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**Representative Government, Represented Government,**

**and the No-Contact Rule**

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**Representative Government, Represented Government,**

**and the No-Contact Rule**

Phillip M. Sparkes[[1]](#footnote-1)\*

Rule 4.2 of the Model Rules of Professional Conduct is the so-called “no-contact” or “anti-contact” rule. It provides:

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.[[2]](#footnote-2)

There is nothing in the model rule to suggest that an attorney’s communications with the government are exempt from the ethical constraints it imposes or that an attorney for the government is exempt from its strictures. However, construed strictly the rule would inhibit the free exchange of information between the government and the people, as well as the business of government itself. The struggle, then, is to figure out how the rule should apply to the government context. The discussion that follows considers some the tensions inherent that aspect of the rule.

I. Introduction

The rule has deep roots in our adversary system.[[3]](#footnote-3) The original ABA Canons of Professional Ethics included a no-contact rule.[[4]](#footnote-4) Later, the ABA Model Code of Professional Responsibility contained a provision[[5]](#footnote-5) substantially the same as that in the ABA Model Rules and set out the central proposition on which all of the anti-contact rules have rested: “The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel.”[[6]](#footnote-6) The Restatement (Third) of the Law Governing Lawyers also formulates a no-contact rule,[[7]](#footnote-7) although one somewhat different from that in the Model Rules. Despite its deep roots and the general acceptance of its core rationale, the rule nevertheless has been and remains a source of controversy,[[8]](#footnote-8) sometimes especially so in the governmental context.

The purposes of the rule are to protect the represented person against overreaching by adverse counsel, to safeguard the client-lawyer relationship from interference by adverse counsel, and to reduce the likelihood that clients will disclose privileged or other information that might harm their interests.[[9]](#footnote-9) As with many other ethical rules, its focus on protecting the client complicates matters pertaining to a government client. As Professor Patterson explained, “The ultimate source of the rules of legal ethics is the lawyer-client relationship. The paradigm of that relationship is one lawyer, one client and the lawyer’s first duty is to serve and protect the interests of that client…. The structure of the lawyer’s relationship to the government client is not so simple.”[[10]](#footnote-10) For the lawyer with a government client, the generally poor fit of the Model Rules is exacerbated in the case of Model Rule 4.2 because its version of the no-contact rule is overbroad and ambiguous in many important respects.[[11]](#footnote-11)

One can break Model Rule 4.2 into at least eight component parts: a condition – in representing a client; five elements of a general rule – (1) a lawyer (2) shall not communicate (3) about the subject of the representation (4) with a person (5) the lawyer knows to be represented by another lawyer in the matter; and two exceptions – unless the lawyer (1) has the consent of the other lawyer or (2) is authorized to do so by law or a court order. Although the components vary in their complexity, breaking out the rule this way provides a convenient framework for considering the issues that arise in the rule’s application in the government context. In turn, each component must be considered from two perspectives, that of the lawyer representing the government and that of the lawyer representing a client dealing with the government.

II. Representing a Client

The condition presents more difficulty than might first appear. For the lawyer representing the government, of course, there is the perennial debate about exactly who is the client. Many writers have offered suggestions as to the identity of the government lawyer’s client, among them Professor Cramton who sums up the possibilities as “(1) the public, (2) the government as a whole, (3) the branch of government in which the lawyer is employed, (4) the particular agency or department in which the lawyer works, and (5) the responsible officers who make decisions for the agency.”[[12]](#footnote-12) As the Restatement (Third) of the Law Governing Lawyers acknowledges, no universal definition of the client of a government lawyer is possible.[[13]](#footnote-13)

For the lawyer dealing with the government, Model Rule 4.2 clearly applies when the lawyer is representing another private individual or a private organization. What is less clear is whether the rule also applies where a lawyer is the principal acting pro se for his or her own interest. An example might be the lawyer who seeks a variance to install a deck on the lawyer’s personal residence or the lawyer who contests an assessment. Hazard and Irwin suggest that in such instances lawyers have legitimate interests in being treated like any other person.[[14]](#footnote-14) Although the Restatement (Third) expressly excepts from the general no-contact rule the lawyer who “is a party and represents no other client in the matter,”[[15]](#footnote-15) the model rule does not. Hazard and Irwin are sympathetic to the view of the Nevada court which explained that the lawyer, when proceeding pro se, “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.”[[16]](#footnote-16) Courts and ethics committees, however, remain split on the proper application of the rule in such situations.[[17]](#footnote-17) Also unclear is how the rule should apply where a lawyer represents a government client against another lawyer’s government client – for example, a mayor in a dispute with a city council or a planning board in a dispute with a housing authority.[[18]](#footnote-18)

III. A Lawyer

The first element of the general rule makes clear that it governs lawyers. It does not govern clients. Principals may communicate directly with each other,[[19]](#footnote-19) although the lawyer-principal must be circumspect for the reasons discussed in Part II above.

When read in connection with Model Rule 8.4, which provides that a lawyer may not violate a rule through the acts of another, Model Rule 4.2 applies as a practical matter not only to lawyers but to persons under the lawyer’s supervision or control or acting at the lawyer’s direction (which could include a client in some instances).[[20]](#footnote-20) Lawyers representing the government and lawyers representing persons dealing with the government both must be alert to this aspect of the rule. An example where this comes into play is in the use of undercover investigators. The use of undercover investigators in civil and criminal law enforcement is discussed in Part VII below.

IV. Communication

The rule does not define what it means to “communicate.” The rule applies to all forms of communication.[[21]](#footnote-21) Merely observing a party conducting its affairs, however, would not be “communicating.”[[22]](#footnote-22) Thus, attendance at an open meeting without more would not constitute a communication. Neither would the adventitious receipt of information from someone who has spoken with the represented person independently be a communication within the scope of the rule.[[23]](#footnote-23)

One potential problem for the organizational client is broadcast communications to employees. One can imagine a city’s personnel director distributing a policy manual to all employees that touches upon issues currently being contested by one or more employees. Such instances are often analyzed under the subject-of-the-representation or authorized-by-law components discussed below.

V. Subject of the Representation

Model Rule 4.2 is inapplicable if a communication concerns a matter separate from the subject of the representation. The rule then does not operate to prevent a lawyer representing a person disputing a citation before a local government’s code enforcement bureau from contacting the city on the same person’s behalf to secure a parade permit or to make a freedom of information request. Neither does the rule apply to social, business, or other relationships unrelated to the representation.[[24]](#footnote-24)

VI. Represented Persons

The government is an organizational client[[25]](#footnote-25) which, like other organizational clients, is a person within the scope of the rule. Organizations, however, can speak and act only through natural persons. Therefore, in the usual situation where an organization is the client, certain persons within the organization will also be off-limits under Model Rule 4.2.[[26]](#footnote-26) In the case of the non-governmental organization, what is now Comment 7 says that the 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.”[[27]](#footnote-27) The former Comment 4 to the 1995 version of the rule articulated a broader view.[[28]](#footnote-28) Various other approaches have been suggested as well.[[29]](#footnote-29) Given the difficulty of applying Model Rule 4.2 to the private organizational client, it is not surprising that the rule presents similar difficulties in its application to the government.

As the Restatement points out, if a broad no-contact rule were applied to dealings with a government agency, any disputed matter could be pursued with safety only through the agency’s lawyer.[[30]](#footnote-30) The Restatement avoids this problem by creating an express exception premised on the notion that the government’s need for the broad protection of the no-contact rule is “dubious.”[[31]](#footnote-31) Model Rule 4.2, however, applies to communication with government officials and employees on the same terms as it applies to communications with any private organization.[[32]](#footnote-32) It tries to avoid the problem through the cryptic authorized-by-law exception discussed below.

