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.

[5] This Rule applies to a lawyer who is a party to a proceeding in the same manner as it does to a lawyer representing a client.

[6] In the case of a represented organization, consent of the organization's lawyer is not required for communication with a former constituent unless the former constituent is represented by the organization's lawyer through an independent engagement or unless a lawyer knows or reasonably should know that the former constituent's conduct materially contributed to the matter underlying the representation. In communicating with a former constituent, a lawyer shall not seek to elicit privileged or confidential information. If a constituent of the organization is represented in the matter by his or her own lawyer, consent by that lawyer 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.

[7] Once a proceeding has been certified as a class action and any opt-out period has expired, members of the class are considered represented persons for purposes of this Rule. Prior to that time, only those members of the class with whom the class's lawyer maintains a personal client-lawyer relationship are considered represented persons.

[8] Communications authorized by law include communications that a lawyer is authorized to make under Federal and state constitutional law, statute, agency regulation having the force of law, or decision or rule of a court of competent jurisdiction. Communications authorized by law may 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 has other legal obligations, such as those protecting constitutional rights of an accused.

[9] 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 the represented person's lawyer is abusing this Rule, where a lawyer has been unable to contact the represented person's lawyer, or where a public policy rationale strongly supports a waiver of this Rule.

[10] Communications necessary in light of what the lawyer reasonably believes to be an emergency include communications that the lawyer believes necessary to address an imminent and reasonably certain risk of death, substantial bodily harm or compromised personal safety. They may also include communications that the lawyer believes necessary to address an imminent risk of harm to the financial interests or property of another, in furtherance of which the lawyer's client used the lawyer's services. See Rule 1.6. Where the risk of harm is not imminent, a lawyer should seek a court order prior to engaging in the communication.

[11] Communications with a public officer or agency permitted under this Rule include those by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government under Federal or state law. This exception does not encompass communications regarding imminent or pending litigation, nor does it apply to a public official who is potentially personally liable in the matter in question.

[12] A represented person, including a constituent of a represented organization, may waive the protections of this Rule by initiating the communication with the lawyer. A lawyer involved in a matter who is contacted by a represented person in the matter shall confirm the represented person's communication in writing.

[13] 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. In the context of organizational representation, the prohibition on communications applies where the lawyer knows or reasonably should know that a constituent is in a position within the organization to be classified as a represented person. This means that the lawyer has actual knowledge of the constituent's position or that a lawyer of reasonable prudence and competence would have actual knowledge in the same circumstances. See Rule 1.0(j).

[14] When a lawyer communicates with a person not known to be represented by counsel or with a represented person under an exception to this Rule, the lawyer's communications are subject to Rule 4.3. When engaging in undercover investigatory communications authorized by law, however, a lawyer is not required to identify the lawyer's identity and role in the matter.
