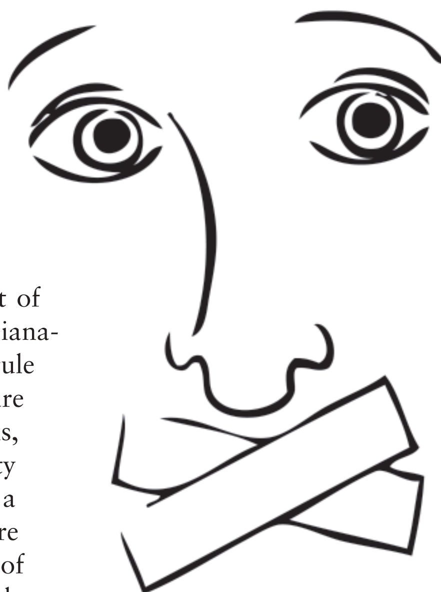
# Look Who's Talking Now —

## An examination of Rule 4.2's impact in the corporate setting

BY ADAM THAMES

One of the most fundamental rules of ethics is the rule regarding communication between attorneys and represented persons, which is sometimes referred to as the "no-contact" rule.[1] This rule prohibits an attorney from communicating with represented persons about the subject matter of the representation without consent of the represented party's counsel.[2] Louisiana-based courts have found that this rule is intended to "prevent disclosure of attorney-client communications, to protect the party from 'liability creating' statements elicited by a skilled attorney,"[3] and, perhaps more importantly, "to protect the sanctity of the attorney-client relationship and by so doing, to safeguard the integrity of the profession and preserve public confidence in our system of justice."[4]



The current version of the "no-contact rule," Rule 4.2 of the Rules of Professional Conduct, states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with:
> (a) 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) a person the lawyer knows is presently a director, officer, employee, member, shareholder or other constituent of a represented organization and
> > (1) who supervises, directs or regularly consults with the organization's lawyer concerning the matter;
> > (2) who has the authority to obligate the organization with respect to the matter; or
> > (3) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Part (a) sets forth the traditional rule regarding contact with individuals who are represented by counsel. Part (b) — often the more debated section — covers contact with employees and other constituents of an organization that are currently represented by counsel.

The subject of Rule 4.2 has been characterized as the "legal equivalent of espionage," in that the rule serves to protect attorneys and their clients from attempts to "spy on" the sacred attorney-client relationship.[5] In reality, however, the application of the rule has less to do with legal espionage than with finding a balance between the need for efficiency in gathering information and the desire to protect privileged communications.[6]

Nowhere is the balancing act between gathering information and protecting privileged communications more apparent than in the corporate and organizational setting. On the one hand, access to information possessed by an organization and its employees is critical in enabling attorneys to prepare for and defend against lawsuits involving the organization. On the other hand, the organization and its attorneys have legitimate concerns in protecting against disclosure of privileged information that such access may facilitate.[7]

Although corporations act through representatives and agents, not all of these individuals fall within the scope of protection provided by Rule 4.2. In fact, there are only three categories of employees that an attorney should treat as "parties" for purposes of the rule: (1) employees with managerial responsibility; (2) employees whose acts or omissions concerning the subject of the representation may be imputed to the organization for liability purposes; and (3) employees whose statements may constitute admissions on the part of the organization.[8]

However, as stated above, Rule 4.2 is, at its core, a protective device for the attorney-client privilege. As such, Rule 4.2's application depends in large part upon the relevant rules of privilege. In the corporate setting, a crucial inquiry is just how broadly the attorney-client privilege extends: do all employees of a corporation fall within the protection of the privilege, or only some smaller portion?

The leading case on the scope of attorney-client privilege within the corporate setting is *Upjohn v. U.S.*, where an extensive internal investigation was conducted by the corporation's counsel regarding payments to foreign officials.[9] During the course of investigation, interviews of management, officers and employees were conducted. In an IRS proceeding, the government requested that the corporation produce attorney notes and other similar documents or provide access to the interviewed employees, which *Upjohn* refused, citing attorney-client privilege. On appeal, the Sixth Circuit held that the privilege applied only to the "control group" of the corporation, and thus ordered the documents to be produced. Under the control group theory, the privilege extended only to those who were in a position to control or take substantial part in a decision that the corporation could take upon advice of counsel—not to all employees.