In its use of the word “constituent,” Comment 7 to Model Rule 4.2 purposefully evokes Model Rule 1.13.[[33]](#footnote-33) As used in Rule 1.13, “constituent” denotes someone with a legal relationship to the organization.[[34]](#footnote-34) Under Comment 4 to the 1995 version of Rule 4.2, there was a question whether the rule applied to former constituents of an organization. In its use of the term “constituent,” Comment 7 first implies what it then makes explicit: “Consent of the organization’s lawyer is not required for communication with a former constituent.”[[35]](#footnote-35) The rationale for this is twofold. First, to the extent that the purpose of Model Rule 4.2 is to safeguard the client-lawyer relationship, that relationship is not implicated in the case of the former employee. Second, “one can no longer assume that the organization and the former constituent share the unity of interest that might be accepted as a justification for allowing the organization’s lawyer to control communication.[[36]](#footnote-36)

Previously, there was debate about whether Model Rule 4.2 applied to communication with former officers and employees.[[37]](#footnote-37) Current Comment 7 asserts, “[c]onsent of the organization’s lawyer is not required for communication with a former constituent.”[[38]](#footnote-38) The Restatement agrees that contact with a former officer or employee ordinarily is permitted, even if the person had formerly been within a category of persons with whom contact was prohibited.[[39]](#footnote-39) The reasons are twofold. One is that the former constituent is no longer acting for the organization and so does not implicate the client-lawyer relationship the rule seeks to protect. The other is that one cannot assume that the organization and the former constituent share the unity of interest that would justify allowing the organization’s lawyer to control communication.[[40]](#footnote-40)

Another purpose underlying Model Rule 4.2 is to reduce the likelihood that clients will disclose privileged or other information that might harm the client’s interests. Nevertheless, it is possible that former constituents might disclose privilege information. For that reason, some courts and bar association ethics committees take the position that consent of the organization’s lawyer is required if the former employee possesses privileged or confidential information, if the former employee’s act could be imputed to the organization for purposes of criminal or civil liability, or if the former employee participated in the organization’s legal representation.[[41]](#footnote-41)

VII. Knowledge of Representation

For the rule to apply, the lawyer must “know” that the person contacted is represented by another lawyer in the matter. As Comment 8 explains, the rule only applies where “the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances.”[[42]](#footnote-42) The lawyer representing a private client dealing with the government would do well to assume that “[t]he government is always represented by counsel.”[[43]](#footnote-43)

One of the more frequently discussed situations involving government attorney contact with represented persons involves law enforcement investigations[[44]](#footnote-44) and prosecutors’ pre-indictment communicating with represented suspects.[[45]](#footnote-45) Taken literally, Model Rule 4.2 would prevent lawyers in either civil or criminal cases from participating in undercover operations.[[46]](#footnote-46) The undercover investigators would be misrepresenting whom they represent and their real purpose.[[47]](#footnote-47) Further, the investigators would be contacting persons who are represented by lawyers. Undercover investigations are discussed in Part IX below.

VIII. Consent of the Other Lawyer

Model Rule 4.2 contains two exceptions to the no-contact rule, the first of which permits a lawyer to contact a represented person when the lawyer “has the consent of the other lawyer.” In a sense, this first exception is merely formal.[[48]](#footnote-48) However, there is at least one instance in the government context where it is appropriate to ask whose consent is required. Take the example of a city official who is a defendant in a civil rights action in both his official and personal capacities. It is common in such instances for the official to be represented in his official capacity jointly with the city by the city’s attorney and to be represented in his private capacity by his own attorney. How is the rule applied when a constituent retains separate counsel in a matter? Comment 7 answers, “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.” The communicating lawyer does not have to secure the consent of the city’s lawyer as well.[[49]](#footnote-49)

IX. Authorized by Law or Court Order

If the first exception is merely formal; the second is “opaque.”[[50]](#footnote-50) What communications are authorized by law is not clear from the rule itself.[[51]](#footnote-51) However, Comment 5 offers two illustrations. One is “investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.”[[52]](#footnote-52) The other is “communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate withthe government.”[[53]](#footnote-53)

A. Investigative Activities

The application of Model Rule 4.2 to criminal investigations has had a long and contentious history.[[54]](#footnote-54) The Restatement notes that on the one hand “[r]igidly applying the anti-contact rule to prosecutors would create unfortunate incentives to eliminate them from involvement in investigations” while on the other hand the temptation for prosecutors to overreach or interfere in client-lawyer relationships in order to solve a crime argues in favor of an anti-contact rule for prosecutors.[[55]](#footnote-55) Not surprisingly then, courts have been somewhat divided in their application of the rule to criminal investigations.[[56]](#footnote-56)

The issue has been particularly contentious with respect to its application to federal prosecutors. The issue gained prominence after the decision in *United States v. Hammad*,[[57]](#footnote-57) which held that the no-contact rule not only applied criminal prosecutions as well.[[58]](#footnote-58) The case also held that the prosecutor in the case had violated the no-contact rule. This case was the catalyst for the Department of Justice’s unsuccessful attempt to seek exemption from the ethical rule.[[59]](#footnote-59)

A number of court decisions, mainly involving the conduct of undercover investigators or informants acting in concert with prosecutors, have limited the applicability of the no-contact rule in the criminal context. Some decisions hold it wholly inapplicable to all pre-indictment non-custodial contacts[[60]](#footnote-60) while others hold it inapplicable to some such contacts by informants or undercover agents.[[61]](#footnote-61)

As noted above, Comment 5 contemplates that the authorized-by-law exception applies to civil enforcement proceedings as well as to criminal enforcement proceedings. Examples of civil enforcement proceedings would include the use of civil rights “testers” to gather evidence of discrimination in employment, housing, or public accommodations.[[62]](#footnote-62) Courts have upheld the legality of this practice and concluded that lawyer direction and involvement in the process is authorized bylaw and permissible under the no-contact rule.[[63]](#footnote-63) However, some courts distinguish between criminal and civil investigations, disapproving deceptive undercover civil investigations.[[64]](#footnote-64) At least one court has gone further, accepting the argument that lawyers – whether in private or government practice – may not misrepresent their identity or purpose in investigating either a civil or criminal matter.[[65]](#footnote-65)

B. Exercising a Constitutional or Other Legal Right to

Communicate withthe Government

The First Amendment to the United States Constitution guarantees “the right of the people … to petition the Government for a redress of grievances.”[[66]](#footnote-66) It is a guarantee “implicit in the concept of representative government.”[[67]](#footnote-67) Thus, Model Rule 4.2 contains “an important exception based on the constitutional right to petition and the derivative public policy of ensuring a citizen’s right of access to government decision makers.”[[68]](#footnote-68) As important as it may be, it is equally obscure.

All jurisdictions accept that direct lawyer contact with a represented government official is permissible when protected by that right.[[69]](#footnote-69) However, there is little guidance on what contact is protected. Consequently, some jurisdictions make the exception explicit in their codes of ethics.[[70]](#footnote-70) California, for example, provides that its no-contact rule does not apply to communications with a public officer, board, committee, or body.[[71]](#footnote-71) The District of Columbia Rules of Professional Conduct provide:

(d) This rule [4.2] 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, provided that in the event of such communications the disclosures specified in (b) are made to the government official to whom the communication is made.[[72]](#footnote-72)

The North Carolina Rules of Professional Conduct provide:

(b) Notwithstanding section (a) above, in representing a client who has a dispute with a government agency or body, a lawyer may communicate about the subject of the representation with the elected officials who have authority over such government agency or body even if the lawyer knows that the government agency or body is represented by another lawyer in the matter, but such communications may only occur under the following circumstances:  
(1) in writing, if a copy of the writing is promptly delivered to opposing counsel;  
(2) orally, upon adequate notice to opposing counsel; or  
(3) in the course of official proceedings.

Most state codes, like the Model Rules themselves, contain no express exception. Instead, the exception remains implicit in the rule’s recognition of contacts authorized by law.

