

## **A Lawyer's Duty Not to Communicate with Persons Represented by Counsel**

**Question:** A lawyer works in-house for a federal agency where one of their primary duties is monitoring grants issued by the agency. When grantees fail to comply with reporting requirements or when the grantees' reporting indicates that they are no longer eligible to receive benefits under the program's rules, the lawyer sends a demand letter requesting that the grantee return the grant money. In response to the demand letters, some grantees provided the names and contact information for their counsel. May the agency lawyer continue contacting the grantees directly after being advised that the grantees are represented by counsel?

**Short Answer:** If a lawyer sends a demand letter and then learns that the recipient is represented by counsel, the lawyer has a duty under Rule 4.2 of the Illinois Rules of Professional Conduct to stop communicating with the recipient and instead communicate only with the recipient's counsel.

### **Discussion:**

Rule 4.2 of the Illinois Rules of Professional Conduct 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.

Rule 4.2 requires a lawyer to immediately terminate communication with the person when the lawyer learns that such communications would be prohibited by the Rule. Notably, Comment [3] of the Rule states that communications with a represented person are prohibited even when the represented person initiates or consents to the communication. If a lawyer is uncertain whether a communication with a represented person is permissible under the Rule, Comment [6] provides that the lawyer may seek a court order.

The purpose of this Rule, as set forth in Comment [1], is to protect a represented person from possible overreaching by other lawyers in the matter, interference by those other lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

In 1995, the American Bar Association issued its Formal Opinion 95-396, which addresses several issues relating to Rule 4.2, including the Rule's application across civil matters, criminal matters, and pre-charge criminal investigations.

Key points from the opinion are:

- Knowledge requirement: A lawyer's knowledge that a person is represented may be inferred from the circumstances.
- Subject-matter limitation: The Rule bars only communications about the subject of the representation.
- Organizational representation: Representing an organization does not prohibit all contact with its employees.

- Responsibility for investigators: Lawyers are accountable for investigator contacts that would violate Rule 4.2 if made directly by the lawyer.
- Authorized-by-law exceptions: The opinion identifies categories of communications that fall outside the Rule because they are legally authorized.
- Initiation by the represented person: A represented person's initiation of the contact does not lift the prohibition.
- Claims of terminated representation: Even if the person asserts their lawyer has been or will be discharged, the communicating lawyer should not proceed without reasonable assurance that the representation has been terminated.

**NOTE:** The opinion predates the broadening of Rule 4.2 to include “persons” the lawyer knows to be represented in the matter, rather than just “parties” the lawyer knows to be represented in the matter.

In this scenario, the agency's lawyer sent a demand letter to a grantee, requesting the return of funds due to the failure to comply with the grant program's requirements or due to their loss of eligibility. The demand letter was a communication sent by the agency lawyer in connection with the representation of a client—the agency. When a grantee responded to the agency's demand letter with the contact information for the grantee's counsel, the agency's lawyer learned that the grantee was represented in connection with the issue of their continued eligibility to receive funds from the agency. Without the consent of the grantee's counsel, or authorization by law or court order, the agency lawyer is thereafter prohibited from communicating directly with the grantee about the subjects of the demand letter.

**Resources:**

[ABA Formal Opinion 95-396 \*Communications with Represented Persons\* \(July 28, 1995\)](#)  
[Illinois Supreme Court Rule 4.2: \*Communications with Person Represented by Counsel\*](#)