The United States Supreme Court, however, reversed the ruling, rejecting the control group test as too impracticable, and finding that all of the communications were covered. The Supreme Court declined to adopt a bright-line rule. Instead, it embraced a case-by-case balancing approach. Thus, under *Upjohn*, the attorney-client privilege can be extended to all employees of a corporation.[10]

Despite the ruling in *Upjohn*, attorneys should note that neither privilege nor Rule 4.2 apply automatically to all employees of a corporation. As such, courts are often required to define where the line between access and privilege lies. Of specific concern is the extent to which attorneys can conduct *ex parte* communications with the employees of a represented entity without violating their ethical responsibilities.

In the case of *In re Shell Oil Refinery*, the plaintiff's legal committee (PLC) gained possession of Shell documents through *ex parte* communications with current Shell employees.[11] Faced with possible Rule 4.2 violations, PLC submitted an affidavit to the court indicating that before initiating any communication with the Shell employee, it was verified that the Shell employee did not hold a managerial position and was not an individual whose actions or non-actions would impose liability on Shell Oil Company. Nonetheless, in order to preserve the integrity of the judicial proceeding, the court prohibited plaintiff's counsel from making use of any documents it obtained through *ex parte* communications with Shell's current employees and also prohibited plaintiff from further *ex parte* contact with any Shell employees other than those who were plaintiffs in the suit. However, the court noted, *in dicta*, that informal interviews with employees of an adverse corporation can, in certain circumstances, be entirely appropriate, for example, where the *ex parte* communications occur with a low-level employee whose conduct or scope of employment was not involved in the disputed events.[12]

In another Eastern District case, *Woodard v. Nabors Offshore Corp.*, plaintiff's counsel hired a private investigator who subsequently initiated *ex parte* communications with one of the corporate defendant's current employees.[13] Thereafter, the court granted a protective order prohibiting any further *ex parte* contact with the current employee, who the court determined was "an agent of the corporation, with some supervisory authority over plaintiff and whose acts or omissions concerning the alleged incident may be imputed to the organization for liability purposes or whose statements may constitute admissions on the part of the organization."[14]

However, unlike current employees, the concerns behind Rule 4.2 are largely, if not entirely, absent as to former employees. According to a formal opinion issued by the American Bar Association (ABA), "[n]either the Rule nor its comment purports to deal with former employees of a corporate party" and allowed for no exceptions even "if the former employee was highly placed in the company (such as a former officer or director)."[15] Moreover, the ABA reaffirmed that "Rule 4.2 does not prohibit contacts with former officers or employees of a represented corporation, even if they were in one of the categories with which communication was prohibited while they were employed."[16]

The Louisiana opinions regarding former employees hold likewise. In *Schmidt v. Gregorio*, the court held that Rule 4.2 did not prohibit *ex parte* communication between plaintiff's counsel and former employees of the defendant hospital.[17] Similarly, in *Lirette v. Delchamps*, the court found plaintiff's counsel's *ex parte* communications with former employees of the corporate defendant did not violate Rule 4.2 because the former employees had no current relationship with defendant, had no responsibilities on behalf of defendant, could not perform an act that may be imputed to defendant, and could not make a statement that would be an admission on the part of defendant.[18] In fact, most Louisiana-based courts have concluded that ethical rules do not prohibit *ex parte* communication with former employees of a defendant corporation as long as the interviewing attorney does not inquire into privileged matters.[19]

It is important for attorneys to be keenly aware of this rule as one could face serious consequences for any violations. At least one court has suspended an attorney from the practice of law for *ex parte* contact with corporate employees,[20] while others have suppressed all evidence obtained through *ex parte* communications.[21] Though courts have been more inclined to protect communications with current employees, all *ex parte* communications in the corporate setting will be scrutinized and may be subject to harsh disciplinary and evidentiary consequences. Thus, a violation of this rule could have resounding effects on both the attorney and the client.

In conclusion, an attorney must proceed with great caution before communicating with either current or former employees in a corporate or organizational setting.

