
Wisconsin Informal Ethics Opinion EI-17-04: Contact with Persons Represented in Unrelated Matters

December 19, 2017

***Synopsis:** SCR 20:4.2(a) prohibits communication with a represented person about the subject matter of the representation by another lawyer who represents a person in the same matter. Therefore, a lawyer who does not represent a person in the relevant matter is free to communicate with a represented person about the matter without the consent of the person's counsel. Lawyers are also free to meet with represented prospective clients provided the lawyer does not represent another person in the same matter or is otherwise prohibited from doing so. When communicating with former clients who have transitioned to successor counsel, lawyers should be cautious not to communicate with the former client about matters within the scope of successor counsel's representation of the former client.*

Introduction

This opinion addresses three questions about when a lawyer may interact with a person who is represented by another lawyer. Sometimes there is confusion about whether it is appropriate for a lawyer to communicate with such a person without the consent of the person's counsel. Supreme Court Rule ("SCR") 20:4.2 governs the lawyer's responsibility in such a situation. In this opinion, the State Bar's Standing Committee on Professional Ethics (the "Committee") considers three situations. In the first, a lawyer who represents a client in Matter A wishes to communicate with a witness, who is represented by counsel in separate Matter B. In the second, a person who is already represented by counsel wishes to consult with a second lawyer about the possibility of retaining the second lawyer in the very matter in which the person is already represented. Finally, in the last situation, a client has discharged a lawyer and the client has retained successor counsel, and the first lawyer wishes to communicate with the client.

Discussion: Scenario One – witness represented in a different matter

Contact with represented persons is governed by SCR 20:4.2, which reads as follows:

- (a) 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.

(b) An otherwise unrepresented party to whom limited scope representation is being provided or has been provided in accordance with SCR 20:1.2(c) is considered to be unrepresented for purposes of this rule unless the lawyer providing limited scope representation notifies the opposing lawyer otherwise.

ABA Comment paragraph [4] explains:

[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.

(emphasis added)

The Rule and comment make plain that the prohibition contained in SCR 20:4.2 applies only to a person or party *represented in the same matter* in which the contacting lawyer represents a client and prohibits communication about *that matter*.¹ Thus, for example, a lawyer who represents a client charged with attempted homicide is free to contact a witness who is represented in connection with an unrelated burglary charge without the consent of the lawyer who represents the witness on the burglary charge.² Lawyers are free to communicate with represented persons concerning matters outside the scope of the representation.³

The Standing Committee on Ethics and Professional Responsibility of the American Bar Association (ABA) directly addressed this situation in Formal Opinion 95-396:

¹ See also Restatement (Third) of the Law Governing Lawyers §99, comment d.

² See also N.Y. State Ethics Op. 904 (2012).

³ Indeed, lawyers may be obligated to contact witnesses who are represented in different matters. In *State v. Reno*, 2017 WL 5077948, the Wisconsin court of appeals upheld a finding that a lawyer provided ineffective assistance of counsel because the lawyer failed to interview or subpoena an important witness who was represented on a different matter because the lawyer mistakenly believed he was prohibited from doing so by SCR 20:4.2.

If a person is represented by counsel on a particular matter, that representation does not bar communications on other, unrelated matters. For example, suppose a lawyer represents Defendant on a charge involving crime A. Under Rule 4.2, another lawyer may not, pursuant to a representation, either as prosecutor or as counsel for a co-defendant involving crime A, communicate with Defendant about that crime without leave of Defendant's lawyer. However, if the communicating lawyer represents a client with respect to a separate and distinct crime B and wishes to contact Defendant regarding that crime, the representation by counsel in crime A does not bar communications about crime B. Similarly, the fact that Defendant had been indicted on crime A would not prevent the prosecutor from communicating with Defendant, directly or through investigative agents, regarding crime B.

(footnote omitted)

New York State Bar Association Ethics Opinion 884 (2011) similarly concluded:

Under Rule 4.2, a lawyer may not communicate about the subject of a criminal representation with a party the lawyer knows to be represented by another lawyer in the matter without the consent of the other lawyer. A non-party witness in such matter is not protected by Rule 4.2. Consequently, a lawyer for a party may communicate with the witness without the consent of counsel who represents the witness in a related matter, provided that during such interview the lawyer does not violate Rules 3.4(a)(1) or (2) or 8.4(b) or (d). This, however, does not prevent the witness' lawyer from advising his client not to speak with anyone about the facts of the case outside the presence of his lawyer. The conclusion of this opinion does not extend to civil matters.