The ABA made a conscious choice not to address communication with government officials as an ethics issue.[[73]](#footnote-73) It left the issue to be resolved by reference to other law, including the right to petition for redress of grievances.[[74]](#footnote-74) Neither ABA Formal Ethics Opinion 95-396 nor ABA Formal Ethics Opinion 97-408 provides much help in understanding when a lawyer may communicate with government officials without the consent of the government’s lawyer. As a result, some commentators have attempted to fill the void. For example, Prof. Ernest Lidge proposed a four-factor test for determining whether a given communication is authorized by law:

the specificity of the authorizing language; the inherent dangers in the communication involved; the type of “law” providing the authorization-for example, constitution, statute, court order, substantive regulation, or procedural regulation; and the policies favoring the communication.[[75]](#footnote-75)

ABA Formal Ethics Opinion 97-408 concludes that a lawyer representing a private party in a controversy with the government may “communicate directly with government decision makers in certain limited circumstances within the ambit of the right to petition, even though it would in the same circumstances prohibit communication with a represented private person or organization without consent of counsel.”[[76]](#footnote-76) Such contacts are, however, subject to two important conditions. First, the government official to be contacted must have authority to take or recommend action in the controversy, and the sole purpose of the communication must be to address a policy issue, including settling the controversy.[[77]](#footnote-77) Second, the lawyer for the private party must always give government counsel advance notice that it intends to communicate with officials of the agency to afford such officials an opportunity to discuss with government counsel the advisability of entertaining the communication.[[78]](#footnote-78)

The Restatement takes an approach different from that of the ABA. Section 101 provides that the general no-contact rule “does not apply to communications with employees of a represented governmental agency or with a governmental officer being represented in the officer’s official capacity.”[[79]](#footnote-79) It then creates an exception to this partial exception where the government client is represented with respect to negotiation or litigation of a specific claim and the contact does not involve an issue of general policy.[[80]](#footnote-80)

The Restatement’s position is that the no-contact rule should be limited in its application to those instances in which the government is in a position “closely analogous” to that of a private litigant.[[81]](#footnote-81) It describes that position as “an appropriate compromise between the more extreme positions of either applying the anti-contact rule broadly to governmental clients or making the rule inapplicable in all such instances.”[[82]](#footnote-82) Courts have reached decidedly different results in applying Rule 4.2 to governmental entities.[[83]](#footnote-83)

X. Conclusion

Model Rule 4.2 presents a myriad of challenges in its application to the governmental context. While the rule generally protects represented government entities from unconsented contacts by opposing counsel, it contains an important exception based on the constitutional right to petition and on the derivative public policy of ensuring a citizen's right of access to government decision makers. State and local ethics committees, case law, and other authority vary widely in their understanding and application of that exception. It is important for the practitioner to consult those sources.

**APPENDIX A**

**ABA Model Rules of Professional Conduct**

**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 uncounselled disclosure of information relating to the representation.

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

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that 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 withthe 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 B**

American Bar Association Formal Ethics Opinion 97-408

COMMUNICATION WITH GOVERNMENT AGENCY REPRESENTED BY COUNSEL

August 2, 1997

Model Rule 4.2 generally protects represented government entities from unconsented contacts by opposing counsel, with an important exception based on the constitutional right to petition and the derivative public policy of ensuring a citizen's right of access to government decision makers. Thus Rule 4.2 permits a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or to recommend action in the matter, provided that the sole purpose of the lawyer's communication is to address a policy issue, including settling the controversy. In such a situation the lawyer must give government counsel reasonable advance notice of his intent to communicate with such officials, to afford an opportunity for consultation between government counsel and the officials on the advisability of their entertaining the communication. In situations 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, Rule 4.2 prohibits communication without prior consent of government counsel. ABA Informal Opinion 1377 (1977) is limited to the extent of the conclusions in this opinion.

Opinion

In this opinion the Committee addresses whether a lawyer who is representing a private party in a controversy with a government entity may communicate about the matter with responsible government officials without the prior consent of government counsel. The question presented is whether and to what extent Model Rule 4.2 (the "no-contact" rule) applies to a lawyer's communications with government officials. The text of Rule 4.2[[84]](#footnote-84) applies its prohibition equally to all represented persons, including both private and public organizational entities; however, its commentary appears to contemplate that some communications by a lawyer with officials of a represented government entity may be permissible, under the "authorized by law" provision of the Rule, as an extension of the right to petition government for redress of grievances guaranteed by the First Amendment to the United States Constitution and analogous provisions of state constitutions.

Balancing the interests served by the no-contact rule against the constitutionally-based policy favoring citizen access to government decision makers, the Committee concludes that Rule 4.2 does not prohibit a lawyer representing a private party in a controversy[[85]](#footnote-85) with the government from communicating directly with governmental officials who have authority to take or recommend action in the matter, provided the communication is solely for the purpose of addressing a policy issue, including settling the controversy. To give effect to the purposes of Rule 4.2 even in this situation, however, the Committee concludes that the lawyer must afford government counsel reasonable advance notice of an intent to communicate, in order to afford an opportunity for the officials to obtain advice of counsel before entertaining the communication. In situations where the right to petition has no apparent applicability, such as interviews with government fact witnesses to develop evidence for use in litigation, Rule 4.2 applies to a lawyer's communications with officials of a represented government entity in the same way that it applies to a lawyer's communications with officials of a private organization, and no communication is therefore permitted except with consent of counsel.

Discussion

The rationale and application of the no-contact rule in Model Rule 4.2 was recently reviewed in depth by this Committee in Formal Opinion 95-396. There the Committee reaffirmed the key proposition upon which the no-contact rule rests, as articulated in EC 7-18 of the predecessor Model Code of Professional Responsibility, that "[t]he legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel." Id. at 5. Implementing this concept, the no-contact rule "provide[s] protection of the represented person against overreaching by adverse counsel, safeguard[s] the client-lawyer relationship from interference by adverse counsel, and reduce[s] the likelihood that clients will disclose privileged or other information that might harm their interests." Id. The question addressed in this opinion is whether and to what extent represented government entities are afforded the protections of the no-contact rule.[[86]](#footnote-86)

The text of Rule 4.2 does not define the "persons" with whom ex parte contact is forbidden, but the commentary makes clear that the rule's protections extend to represented organizations as well as individuals. See Rule 4.2 Comment [4]. Moreover, Comment [1] refers to a controversy between "a government agency and a private party," reflecting an expectation that the represented organizations protected from ex parte contacts would include public, as well as private, organizational entities.[[87]](#footnote-87) At the same time, the commentary to Rule 4.2 also contemplates that some communications with representatives of government entities that the rule would otherwise forbid may nonetheless be permitted because they fall within the "authorized by law" exception to the rule: "Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter." Rule 4.2 Comment [1]. While this somewhat cryptic formulation might arguably be intended only to indicate that exceptions to Rule 4.2 may be created by "law" external to it, including constitutional law, we think it is better understood as an indication that the rule itself has a limited application in situations where a citizen has a constitutional right to communicate directly with a government decision maker.[[88]](#footnote-88)

In sum, the Committee finds no basis in the text of Rule 4.2 or its commentary for concluding that governmental agencies are categorically excluded from the class of represented "persons" protected by the rule. There is some evidence in the commentary that they were intended to be included in that class, at least as a general matter, but other evidence in the commentary of an intention that the application of the rule be limited where communications with government officials are concerned.

Most state bar associations and courts that have considered the issue are in agreement that the no-contact rule generally applies where lawyers for private parties seek to communicate about a controversy with governmental officials.[[89]](#footnote-89) However, most jurisdictions have also interpreted the rule to accommodate the constitutional right to petition and the derivative public policy of ensuring a citizen's right of access to government decision makers.[[90]](#footnote-90) Two jurisdictions, California and the District of Columbia, provide specific exceptions to the no-contact rule that limit its application where represented government entities are concerned.[[91]](#footnote-91) Many commentators argue that the no-contact rule has limited, if any, application to contacts with represented government entities, in light of First Amendment considerations.[[92]](#footnote-92)

The Committee agrees with the weight of authority that Rule 4.2 is generally applicable to communications by lawyers with represented government entities. We see no basis for categorically exempting government entities from the protection afforded by the no-contact rule where such entities have chosen to deal with a particular controverted issue through legal counsel. At the same time, we also agree that the no-contact rule must not be applied so as to frustrate a citizen's right to petition, exercised by direct communication with government decision makers, through a lawyer.[[93]](#footnote-93) In the words of one recent bar committee opinion, "government lawyers should not be able to block all access to government officials to the point of interfering with the right to petition for redress, [but] neither should attorneys [for private parties] be allowed to approach uncounselled public officials who 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." New York City Bar Opinion, supra note 7 at 5. See also D.C. Rule 4.2(d) and Comment [7], quoted in note 8, supra.