Specifically, one should forgo any *ex parte* contact if the employee was highly placed within the company, was privy to privileged information about the dispute, or whose actions could be imputed to the employer. So, for those seeking to uncover the next corporate scandal, be aware that victory could be short-lived if you run afoul of your ethical duties under Rule 4.2.

[1] *See* Frank L. Maraist, 21 *Louisiana Civil Law Treatise* § 9.3.
[2] *See* Rule 4.2 of the Louisiana Rules of Professional Conduct.
[3] *Jenkins v. Wal-Mart Stores, Inc.*, 956 F.Supp. 695, 696 (W.D. La. 1997).
[4] *State v. Gilliam*, 98-1320 (La. App. 4th Cir. 12/15/99), 748 So.2d 622, 638, *writ denied*, 04-0880 (La. 1/12/85), 894 So. 2d 415.
[5] Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* 107 (6th ed. 2002).
[6] *See* Andrew R. Lee, *Why Can't I Interview That Witness?* (on file with author).
[7] *Id.*
[8] *In Re Shell Oil Refinery,* 143 F.R.D. 105, 107-08 (E.D. La. 1992) (citing Model Rules of Professional Conduct, Rule 4.2).
[9] 101 S.Ct. 677 (1981).
[10] *Id.* at 686.
[11] 143 F.R.D. 105 (E.D. La. 1992).
[12] *Id.* at 108.
[13] 00-2461, 2001 WL 13339 (E.D. La. Jan. 4, 2001).
[14] *Id.* at *3.
[15] ABA Formal Op. 91-359 at 4 (Mar. 22, 1991).
[16] ABA Formal Op. 95-396 (July 28, 1995) (citing ABA Formal Op. 91-359 (1991)).
[17] 23,305 (La. App. 2d Cir. 10/27/93), 705 So.2d 742.
[18] 95-4086, 1996 WL 267991 (E.D. La. May 20, 1996).
[19] *See,* e.g., *Jenkins v. Wal-Mart Stores, Inc.*, 956 F.Supp. 695 (W.D. La. 1997); *Schmidt v. Gregorio*, 23,305 (La. App. 2d Cir. 10/27/93), 705 So.2d 742; *Seitel Geophysical Inc. v. Greenhill Petroleum Corp.*, 95-1648, 1995 WL 686754 (E.D. La. Nov. 17, 1995); *Larkin v. U.S.*, 01-0527 (E.D. La. Oct. 9, 2002); *Barron Builders & Management Co. v. J&A Conditioning & Refrigeration, Inc.*, 96-2921, 1997 WL 685352 (E.D. La. Oct. 31, 1997).
[20] *See In Re Bilbe*, 02-1740 (La. 2/7/03); 841 So.2d 729 (wherein an attorney suspended from the practice of law for three years for, among other things, repeatedly contacting executives of the defendant corporation, after being expressly advised by the lawyer for the corporation not to do so).
[21] *See Shell*, 143 F.R.D. 105; *Giardina v. Ruth U. Fertel, Inc.*, 00-1674, 2001 WL 1628597 (E.D. La. Dec. 17, 2001)(wherein both courts prohibited the use of any documents allegedly obtained through *ex parte* communications with corporate employees); see also, *State v. Gilliam*, 748 So.2d at 638 (wherein the Louisiana appellate court stated, with Rule 4.2 in mind, that "[w]here there is an improper communication discovered or considered before it is used at trial, and a violation of the ethical rule is found, it should be held inadmissible).

## GAIL'S GRAMMAR

Is it okay to use OK? And should it be written okay, OK, O.K. or o.k.?

H.L. Mencken called OK "the most shining and successful Americanism ever invented." One common story regarding its origin is that O.K. was the nickname for Martin Van Buren, based on his birthplace in Kinderhook, New York. It is also sometimes said to be an abbreviation of the folk phonetic spelling *oll correct* (all correct). The AP Stylebook says to use OK, not "okay," but other stylebooks disagree. So many people have strong opinions that my advice is to avoid the word in any of its forms in formal writing. In informal use, okay, OK and O.K. (but never o.k.) are all acceptable unless writing for a publication that follows the AP Stylebook.

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