

Ethics: Third-Party Communications with Council and Staff (Part II)

Tex. Disciplinary R. Prof'l Conduct 4.02

Rule 4.02. Communication with One Represented by Counsel

(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Tex. Disciplinary R. Prof'l Conduct 4.02

Rule 4.02 prohibits all communications between a lawyer and a represented person only when:

- the communication occurs in the course of the lawyer's representation of a client or the lawyer's interests;
- the person with whom the lawyer communicates is represented by counsel;
- the communication is on the subject of both the lawyer's representation and the person's representation; and
- the lawyer knows that the person is represented by counsel on that subject.

Camoco, LLC v. Leyva, 333 F.R.D. 603, 608 (W.D. Tex. 2019)

Purpose

- The purpose of the rule is “to preserve the integrity of the client-lawyer relationship by protecting the represented party from the superior knowledge and skill of the opposing lawyer.” *Camoco, LLC v. Leyva*, 333 F.R.D. 603, 608 (W.D. Tex. 2019).

Elements

1. Representing a client
2. Lawyer shall not:
 - (A) Communicate or
 - (B) Cause or encourage another to communicate
3. About the subject of the representation
4. With an entity of government
5. The lawyer knows to be represented by another lawyer regarding that subject
6. Unless:
 - (A) The other lawyer consents or
 - (B) The lawyer is authorized by law to do so

Is the lawyer representing a client?

Lawyer as a party - A lawyer who is a party to a matter but does not represent any other party may communicate directly with a represented adverse party. Tex. Comm. on Prof'l Ethics, Op. 653.

Specifically rejects holding in *Vickery v. Comm'n for Law. Discipline*, 5 S.W.3d 241, 260 (Tex. App. 1999) that found a lawyer that was a party in a divorce proceeding violated the rule when he induced a friend who is also an attorney, but not his attorney of record, to speak to the lawyer's spouse about the case. The holding in Opinion 653, in keeping with Restatement (Third) of the Law Governing Lawyers (2000) Section 99(1)(b), is based on the concept that a lawyer representing herself cannot be both client and party.

Two things to keep in mind:

1. Even when representing himself, the lawyer is bound by the other Rules, e. g. R. 8.04(a)(3) prohibiting dishonesty, fraud, deceit, or misrepresentation.
2. "The man who defends himself in court has a fool for a lawyer and a jackass for a client." – Benjamin Franklin (in *Bewitched*, Episode: Samantha for the Defense, December 15, 1966).

Consultants – Lawyer states that they are acting in the capacity of consultant not lawyer?

Is the lawyer communicating or causing another to communicate?

R. 4.02, Comment 2

“Paragraph (a) does not, however, prohibit communication between a lawyer's client and persons, organizations, or entities of government represented by counsel, **as long as the lawyer does not cause or encourage the communication** without the consent of the lawyer for the other party.”

Party entitled to information - “No Disciplinary Rule was violated if the attorney advised the client only to request a statement as to his account balance and a written statement of his account, and bring it to him for review, regardless of whether the finance company had in-house or outside counsel, or no attorney.” Because the client was entitled to request the information, the attorney did not violate R. 4.02 by advising the client to do so, even if the attorney knew the finance company had in-house counsel. Tex. Comm. on Prof'l Ethics, Op. 488.

Would this rule apply to an Open Records Request? Questions at open meeting?

Investigators - Under the Texas Disciplinary Rules of Professional Conduct, a lawyer for a Texas governmental agency is not required to limit communications by the agency's enforcement officers who are not subject to the lawyer's direct supervisory authority with regulated persons who are represented by lawyers. However, a lawyer for a governmental agency is not permitted to communicate directly with a regulated person that is represented in the matter by a lawyer who has not consented to the communications and is not permitted to cause or encourage such communications by other agency employees, and the agency lawyer is obligated to prevent such communications by employees over whom the lawyer has direct supervisory authority. Tex. Comm. on Prof'l Ethics, Op. 600.

Would this rule apply to code enforcement? Police department?

What is the subject of the representation?

This *should* be clear to all concerned. This mainly plays a factor in determining whether the attorney knew that the City was represented by counsel regarding the subject.