The Committee therefore concludes that Rule 4.2 permits a lawyer representing a private party in a controversy with the government to communicate directly with government decision makers in certain limited circumstances within the ambit of the right to petition, even though it would in the same circumstances prohibit communication with a represented private person or organization without consent of counsel.

Recognizing the uncertain parameters of the constitutional right to petition and the limited scope of our own jurisdiction to opine on questions of law, the Committee believes that the most responsible way of accommodating the tension between a citizen's right of access and the government's right to be protected from uncounselled communications by an opposing party's lawyer, is to make all unconsented contacts with government officials that would otherwise be prohibited by the no-contact rule subject to two important conditions.

First, the government official to be contacted must have authority to take or recommend action in the controversy, and the sole purpose of the communication must be to address a policy issue, including settling the controversy.[[94]](#footnote-94)

Second, because of the predictable difficulty of confining the scope of the communication to policy issues where a contacted official is also a potential fact witness, and in recognition that the government has a right to the active participation of its lawyers even where the right to petition applies, the Committee believes it essential to ensure that government officials will have an opportunity to be advised by counsel in making the decision whether to grant an interview with the lawyer for a private party seeking redress. Thus the lawyer for the private party must always give government counsel advance notice that it intends to communicate with officials of the agency to afford such officials an opportunity to discuss with government counsel the advisability of entertaining the communication. When the lawyer for the private party wishes to communicate in writing with government officials, the policy of fairness embodied in the rule also dictates that the lawyer must give government counsel copies of the written material at a time and in a fashion that will afford her a meaningful opportunity to advise the officials whether to receive the communication from the lawyer for the other side. This approach balances the constitutionally favored policy of affording direct access to government decision makers against the government's need to protect itself from overreaching by lawyers for private parties. Requiring the lawyer to give advance notice of an intended communication gives the government the benefit of most of the rule's salutary purposes, while obviating the possibility that government counsel could attempt to block access to their principals by invoking a rule of professional conduct.[[95]](#footnote-95)

In situations where the right to petition has no apparent applicability, either because it is not the sole purpose of the contact to address a policy issue or because the government officials with whom the lawyer wishes to communicate are not authorized to take or recommend action in the matter, Rule 4.2 should be considered fully applicable to a lawyer's communications with officials of a represented government entity, just as it would apply to a lawyer's communications with officials of a private organization. In such situations, no communication by the lawyer is permitted except with consent of counsel.

To illustrate, the lawyer for a private party in a lawsuit against a municipality may seek a meeting with a committee of the City Council for the purpose of discussing settlement of the issues that the Council has the power to settle, but she must give sufficient advance notice to the lawyer designated to represent the City in the suit to enable the City lawyer to consult the Council committee and be present at the meeting if the Council committee desires this, or to advise the Council committee against agreeing to such a meeting. The lawyer may also write directly to members of the Council committee on behalf of her client, but must provide the City's lawyer with an advance copy of the letter. We note in this regard that many situations in which a lawyer might reasonably want to communicate directly with government decision makers are likely to be ones in which Rule 4.2 either does not apply at all because no specific controversy between the government and the private client has yet developed,[[96]](#footnote-96) or are ones specifically superseded by a statute authorizing citizen communications with government officials. See note 5, supra.

In contrast, Rule 4.2 would generally forbid a lawyer representing a private party in a controversy with the government from making an ex parte contact with government officials who are not authorized to take or recommend action in the matter, or where the purpose of the communication is to develop evidence as well as address a policy issue. As an example, the lawyer for a private party interested in conducting a factual inquiry for use against the government in litigation would not be permitted to communicate with certain agency officials[[97]](#footnote-97) without government counsel's consent. See ABA Informal Opinion 1377 (1977).[[98]](#footnote-98)

Conclusion

The Committee concludes that Rule 4.2 generally protects represented government entities from unconsented contacts by opposing counsel, with an important exception based on the constitutional right to petition and the derivative public policy of ensuring a citizen's right of access to government decision makers. Rule 4.2 permits a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials having authority to take or to recommend action in the matter, provided that the sole purpose of the communication is to address a policy issue, including settling the controversy. In such a situation the lawyer must give government counsel reasonable advance notice of his intent to communicate with such officials in order to afford them an opportunity to seek advice of counsel before deciding whether to entertain the communication. In situations where the right to petition has no apparent applicability, either because of the position and authority of the officials sought to be contacted or because of the purpose of the proposed communication, Rule 4.2 prohibits communication without prior consent of government counsel.

The Committee emphasizes that the views expressed in this opinion relate solely to whether or not the communications described are ethically proper under Model Rule 4.2. Although disciplinary agencies should allow the exceptions noted, state and local ethics committees, case law, or other authority may impose different standards and must be consulted. And, where case law does not establish the parameters of the right of the client or his lawyer to petition for redress of grievances, the private party's lawyer would be well advised to obtain court approval to interview a government official where a matter is in litigation.[[99]](#footnote-99)

Concurrence

This opinion is the extension of our opinion 95-396 (1995). In that opinion, six of the ten members of our committee interpreted the scope of Model Rule 4.2 which prohibits a lawyer from communicating with a person represented by another lawyer where the communication relates to that representation. I felt compelled to dissent from that opinion and asserted that it was "overbroad and obstructs the legitimate search for the facts and truth in civil litigation."  
The main thrust of the majority opinion in 95-396 was their concern that government lawyers in the criminal context might initiate contacts with represented persons. The majority argued such contacts should be proscribed "based upon the constitution and concern for the rights of criminal defendants which might be overwhelmed by the resources of law enforcement agencies." My dissent contended that by the across the board application of Model Rule 4.2 to both criminal and civil litigation the majority had "thrown out the baby with the bathwater."

Now our committee addresses an issue ancillary to that opinion by applying Model Rule 4.2 to the represented individual whose adversary is a government entity which is represented by counsel. My concern is that this opinion affords the government a degree of insulation that may be inconsistent with an attorney's obligation to her client in situations where the government's excessive zeal has placed the client's life, liberty or property at risk. The majority's insistence that Model Rule 4.2 imposes a reciprocal obligation upon both the government's lawyers and their private counterparts simply does not take into account either the disparity of power and resources between them or the fact that the government is the representative of society at large and not just another litigant committed to advancing a private interest by prevailing in a particular dispute. In light of those considerations, our expectations, and sometimes the law, governing the conduct and obligations of government and private attorneys may not always be so neatly symmetrical.

For instance, in a criminal case we would expect the government attorney to terminate a prosecution if she learns or becomes convinced that the defendant is innocent of the charge. Clearly, there is no reciprocal bar to the defense attorney's continuing to mount a defense despite knowledge of the client's guilt. In that same context, the government's Brady obligation requires its lawyers to disclose exculpatory information while there is no reciprocal requirement that the defendant's attorney disclose inculpatory information. In the context of civil litigation, as well, the government ought to be constrained by considerations of fairness and justice which transcend the merely tactical limitations presented by the particulars of a lawsuit. All too often, such is not the case and it is left to the private attorney, faced with the government's overwhelming advantage in power and resources, to attempt as best she can to level the playing field in order to effectively defend her client. In such circumstances, the most vigorous, dedicated, perhaps even aggressive, form of representation is required.

Model Rule 4.2 seeks a salutary goal and, with rare exceptions and only in the most extreme instances of governmental excess, must be the standard by which a lawyer's conduct should be judged. But there must be a safety valve. We should recognize that, however infrequent, overzealousness by government lawyers in pursuing their perceived goals undermines the viability of our system of justice and democracy. I am concerned that 97-408 ignores the fact that there have been unfortunate episodes in our history when the government's agents have not always acted well or in the public's best interest. When such circumstances arise, all lawyers have a continuing obligation to act with "commitment and dedication to the interest of the client and with zeal in advocacy on the client's behalf." Model Rule 1.3 Comment [1].

In conclusion, I wish to confront any suggestion that my unease with the majority's opinion is motivated by anti-government concerns. Nothing could be further from the truth. I just cannot close my eyes to the fact that history is replete with examples of governmental excess and overreaching. Our profession has uniquely honored lawyers who, in the defense of justice and the rights of individual citizens, have interposed themselves between the awesome power of government and their clients, often at great personal risk to themselves. This concurrence does nothing more than provide such an attorney with the opportunity to argue necessity and justification should a disciplinary proceeding be brought against her on the authority of this opinion.  
  
