New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW. NYLJ.COM
ALM.
DECEMBER 9, 2022

ANTITRUST TRADE AND PRACTICE

Expert Analysis

# The No Contact Rule: Common Scenarios and Best Practices

By Brian A. Katz

Rule 4.2 of the New York Rules of Professional Conduct, also known as the "No Contact Rule," is frequently implicated, yet not always fully understood. At a high level, the Rule prohibits lawyers from speaking directly with a party the lawyer knows to be represented by counsel about the subject of the representation. The rule arises in a variety of contexts where its application is murky, such as settlement negotiations and investigations. Careful consideration of the Rule is imperative as its violation can have a range of consequences.

The No Contact Rule provides that "a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law." N.Y. Rules Prof'l Conduct 4.2. The rationale behind the rule is to "prevent situations in which a represented party may be taken advantage of by adverse counsel." *Niesig v. Team I*, 76 N.Y.2d 363, 370 (1990).

The scope of the Rule is broad, but not all-encompassing. It is limited to communications "about the subject of the representation," and requires that the lawyer have *actual knowledge* that the party is represented by a lawyer. However, actual knowledge can be inferred from the circumstances, and a lawyer cannot ignore the obvious. N.Y. Rules Prof'l Conduct 4.2, cmt. 8. Importantly, the Rule is not limited to litigations, and it applies even if the represented party initiates or consents to the communication. *Shuler v. Liberty Consulting Servs*., Ltd., 2022 WL 1552039, at *10 (E.D.N.Y. April 4, 2022) (report and recommendation adopted). Moreover, the rule applies equally to agents of an attorney—such as paralegals or investigators—which the attorney "causes" to communicate with a represented party.


Consequences for violation of the Rule can result in disciplinary sanctions, and in certain circumstances, can impact the substance of the case itself. For instance, where the Rule is violated in the context of settlement negotiations, the signed settlement agreement could be rendered null and void. See *Shuler*

BRIAN A. KATZ *is a partner and co-chair of the litigation department at Olshan Frome Wolosky.* SAHAND FARAHATI, *an associate, assisted in the preparation of this article.*

*v. Liberty Consulting Servs*., 2022 WL 1552039 (E.D.N.Y. April 4, 2022). A lawyer (and their firm) can also be disqualified from representation of their client for violation of the rule. See *Papanicolaou v. Chase Manhattan Bank, N.A*., 720 F. Supp. 1080, 1087 (S.D.N.Y. 1989). Below, we consider common circumstances in which the rule arises.

**Direct Communication Between Represented Parties**

In practice, settlement negotiations are sometimes best facilitated when clients speak to one another directly without lawyers present. While the Rule allows for these interactions, a lawyer may have an obligation to provide notice to the other party's lawyer that the outreach will occur.

The Rule explains that "a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place." N.Y. Rules Prof'l Conduct 4.2. Thus, as long as the lawyer provides reasonable advance notice to the party's counsel, the lawyer can advise its client to speak with the party directly, and counsel as to those communications.

The rule does not require notice where the interaction is not "caused" by the lawyer and is instead undertaken on the client's own initiative. This makes sense—a client is not bound by its attorney's rules of professional conduct. But can an attorney *advise* as to those communications without providing notice to the other lawyer? A New York City Bar Association Ethics Committee Opinion answers this question affirmatively—it explains that "where the client conceives the idea to communicate with a represented party, … [t]he lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient." NYC Eth. Op. 2002-3 (May 3, 2002). The Opinion explains that "overreach" in this context means "converting a communication initiated or conceived by the client into a vehicle for the lawyer to communicate directly with the nonclient[.]" Id. However, counsel should proceed cautiously. On occasion, courts have found lawyers to have overreached or "caused" a client's communication with a represented party, albeit on specialized facts. See, e.g., *Dosso v. Knights Collision Experts*, 2021 WL 9038372, at *9 (E.D.N.Y. Sept. 15, 2021) (report and recommendation adopted) (finding the No Contact Rule was violated where an attorney drafted a settlement agreement that their client then sent to a represented party for their signature).

> Application of the No Contact Rule will often turn on facts specific to the case and individuals involved.

**Communication With Employees of a Represented Company**

Sometimes counsel may wish to speak with employees of a company they are litigating against in the course of investigating that company's conduct. The New York Court of Appeals considered this question and determined that the Rule applies only to communications with corporate employees "who have the legal power to bind the corporation in the matter or who are responsible for implementing the advice of the corporation's lawyer, or any member of the organization whose own interests are directly at stake in a representation." *Niesig*, 76 N.Y.2d at 363. In *Niesig*, the Court of Appeals held that that plaintiff's counsel in a construction accident case could conduct ex parte interviews with employees of the defendant company who

witnessed the accident. Therefore, whether counsel can communicate with the employees of a represented company will depend on the role and title of the particular employee at issue, and should be determined on a case-by-case basis.

**Communication With In-House Counsel for a Represented Company**

There may be situations in which a lawyer may want to communicate directly with the in-house counsel of a corporate entity that is represented by outside counsel. In-house counsel are situated differently from other employees with respect to the No Contact Rule by virtue of their legal training, and the Rule itself does not distinguish between outside and in-house counsel. A New York City Bar Association Ethics Committee Opinion explains that while courts "have not reached a uniform conclusion" on the question, the "majority view is that such communication is generally permissible." NY Eth. Op. 2007-1 (2007). However, it is important that "the in-house counsel be acting as a lawyer for the entity[.]" Id. The Opinion lists a number of considerations to determine if the in-house counsel is acting as a lawyer or is acting simply in a business capacity. These considerations include: (1) their job title, (2) whether court papers list the in-house counsel as an attorney on the matter, (3) their course of conduct, (4) their membership in an in-house legal department, and (5) their response to an inquiry as to their role.

**Email Chains That Include a Represented Party and Their Lawyer**

One of the more mundane situations in which the Rule is implicated is where an adversary's client is copied on an email chain, and a reply-all might violate the Rule. An attorney cannot satisfy the Rule by simply sending a communication simultaneously to both the represented party and their lawyer because the Rule expressly calls for *prior* consent. However, consent can be inferred from the circumstances.

A New York City Bar Association Ethics Committee Opinion considers the topic and concludes that "an attorney who cc's their own client on an email to other counsel should reasonably expect that such other counsel will use the reply-all function and thus consents to the other counsel doing so within the meaning of Rule 4.2(a)." NY Eth. Op. 2022-3 (2022). However, such implied consent is "not unlimited." The scope will depend on the statements and conduct of the lawyer, and is limited to "the consent that might reasonably be inferred from the context." Id. For instance, counsel copying their client on a communication may constitute implied consent to a reply-all "on the same subject within a reasonable time," but not a different subject. Id.

***

All told, application of the No Contact Rule will often turn on facts specific to the case and individuals involved. In making judgment calls about whether a communication is authorized, counsel should always keep in mind the purpose of the Rule—to "prevent situations in which a represented party may be taken advantage of by adverse counsel." *Niesig*, 76 N.Y.2d at 370.

OLSHAN
OLSHAN FROME WOLOSKY LLP