This is a two-way street.

What about an open records request submitted by a defendant in a municipal court case who is represented by an attorney in the municipal court case?

What if the defendant's parent submitted the request?

Is the communication with the City?

“Entity of government” includes: (1) those with managerial responsibility that relates to the subject of the representation; and (2) those employed by the entity whose actions may make the entity vicariously liable. R. 4.02(c)

Managerial responsibility – city council, city manager, department heads. P&Z members? Others?

Vicarious liability – nearly any officer or employee.

Does the lawyer know the City is represented by counsel regarding the matter?

Generally, per charter or ordinance, an appointed City Attorney serves as general counsel and represents the City in all matters.

“Special counsel” may only represent City in select matters – land use, elections, litigation, etc.

Can be easily clarified by City Attorney notifying the lawyer.

(Please see the City of San Antonio City Attorney’s Letter to Attorney Lobbyist graciously provided by Camila W. Kunau, Assistant City Attorney for an excellent example)

Has the lawyer consented?

Consent can be implied e.g. private placement memo directed to multiple recipients. R. 4.02, Comment 2.

Consent alleged by defendant due to other lawyer instructing client to record further conversations with defendant. Court did not find consent because other lawyer was attempting to document improper communications and because initial contact from defendant preceded instruction to record. *Vickery v. Comm'n for Law. Discipline*, 5 S.W.3d 241, 260 (Tex. App. 1999).

Can also be easily clarified by notice from City Attorney.

What if the lawyer cc's the client on an email to you? Is that consent for you to "reply all" and include the client?

Is communication authorized by law?

Workers' Compensation Commission – Requires communications be sent to both claimant and claimant's attorney. Creates and exception to R. 4.02. Tex. Att'y Gen. Op. JC-0572 (2002).

Labor grievance - Communications by an attorney as “representative” of employee that is part of a labor organization are authorized by law. Tex. Comm on Prof'l Ethics, Op. 492.

Open Meetings - “A governmental body shall allow each member of the public who desires to address the body regarding an item on an agenda for an open meeting of the body to address the body regarding the item at the meeting before or during the body's consideration of the item.” Tex. Gov't Code § 551.007.

Public Information Act – Attorneys can submit directly to City. City attorney may respond directly to requestor known to be represented by counsel?

Eminent Domain – Certain communications – offers, notices of hearings, etc., must be sent directly to the landowner.

Duties to public at large – Comment 3 is frequently cited by attorneys as an exception when the city employee has an obligation “to the public at large.” However, Comment 3 only applies to paragraph (b), which refers to experts retained or employed by the city.

Other Issues

Direct contact from represented citizen –

Permit applicant contacts city attorney directly or city staff contacts permit applicant's attorney directly.

- The contacting party does not want to incur attorney's fees for something "they can handle themselves"
- Lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer
- Get permission from the opposing lawyer – not their client
- As a practical matter, a sensible course for the communicating lawyer would generally be to confirm whether in fact the representing lawyer has been effectively discharged. For example, the lawyer might ask the person to provide evidence that the lawyer has been dismissed. The communicating lawyer can also contact the representing lawyer directly to determine whether she has been informed of the discharge. *In re News Am. Pub., Inc.*, 974 S.W.2d 97, 103 (Tex. App. 1998), subsequent mandamus proceeding sub nom. *In re Users Sys. Servs., Inc.*, 22 S.W.3d 331 (Tex. 1999).

Unrepresented parties –

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. Rule 4.03

Proposed Rule 4.03 "The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

Inadvertent emails –

The committee on Disciplinary Rules and Referenda proposes adding a second comment under rule 4.04 to include the underlined text that follows:

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person. **(b)** A lawyer shall not present, participate in presenting, or threaten to present: (1) criminal or disciplinary charges solely to gain an advantage in a civil matter; or (2) civil, criminal or disciplinary charges against a complainant, a witness, or a potential witness in a bar disciplinary proceeding solely to prevent participation by the complainant, witness or potential witness therein. **(c)** A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Takeaways

- Check all the boxes
- R. 4.02 is a two-way street
- Clearly communicate to the other lawyer that you represent the City and you do not consent to the direct communication.