Richard L. Amster

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I view the concurring remarks of my experienced colleague Richard Amster as not inconsistent with the Committee's full opinion, and am therefore pleased to join them. Whether governmental or private clients are involved, the question whether particular, rare circumstances should justify a departure from Rule 4.2's strict prohibition depends on a case-by-case analysis properly left to individual disciplinary authorities. This Committee's mission of providing general interpretive guidance to lawyers for the normal run of cases is well-served by the main opinion.  
  
Rory K. Little

1. \* Director, Local Government Law Center, and Assistant Professor of Law, NKU Chase College of Law. B.S., Rensselaer Polytechnic Institute; J.D., DePaul University College of Law; LL.M., Notre Dame Law School. [↑](#footnote-ref-1)
2. Model Rules of Prof’l Conduct R. 4.2 (2010). The current version of the model rule and its official comments appear as Appendix A. Originally adopted in 1983 and later amended in1995, the ABA in 2005 made limited but important changes to the rule upon the recommendation of the Commission on the Evaluation of the Rules of Professional Conduct (the “Ethics 2000 Commission”). Carl A. Pierce, the Associate Reporter for the commission, described the commission’s work and evaluated the revised rule in a series of three articles: 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 (2002) (hereinafter Pierce, *Variations: Part I*); 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 (2003) (hereinafter Pierce, *Variations: Part II*); and Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA’s Revision of Model Rule 4.2 (Part III)* (hereinafter Pierce, *Variations: Part III*), 70 Tenn. L. Rev. 643 (2003). Many states have yet to adopt the current version of the rule or have crafted their own variation of it. The Cornell Legal Ethics Library provides links to state ethics codes at http://www.law.cornell.edu/ethics/. [↑](#footnote-ref-2)
3. *See* Mark H. Altman, *The Story of a Rule*, 2000 L. Rev. Mich. St. U. Det. C.L. 713 (tracing the evolution of the rule from a “rule of etiquette” to a rule of law). *See also,* John Leubsdorf, *Communicating with Another Lawyer’s Client: The Lawyer’s Veto and the Client’s Interests*, 127 U. Pa. L. Rev. 683 (1979). [↑](#footnote-ref-3)
4. ABA Canons of Prof’l Ethics Canon 9 (1908). “A lawyer should not in any way communicate upon the subject of a 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. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.” Professors Hazard and Irwin assert that Canon 9 was effectively a rule of evidence rather than a prophylactic rule. Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward a Revised 4.2 No-Contact Rule*, 60 Hastings L.J. 797, 799 (2009). [↑](#footnote-ref-4)
5. Model Code of Prof’l Responsibility DR 7-104(A)(1) (1980) (“During the course of his representation of a client a lawyer shall not: (1) [c]ommunicate or cause another to 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.”). Until its amendment in 1995, Rule 4.2 also used the term “party” rather than the term “person.” [↑](#footnote-ref-5)
6. Model Code of Prof’l Responsibility EC 7-18 (1980). In its expression of the rule’s purpose, Comment 1 to Model Rule 4.2 also emphasizes its contribution to the proper functioning of the legal system. Model Rules of Prof’l Conduct R. 4.2 cmt. 1 (2010). *See generally,* Pierce, *Variations: Part I*, *supra* note 1, at 140-47. [↑](#footnote-ref-6)
7. Restatement (Third) of The Law Governing Lawyers §§ 99-102. [↑](#footnote-ref-7)
8. Pierce, *Variations: Part I*, *supra* note 1, at 123-38. [↑](#footnote-ref-8)
9. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95-396 (1995). *See also* American Bar Association, Annotated Model Rules of Professional Conduct (5th ed.) 418-19 (2003); Restatement (Third) of The Law Governing Lawyers § 99 cmt. b; Model Rules of Prof’l Conduct R. 4.2, cmt. 1 (2010); and Hazard & Irwin, *supra* note 3, at 801-06. [↑](#footnote-ref-9)
10. L. Ray Patterson, Legal Ethics: The Law of Professional Responsibility, Pt.III-4 (1982). [↑](#footnote-ref-10)
11. Hazard & Irwin, *supra* note 3, at 798. [↑](#footnote-ref-11)
12. Roger C. Cramton, *The Lawyer as Whistleblower: Confidentiality and the Government Lawyer,* 5 Geo. J. Legal Ethics 291, 296 (1991). *See also* Catherine J. Lanctot, *The Duty of Zealous Advocacy and Ethics of the Federal Government Lawyer: The Three Hardest Questions,* 64 S. Cal. L. Rev. 951, 1004 (1991) (listing possible clients as the agency official, the agency itself, the government, and “the people.”); Robert P. Lawry, *Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question,* 37 Fed. B.J. 61 (1978), and Robert P. Lawry, *Confidences and the Government Lawyer*, 57 N.C.L. Rev. 625 (1978-79). [↑](#footnote-ref-12)
13. Restatement (Third) of the Law Governing Lawyers, § 97, cmt c. *See also*, Model Rules of Prof’l Conduct R. 1.13 cmt. 6 (2010). [↑](#footnote-ref-13)
14. Hazard & Irwin, *supra* note 3, at 830. [↑](#footnote-ref-14)
15. Restatement (Third) of The Law Governing Lawyers § 99(1)(b); *id.* cmt. e; Am. Bar Assoc., Annotated Model Rules of Professional Conduct (5th ed.) 426-27 (2003) (collecting sources). [↑](#footnote-ref-15)
16. Hazard & Irwin, *supra* note 3, at 199. [↑](#footnote-ref-16)
17. Hazard & Irwin, *supra* note 3, at 830-31. [↑](#footnote-ref-17)
18. The Restatement (Third) “takes the position that the application of the anti-contact rule to representations against the government should be limited to those instances in which the government stands in a position closely analogous to that of a private litigant and with respect to contact where potential for abuse is clear.” Restatement (Third) of the Law Governing Lawyers, § 101, cmt b. [↑](#footnote-ref-18)
19. Ronald D. Rotunda & John S. Dzienkowski, Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility 882-83 (2009). [↑](#footnote-ref-19)
20. *See, e.g.,* ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95-396 (1995). Part IX of the opinion, captioned “A Lawyer Is Ethically Responsible for Contacts by Investigators Acting Under Her Instructions That Would Violate the Bar if Made by a Lawyer,” addresses the circumstances where a lawyer may be held vicariously responsible if an investigator collaborating with her communicates with a represented person without the consent of the representing lawyer. For a discussion of the rule’s approach to lawyer communications through the acts of another, see Pierce, *Variations: Part II*, *supra* note 1, at 330-47. [↑](#footnote-ref-20)
21. Restatement (Third) of The Law Governing Lawyers § 99 cmt. f. [↑](#footnote-ref-21)
22. Am. Bar. Assoc. Annotated Model Rules of Professional Conduct (5th ed.) 420 (2003). [↑](#footnote-ref-22)
23. *Id.* at 419. [↑](#footnote-ref-23)
24. Restatement (Third) of The Law Governing Lawyers § 99 cmt. d. [↑](#footnote-ref-24)
25. *See* Model Rules of Prof’l Conduct R. 1.13, Organization as a Client. [↑](#footnote-ref-25)
26. Am. Bar Assoc., Annotated Model Rules of Professional Conduct (5th ed.) 424 (2003). *See also* ABA Informal Opinion 1410 (Feb. 14, 1978) (corporate officers or employees who are the “alter egos” of the corporation, are parties for purposes of the ethics rules). *Compare* Restatement (Third) of The Law Governing Lawyers § 100(2) (defining who within an organization is a “client” for the purpose of the anti-contact rule). [↑](#footnote-ref-26)
27. Model Rules of Prof’l Conduct R. 4.2 cmt. 7 (2010). “Constituent” is the term used in Rule 1.13. In the context of a governmental organization, defining who is the client, and therefore who is a constituent, is “difficult” and beyond the scope of the rules. *See* Model Rules of Prof’l Conduct R. 1.13 cmt. 6 (2010). [↑](#footnote-ref-27)
28. Rotunda & Dzienkowski, *supra* note 18, at 884-87. [↑](#footnote-ref-28)
29. See the articles collected in Pierce, *Variations: Part I*, *supra* note 1, at 153 n. 82. [↑](#footnote-ref-29)
30. Restatement (Third) of The Law Governing Lawyers § 101 cmt. b. [↑](#footnote-ref-30)
31. *Id.* [↑](#footnote-ref-31)
32. Pierce, *Variations: Part I*, *supra* note 1, at 191. [↑](#footnote-ref-32)
33. *See, e.g.,* Model Rule 1.13, Organization as a Client. Comment 6 makes clear that governmental organizations are within the rule. [↑](#footnote-ref-33)