SCR 20:4.2 also does not prohibit a lawyer from contacting a person who is represented on a different, but related, matter. It is worth noting that SCR 20:4.2(a) prohibits communication about the matter in which the person is represented, but the Rule does not forbid communications about related matters, as long as the person is not represented in the related matters.⁴ Thus, a person may face criminal charges and a civil lawsuit arising from the same underlying facts, but the person may have counsel in connection with the criminal charges, but be unrepresented in the civil lawsuit. In such a situation, a lawyer representing the opposing party in the civil lawsuit may contact the person without the consent of the lawyer who represents the person in connection with the criminal charges.

Courts have consistently interpreted the Rule this way, particularly in criminal matters. For example, in *People v. Santiago*, 925 N.E.2d 1122, (Ill. 2010), the Illinois Supreme Court held that prosecutors did not violate Rule 4.2 by interviewing a mother who was a suspect in a child abuse

⁴ This contrasts with SCR 20:1.9(a), which forbids lawyers from representing new clients whose interests are adverse to former clients in the same or *substantially related matters*.

case without notifying the lawyer who had been appointed to represent her in a separate child protection proceeding arising from the same underlying facts.⁵

A lawyer may contact a person with respect to a matter in which the person is unrepresented without violating SCR 20:4.2. However, for purposes of SCR 20:4.2, a lawyer has obligations when, in the course of representing a client, he or she contacts an unrepresented person. The Committee discussed these obligations in Wisconsin Ethics Opinion E-07-01⁶:

To summarize these duties, when contacting a constituent of a represented organization (or any unrepresented person), the applicable Rules mandate:

1. The lawyer must inform the unrepresented constituent of the lawyer's role in the matter (see SCR 20:4.3).
2. The lawyer must refrain from giving legal advice to an unrepresented constituent if there is a reasonable possibility that the interests of the client may conflict with those of the unrepresented constituent (see SCR 20:4.3).
3. The lawyer must not ask any questions reasonably likely to elicit information that the lawyer knows or reasonably should know is privileged and, if necessary, should caution the unrepresented constituent not to reveal such information (see SCR 20:4.4).
4. The lawyer must not make any false statements of material fact to or mislead an unrepresented constituent (see SCR 20:4.1 and SCR 20:8.4).

(footnote omitted)

These obligations are discussed further in E-07-01.

Lawyers may not make false statements of material fact to third parties.⁷ This prohibits a lawyer from making a false statement in response to a question about whether the lawyer represents someone in connection with a particular matter.⁸

Discussion: Scenario Two – second opinions

⁵ See also *State ex. Rel. Oklahoma Bar Assoc. v. Harper*, 995 P.2d 1143 (Okla. 2000); *Grievance Comm. v. Simels*, 48 F.3d 640 (2d. Cir. 1995).

⁶ Wisconsin Ethics Opinion E-07-01 discusses the extent to which SCR 20:4.2 covers current and former constituents of a represented entity.

⁷ See SCR 20:4.1(a).

⁸ See also Wisconsin Ethics Opinion E-07-01.

SCR 20:4.2, ABA Comment paragraph [4] provides in relevant part:

This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. (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.*

(emphasis added)

The Restatement (Third) of the Law Governing Lawyers §99, comment c., also states, in relevant part:

A lawyer who does not represent a person in the matter and who is approached by an already-represented person seeking a second professional opinion or wishing to discuss changing lawyers or retaining additional counsel, may, without consent from or notice to the original lawyer, respond to the request, including giving an opinion concerning the propriety of the first lawyer's representation. If such additional or substituted counsel is retained, an opposing lawyer may, of course, communicate and otherwise deal with new counsel for the nonclient.

The Comment thus again provides a clear answer; as long as lawyer is not representing another person in the matter, a lawyer may meet with a represented person without the consent of that person's lawyer to discuss the matter and consider forming a lawyer-client relationship.⁹

When such a meeting occurs, the lawyer's responsibilities are governed by SCR 20:1.18 (Duties to Prospective Client). Rule 1.18(b) provides that, even if no client-lawyer relationship ensues from the meeting, "a lawyer who has learned information from a prospective client shall not use or reveal that information learned in the consultation." That information includes the existence of the consultation itself. So the lawyer should not notify the client's other lawyer of the fact of the consultation without the informed consent of the prospective client.¹⁰

Lawyers thus owe prospective clients a duty of confidentiality with respect to the information given to the lawyer by the prospective client *and the fact of the consultation itself*. As discussed

⁹ See also Florida Ethics Opinion 02-05 (2003); Philadelphia ethics Opinion 2004-1 (2004) and New York State Ethics Opinion 1010 (2014).

