CITE AS
25 *Energy & Min. L. Inst.* ch. 3 (2005)

Chapter 3
Communication with a Government Agency Represented By Counsel: Where Does the Ethical Boundary Fall?

By Laura E. Beverage
Karen L. Johnston
Jackson Kelly PLLC
Denver, Colorado

Synopsis

> In general, a lawyer is entirely barred from any representational contact with a person represented by another lawyer. . . . The prohibition is founded upon the possibility of treachery that might result if a lawyer were free to exploit the presumedly vulnerable position of a represented but unadvised party.[1]

§ 3.01. Introduction.

This chapter analyzes the circumstances under which a lawyer representing a private party in a controversy with a government agency may contact the government agency directly on the subject matter of the controversy, knowing that the government is represented by counsel (i.e., the "no-contact rule"). In addition to analyzing the issue under Model Rule 4.2, the Rules of Professional Conduct for other jurisdictions will be considered.[2] Moreover, to the extent other jurisdictions have case law addressing the no-contact rule that is helpful in analyzing the issues, those opinions will also be discussed. Finally, the Restatement (Third) of Law Governing Lawyers will be reviewed.

---

1 Charles W. Wolfram, *Modern Legal Ethics* § 11.6.2 (West Group Publishing 1986).

2 Pursuant to Model Rule 8.5, a lawyer admitted to practice in a jurisdiction is subject to the disciplinary authority of that jurisdiction, regardless of where the lawyer's conduct occurs. However, Rule 8.5 has a Choice of Law provision addressing the situation in which the conduct may occur in a jurisdiction other than that where the lawyer is admitted to practice. State and local ethics committees, case law, or other authority may impose different standards than those discussed herein and must be consulted.

Typically, issues relating to the no-contact rule arise in the context of litigation between private parties. The application of the no-contact rule to contact with a represented government agency raises issues unique to that context: the fundamental constitutional rights to free speech and to petition the government for the redress of grievances may conflict with the general rule prohibiting ex parte contact. Consequently, a balancing of interests must be undertaken, which results in the application of the rule being somewhat ill-defined in this specific context of attorney communications. Thus, the application of the no-contact rule is best analyzed within a factual framework. Thus, the ethical propriety of communications with a represented government agency is explored within the context of various factual circumstances within this chapter.

§ 3.02. When May an Attorney Have Contact with a Represented Government Agency?

[1] — American Bar Association Model Rule 4.2.

In general, the American Bar Association (ABA) Model Rule 4.2[3] protects represented government entities from unconsented contact by opposing counsel. Model Rule 4.2 prohibits a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented in the matter, without the consent of opposing counsel or unless authorized by law to do so.

The text of Model Rule 4.2 (2002) applies its prohibition equally to all represented persons, including both private and public organizational entities. Model Rule 4.2 states:

> 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.[4]

---

3 Amended February 5, 2002, American Bar Association House of Delegates, Philadelphia, Pennsylvania, per Report No. 401. The only substantive change in the language of the rule was the addition of "or a court order." The comments, however, changed significantly.

4 *Model Rules of Professional Conduct*, R. 4.2 (2002).