34. Pierce, *Variations: Part I*, *supra* note 1, at155. [↑](#footnote-ref-34)
35. Model Rules of Prof’l Conduct R. 4.2 cmt. 7 (2010). [↑](#footnote-ref-35)
36. Pierce, *Variations: Part I*, *supra* note 1, at 180. [↑](#footnote-ref-36)
37. *See* James L. Burt, *Ethical Considerations Concerning Contacts by Counsel or Investigators with Present and Former Employees of an Opposing Party*, 38 St. Mary's L.J. 963 (2007). [↑](#footnote-ref-37)
38. Model Rules of Prof’l Conduct R. 4.2 cmt. 7 (2010). [↑](#footnote-ref-38)
39. Restatement (Third) of The Law Governing Lawyers § 100 cmt. g. [↑](#footnote-ref-39)
40. Pierce, *Variations: Part I*, *supra* note 1, at 186. [↑](#footnote-ref-40)
41. Pierce, *Variations: Part I*, *supra* note 1, at 180. [↑](#footnote-ref-41)
42. Rules of Prof’l Conduct R. 4.2 cmt. 8 (2010) [↑](#footnote-ref-42)
43. Ohio Adv. Op. 92-7, 1992 WL 739409 (Ohio Bd. Com. Griev. Disp.) (Apr. 10, 1992). [↑](#footnote-ref-43)
44. *See, e.g.,* Barry R. Temkin, *Deception in Undercover Investigations: Conduct-Based vs. Status-Based Ethics Analysis*, 32 Seattle U. L.R. 123 (2008); William H. Fortune, *Lawyers, Covert Activities, and Choice of Evils*, 32 J. Leg. Prof. 99 (2008); Gerald B. Lefcourt, *Fighting Fire With Fire: Private Attorneys Using The Same Investigative Techniques As Government Attorneys: The Ethical And Legal Considerations For Attorneys Conducting Investigations*, 36 Hofstra L. Rev. 397 (2007); Thomas H. Moore, *Can Prosecutors Lie?,* 17 Geo. J. Legal Ethics 961 (2004). [↑](#footnote-ref-44)
45. *See* Restatement (Third) of The Law Governing Lawyers § 99 cmt. h; ABA Center for Professional Responsibility, Annotated Model Rules of Professional Conduct, 5th ed. 427-28 (2003); William H. Edmonson, Note, *A “New” No-Contact Rule: Proposing an Addition to the No-Contact Rule to Address Questioning of Suspects After Unreasonable Charging Delays,*  80 N.Y.U. L. Rev. 1773 (2005); Terry Goddard, Submitted Prosecutors Should be Precluded from Contacting Parties Ex Parte When Those Parties are Represented by Counsel and not Charged with Criminal Offenses, 41Ariz. Att’y 43 (2005). [↑](#footnote-ref-45)
46. Rotunda & Dzienkowski, *supra* note 18, at 861. [↑](#footnote-ref-46)
47. *Id.* This also implicates Rule 8.4, which forbids a lawyer from engaging in misrepresentation including through the acts of another. [↑](#footnote-ref-47)
48. Hazard and Irwin, *supra* note 3, at 806-07. The authors suggest that no lawyer “would consent to direct contact in circumstances in which the Rule’s protective purpose is implicated.” [↑](#footnote-ref-48)
49. Pierce, *Variations: Part I*, *supra* note 1, at 182-84. [↑](#footnote-ref-49)
50. Hazard and Irwin, *supra* note 3, at 807. [↑](#footnote-ref-50)
51. It is worth remembering that it is the rule itself that is authoritative; the comments are only a guide to interpretation. Pierce, *Variations: Part I*, *supra* note 1, at 153. [↑](#footnote-ref-51)
52. Model Rules of Prof’l Conduct R. 4.2, cmt. 5 (2010). [↑](#footnote-ref-52)
53. *Id.* [↑](#footnote-ref-53)
54. Hazard & Irwin, *supra* note 3, at 806 (2009); Restatement (Third) of The Law Governing Lawyers § 99 cmt. h. [↑](#footnote-ref-54)
55. Restatement (Third) of The Law Governing Lawyers § 99 cmt. h. [↑](#footnote-ref-55)
56. See the cases collected in Restatement (Third) of The Law Governing Lawyers § 99 Reporter’s Note cmt. h. [↑](#footnote-ref-56)
57. 858 F.2d 834 (2d Cir.1988). [↑](#footnote-ref-57)
58. *See* Hazard and Irwin, *supra* note 3, at 806-18. [↑](#footnote-ref-58)
59. *See* U.S. v. Tapp, 2008 WL 2371422 \*4-19 (S.D.Ga. June 04, 2008). *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); 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); Neals-Erik William Delker, *Ethics and the Federal Prosecutor: The Continuing Conflict over the Application of Model Rule 4.2 to Federal* Attorneys, 44 Am. U. L. Rev. 855 (1995); and 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 (1996). [↑](#footnote-ref-59)
60. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95-396 (1995) at n. 23 citing United States v. Ryans, 903 F.2d 731, 740 (10th Cir.), cert. denied, 498 U.S. 855 (1990) and United States v. Heinz, 983 F.2d 609 (5th Cir. 1993). [↑](#footnote-ref-60)
61. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95-396 (1995) at n. 24 citing United States v. Jamil, 707 F.2d 638 (2d Cir. 1983) and United States v. Lemonakis, 485 F.2d 941 (D.C. Cir. 1973) cert. denied, 415 U.S. 989 (1974). [↑](#footnote-ref-61)
62. *See generally*, Ernest F. Lidge III***,*** *Government Civil Investigations and the Ethical Ban on Communicating with Represented Parties,* 67 Ind. L.J.549 (1992). *See also* Julian J. Moore, *Home Sweet Home: The (Mis)application of the Anti-Contact Rule to Housing Discrimination Testers*, 25 J. Legal Prof. 75 (2001). Commentators and courts point out that in such circumstances applying the misrepresentation rules does not further their purposes. *See* David B. Isbell and Lucantonia N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers,* 8 Geo. J. Legal Ethics 791,801-04(1995) and Apple Corps Ltd. v. International Collectors Soc, 15 F.Supp.2d 456, 475 (D.N.J. 1998), cited in Rotunda & Dzienkowski, *supra* note 18, at 866, n.24. [↑](#footnote-ref-62)
63. Hazard & Irwin, *supra* note 3, at 824 (citing Hill v. Shell Oil Co., 209 F. Supp. 2d 876 (N.D. Ill. 2001) and Gidatex, S.r.L. v. Campaniello Imps., 82 F. Supp. 2d 119, 120 (S.D.N.Y. 1999)). [↑](#footnote-ref-63)
64. Rotunda & Dzienkowski, *supra* note 18, at 866 (citing Sequa Corp v. Lititech, Inc. 807 F.Supp 653 (D. Colo. 1992), a case that involved a private rather than government investigation). [↑](#footnote-ref-64)
65. Rotunda & Dzienkowski, *supra* note 18, at 866 (citing In re Conduct of Gatti, 8 P.3d 966 (Or. 2000)). [↑](#footnote-ref-65)
66. U.S. Const. amend. I. [↑](#footnote-ref-66)
67. U.S. v. Hylton, 710 F.2d 1106, 1107 (5th Cir. 1983). B.S., Rensselaer Polytechnic Institute; J.D., DePaul Univ. College of Law; LL.M. Notre Dame Law School. [↑](#footnote-ref-67)
68. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 97-408 (August 2, 1997). The full opinion is attached as Appendix B. It notes that the text of the rule applies equally to private and public organizational entities but that its commentary “appears to contemplate that some communications by a lawyer with officials of a represented government entity may be permissible under the ‘authorized by law’ provision of the Rule….” [↑](#footnote-ref-68)
69. Restatement (Third) of The Law Governing Lawyers §101 cmt. b. “Insofar as a party's right to speak with government officials about a controversy is concerned, Rule 4.2 has been uniformly interpreted to be inapplicable.” Camden v. Maryland, 910 F.Supp. 1115, 1118 n.8 (D. Md. 1996) citing 2 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 4.2:109 (2d ed. Supps.1991 & 1994); Charles W. Wolfram, *Modern Legal Ethics* § 11.6.2 (1986). *See also* ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 97-408 at n. 7 (collecting bar association ethics opinions interpreting Model Rule 4.2 to accommodate the constitutional right to petition). [↑](#footnote-ref-69)
70. The Restatement also makes the exception explicit. Restatement (Third) of The Law Governing Lawyers §101. [↑](#footnote-ref-70)
71. Cal. Rules Prof’l Conduct R. 2-100(c) (2009). As this paper is being written, a commission nearing the end of its work revising the California Rules. Proposed rule 4.2(c)(1) provides that the general no-contact rule does not apply to communications with a public official, board, committee or body. The State Bar of California, Commission for the Revision of the Rules of Professional Conduct has a website describing its work and the proposed rules of professional conduct: http://ethics.calbar.ca.gov/Committees/RulesCommission.aspx. [↑](#footnote-ref-71)
72. D.C. Rules Prof’l Conduct R. 4.2(d). [↑](#footnote-ref-72)
73. Pierce, *Variations: Part I*, supra note 1, at 192. [↑](#footnote-ref-73)
74. *Id.* [↑](#footnote-ref-74)
75. Ernest F. Lidge III***,*** *Government Civil Investigations and the Ethical Ban on Communicating with Represented Parties,* 67 Ind. L.J.549, 552 (1992). [↑](#footnote-ref-75)
76. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 97-408. [↑](#footnote-ref-76)
77. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 97-408 at n. 11. [↑](#footnote-ref-77)
78. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 97-408 at n. 12. [↑](#footnote-ref-78)