¹⁰ For an extensive discussion of obligations to prospective clients, see Wisconsin Ethics Opinion EF-10-03 (2010).

above, the lawyer need not seek the consent of the lawyer representing the person seeking a second opinion and the lawyer may not notify the other lawyer of the fact of the consultation without the informed consent of the prospective client.

Discussion: Scenario Three – former client represented by successor counsel.

Considering this raises a threshold question: is the discharged lawyer “representing a client” within the meaning of SCR 20:4.2 when that lawyer contacts a former client regarding the representation? Courts and ethics committees that have considered this question have overwhelmingly answered it in the affirmative on the theory that lawyers are, in effect, representing themselves. In Formal Opinion 2011-1 (2011), the Ethics Committee of the New York City Bar provided an excellent review of authorities:

Rule 4.2(a) begins with phrase “[i]n representing a client,” which appears to limit the scope of the rule. The weight of authority, however, is that a lawyer may not contact a represented person even when the lawyer is acting pro se and thus not “representing a client” at the time of contact. As explained by the court in *In re Discipline of Schaefer*, 25 P.3d 191, 199 (Nev. 2001), “[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.” *Accord In re Disciplinary Proceeding Against Haley*, 126 P.3d 1262, 1269 (Wash. 2006); *Runsvold v. Idaho State Bar*, 925 P.2d 1118, 1119-20 (Idaho 1996); *Sandstrom v. Sandstrom*, 880 P.2d 103, 108-09 (Wyo. 1994); *In re Conduct of Smith*, 861 P.2d 1013, 1016-17 (Or. 1993); *Comm. on Legal Ethics v. Simmons*, 399 S.E.2d 894, 898 (W. Va. 1990); *In re Segall*, 509 N.E.2d 988, 990 (Ill. 1987); *Vickery v. Comm’n for Lawyer Discipline*, 5 S.W.3d 241, 259-60 (Tex. App. 1999); District of Columbia Op. 258 (1995); Hawaii Op. 44 (2003). *But see Pinsky v. Statewide Grievance Comm.*, 578 A.2d 1075, 1079 (Conn. 1990) (lawyer, in his role as a tenant of an office building, may contact the landlord directly about the landlord’s attempt to evict the lawyer, even though the landlord is represented by counsel in that proceeding).

The Committee agrees that SCR 20:4.2 applies to a lawyer who wishes to communicate with a former client now represented by successor counsel.¹¹

This leads to the inevitable conclusion that a lawyer who wishes to communicate with a former client now represented by successor counsel about matters concerning the representation must seek the permission of successor counsel. Thus, for matters that frequently arise when a client changes counsel in a matter, such as file transfer or assertions of liens on settlement proceeds¹²,

¹¹ For a thorough and thoughtful discussion of the application of the rules of professional conduct to lawyers acting *pro se*, see Margaret Raymond, *Professional Responsibility for the Pro Se Attorney*, 1 St. Mary’s J. Legal Mal. & Ethics 2 (2011).

¹² For example, a former lawyer may assert a lien on settlement proceeds pursuant to Wis. Stat. 757.36.

a former lawyer should begin communication with successor counsel. It may be the case that successor counsel may consider some matters outside the scope of the representation, but former counsel should clarify by consulting with successor counsel.¹³

Conclusion

Lawyers represent clients in connection with specific matters, and SCR 20:4.2 prohibits lawyers who represent a client in a specific matter from communicating about that matter with another person who is represented in the same matter. Lawyers are therefore free to communicate with represented persons about matters outside the scope of the representation or when the lawyer represents no other person in the matter.

¹³ Of course, lawyers are free to contact former clients about matters *outside* the scope of successor counsel's representation. For example, New York City Bar Formal Op. 2011-1 states "In our view, therefore, an inquiry from an attorney to a former client, including, but not limited to, a request for unpaid fees and expenses, would not run afoul of Rule 4.2 in the absence of any reason to believe that successor counsel is representing the client with respect to payment of those fees."