79. Restatement (Third) of The Law Governing Lawyers § 101(1). [↑](#footnote-ref-79)
80. Restatement (Third) of The Law Governing Lawyers § 101(2). [↑](#footnote-ref-80)
81. Restatement (Third) of The Law Governing Lawyers § 101 cmt. b. [↑](#footnote-ref-81)
82. *Id.* [↑](#footnote-ref-82)
83. *Hammond v. City of Junction City, Kansas,* 2002 WL 169370, \*6 (D.Kan.2002) (citing ABA Committee on Ethics and Professional Responsibility, Formal Op. 97-408 (1997)). [↑](#footnote-ref-83)
84. Model Rule 4.2 ("Communication with Person Represented by Counsel") provides:   
    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 by law to do so. [↑](#footnote-ref-84)
85. The Committee does not intend by its use of the word "controversy" in this opinion to suggest any conclusions about the reach of Rule 4.2 that differ from the interpretation given that rule in Formal Opinion **95-396**. The Committee notes in this regard that the right to petition has been held inapplicable to transactions with the government as a buyer or seller. See, e.g., Kurek v. Pleasure Driveaway, 557 F. 2d 580, 593-94 (7th Cir. 1977) ("We have some difficulty understanding how a contract proposal to a governmental unit falls within the ambit of the [right to petition]"), vacated and remanded, 435 U.S. 992, reinstated per curiam, 583 F.2d 378 (7th Cir. 1978), cert. denied, 439 U.S. 1090 (1979). [↑](#footnote-ref-85)
86. A government officer or employee who may be personally liable in a matter is entitled to the full protections of the no-contact rule where she is represented, whether or not her lawyer is employed or retained by the government, and whether or not the government itself is also potentially liable in the matter. Therefore, consent of the lawyer representing the individual employee is always necessary before the employee may be contacted by opposing counsel. Where the same lawyer represents both the government and the individual government employee, consent of that lawyer is necessary before any government official may be contacted on a matter relating to the lawyer's representation of the individual employee. This is because an ex parte contact with representatives of the government entity, even for purposes arguably within the right to petition as to the government, could seriously undermine the ability of counsel to represent the potentially liable employee. [↑](#footnote-ref-86)
87. Comment [1] states:   
    This Rule does not prohibit communication with a party, or an employee or agent of a party, 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. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter. [↑](#footnote-ref-87)
88. This opinion does not deal with statutory provisions that may authorize communications with government officials so as to come within the "authorized by law" exception to Rule 4.2. For example, "whistle blower" statutes may have the effect of authorizing lawyers who represent clients in related disputes to receive information from the government employees without consent of or notice to government counsel assigned to the matter. Freedom of information and "sunshine" statutes similarly may authorize such ex parte communications. Model Rule 4.2 does not apply in those circumstances to bar communications with the employees as long as the requirements of Model Rules 4.3 and 4.4 are observed. [↑](#footnote-ref-88)
89. See, e.g., Brown v. Oregon Department of Corrections, 173 F.R.D. 265 (D. Or. 1997) (plaintiff's counsel in employment discrimination suit against state agency is barred by Rule 4.2 from conducting informal ex parte interviews with the same employees whose alleged conduct formed the basis of the vicarious liability claim against the agency); Alaska Bar Ass'n, Ethics Comm. Op. 94-1 (1994) (Rule 4.2 bars lawyer for litigant against government agency from presenting the litigant's settlement position to the agency's managing board, absent specific authorization by law or consent of agency's counsel, even if the settlement offers on behalf of the litigant may not have been adequately communicated to the board); State Bar of Tex., Professional Ethics Comm. Op. 474 (1991) (Rule 4.2 bars telephone contact by litigant's lawyer with city council criticizing city's settlement offer in suit against city); State Bar of S.D., Ethics Comm. Op. 92-15 (1993) (lawyer representing government employee in grievance matter may not write County Commissioners without County Attorney's consent); Ill. State Bar Ass'n, Comm. on Professional Ethics Op. 92-3 (1992) (defendant's lawyer may not send City officials correspondence with City Attorney about the matter); Conn. Bar Ass'n, Comm. on Professional Ethics Op. 86-1 (1986) (lawyer in litigation against a government agency may communicate with a nonparty official of the agency on subject related to the litigation if official not in the position to bind the agency, but must have government counsel's consent before a contact with an official who is a party); N.C. State Bar Ass'n Op. 132 (1993) (addresses a number of instances of permissible ex parte contact by a lawyer with City employees, but requires lawyer for private party generally to deal with government lawyer or obtain his consent to ex parte interview). [↑](#footnote-ref-89)
90. See, e.g., N.C. State Bar Ass'n, Ethics Comm. Op. 202 (1995) (lawyer did not violate North Carolina Rule 4.2 by writing the Town Council requesting that the Town drop its appeal of a decision granting a lawyer's client a sign variance despite the Town Council's objection to the communication, but required a copy of the letter to be sent simultaneously to counsel for the Town); State Bar of S.D., Ethics Comm. Op. 90-70 (1990) (lawyer representing party in litigation against municipality may write municipal officials about the matter with notice and a copy of the communication to the City Attorney, but may not telephone or meet with officials without City Attorney's consent); Ass'n of the Bar of the City of N.Y., Comm. on Professional Ethics Op. 1991-4 (1991) ("New York City Bar Opinion") (construing DR 7-104(A)(1) of the New York Code of Professional Responsibility and concluding that lawyer for private party may communicate with governmental decision-maker at least in writing with a copy to government counsel); Utah State Bar, Ethics Comm. Op. 115 (1993) (lawyer representing client in a matter against government agency may contact employees of agency orally or in writing outside government attorney's presence on basis of constitutional guarantee of unrestricted access to government, but where government is represented by counsel must disclose this to government employee being interviewed). See also Ky. Bar Ass'n, Ethics Comm. Op. E-332 (1988) (Rule 4.2 narrowly construed in context of litigation with government so that lawyer representing government department in litigation may not prevent private party's lawyer from contacting all employees of the department). [↑](#footnote-ref-90)
91. California Rules of Professional Conduct, Rule 7-103 states simply that the general no-contact rule "does not apply to communications with a public officer, board, committee or body." District of Columbia Rules of Professional Conduct, Rule 4.2(d) provides that the District's no-contact rule in D.C. Rule 4.2(a) (substantially the same as Model Rule 4.2) does not prohibit "communications by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client." Comment [7] to D.C. Rule 4.2 explains:   
    Paragraph (d) does not permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of disputes with the government. It is intended to provide lawyers access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty, or that government personnel are conducting themselves improperly with respect to aspects of the dispute. It 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. [↑](#footnote-ref-91)
92. See, e.g., 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING §4.2:109 at 742 (2d ed. 1991 Supp.); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 11.6 at 614-15 (1986) (requirement of consent of opposing lawyer particularly inappropriate when contacts sought with government agency); John Leubsdorf, Communicating with Another Lawyer's Client: The Lawyer's Veto and The Client's Interests, [127 U. PA. L. REV. 683](http://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&ordoc=0108475872&DocName=127UPALREV683&FindType=Y&AP=&rs=WLW10.06&sv=Split&vr=2.0&fn=_top&mt=Westlaw&pbc=206EC0C0&ifm=NotSet), 686-688 (1979) (arguing against application of the no-contact rule in the government context); Note, DR 7-104 of the Code of Professional Responsibility Applied to the Government "Party," 61 MINN. L. REV. 1007 (1977) (analyzing the rationale for the substantially identical predecessor DR 7-104(A)(1) and arguing that the rule should be narrowly construed to apply only to contacts with a government official who has authority to bind the government in a matter that could be litigated). The most recent draft of the RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS also takes the position that the rule protects government entities from ex parte communications only in connection with "litigation of a specific claim that does not involve broad policy issues," and only "so long as it does not create an opportunity for substantially unfair advantage against the governmental party." RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 161 at 261 (Tent. Draft No. 8, March 21, 1997). Comment b explains that this Section would apply the no-contact rule only in circumstances where the government "stands in a position closely analogous to that of a private litigant and with respect to contact where potential for abuse is clear," but would permit direct contact by the person's lawyer with officials having power to affect policy even in specific claim litigation. Id. at 265. [↑](#footnote-ref-92)
93. The Committee believes that the "right of a party" to communicate with government decision makers, recognized as excepted from the rule's prohibition by Comment [1], must be understood to include the right to communicate through a lawyer, else there would be no reason to deal with the issue in the context of a rule that applies only to lawyers. Since lawyers are by reason of their training and experience particularly well equipped to present legal and policy arguments to officials charged with the administration of laws and regulations, it is appropriate to give content to the drafters' stated intention to defer in interpreting the no-contact rule to a citizen's right to communicate in an effective way. [↑](#footnote-ref-93)
94. Some members of the Committee are of the view that settlement is a proper topic for direct communication by opposing counsel only when the settlement issues to be discussed can fairly be said to constitute policy issues within the ambit of the constitutional right to petition. These members do not believe that settlement of every government "slip and fall" case or Postal Service vehicle accident matter, for example, involves "policy" such that the Constitution would restrict enforcement of Rule 4.2, bearing in mind that a central "objective of the anticontact rule is to prevent improvident settlements and similarly major capitulations of legal position on the part of a momentarily uncounselled, but represented, party." CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 11.6 at 613 (1986). Other members of the Committee believe that a citizen's right to seek settlement of a controversy with the government goes to the very heart of the constitutional right of access recognized and given effect by the drafters of Rule 4.2. [↑](#footnote-ref-94)
95. Some members of the Committee believe that prior notice to government counsel should be permissive rather than mandatory, on the grounds that the comment concerning "communications authorized by law" indicates that communications within the scope of the right to petition are a permitted exception to the requirements of Rule 4.2. The majority believes that notice is mandatory so that any exception to Rule 4.2 is no broader than necessary to permit exercise of the right to petition. [↑](#footnote-ref-95)
96. In order to trigger the rule, "the subject matter of the representation must have been concretely identified." Formal Opinion 95-396 at 15. Thus, general representation of a government entity by a government law office would not implicate Rule 4.2 unless and until the private party's lawyer learned that the agency had sought counsel in connection with a particular controversy. [↑](#footnote-ref-96)
97. See Formal Opinion 95-396 at 15-16, quoting from Rule 4.2 Comment [4]: the no-contact rule does not bar communications with all current employees of a represented government entity, but only with "persons having a managerial responsibility on behalf of the [government]" in connection with the controverted matter, plus "any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." If an employee is represented by his own counsel in the matter, consent by that counsel is sufficient. Finally, Rule 4.2 "does not prohibit contacts with former officers or employees of a represented corporation [or government agency], even if they were in one of the categories with which communication was prohibited while they were employed." Id. n. 47 at 16, citing ABA Formal Op. 91-359 (1991). Gaining from a former government employee information that the lawyer knows is legally protected from disclosure for use in litigation nevertheless may violate Model Rules 4.4, 8.4(c) and 8.4(d) and also may result in court-imposed sanctions. See, e.g., Camden v. State of Maryland, [910 F. Supp. 1115, 1121-24](http://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&ordoc=0108475872&DB=345&SerialNum=1996038949&FindType=Y&ReferencePositionType=S&ReferencePosition=1121&AP=&rs=WLW10.06&sv=Split&vr=2.0&fn=_top&mt=Westlaw&pbc=206EC0C0&ifm=NotSet) (D. Md. 1996) (law firm disqualified from representing plaintiff in discrimination suit and evidence suppressed where, over objection of assigned attorney general, plaintiff's lawyer interviewed State College's affirmative action representative, who disclosed his discussions with the State College's lawyers including their advice and appraisal of strength of plaintiff's case). [↑](#footnote-ref-97)
98. ABA Informal Opinion 1377 addressed a question raised by a lawyer who represented the City in litigation against it and private firms for property damage alleged to have arisen from defective construction of a sewer system. The lawyer asked whether he should not have had prior notification from attorneys for the co-defendants before they interviewed the Building Marshal, who had authority to inspect, require correction and enforce the Building Code. The Committee opined that contact with the Building Marshal was prohibited without prior consent of counsel because he "can commit the corporation, and is therefore within the concept of a 'party' for the purposes of the Code." This Informal Opinion correctly required permission of the City's attorney (and not merely notice to him) prior to the interview with the Building Marshal, because the purpose of the contact was evidently not to resolve a policy issue (which the Building Marshal was at that point in no position to do), but rather for the purpose of gaining admissions useful against the government at trial. The broad language in the opinion suggesting a bar to all unconsented communications with government officials is, however, limited to the extent of the conclusions in this opinion. [↑](#footnote-ref-98)
99. Where a lawyer is uncertain whether certain ex parte contacts may be authorized by law, e.g., contacts made pursuant to open-government or whistle-blower statutes, the Committee agrees with the New York City Bar that the lawyer should seek permission from the court, on notice to the government if appropriate, before contacting the official. See New York City Bar Opinion, supra n. 7 at 6, citing New York State Association for Retarded Children v. Carey, [706 F.2d 956, 960-61](http://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&ordoc=0108475872&DB=350&SerialNum=1983117128&FindType=Y&ReferencePositionType=S&ReferencePosition=960&AP=&rs=WLW10.06&sv=Split&vr=2.0&fn=_top&mt=Westlaw&pbc=206EC0C0&ifm=NotSet) (2d Cir. 1983) (district court properly permitted plaintiffs' counsel, consultants and experts to interview staff of government facility, pursuant to court-imposed guidelines, during post-judgment tour to ascertain extent of defendant government's compliance), cert. denied, [464 U.S. 915](http://web2.westlaw.com/find/default.wl?rp=%2ffind%2fdefault.wl&vc=0&ordoc=0108475872&DB=780&SerialNum=1983237011&FindType=Y&AP=&rs=WLW10.06&sv=Split&vr=2.0&fn=_top&mt=Westlaw&pbc=206EC0C0&ifm=NotSet) (1983). [↑](#footnote-ref-99)