

Ethical Considerations when Communicating with Others

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I.R.P.C. 1.4: COMMUNICATION

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

I.R.P.C. 1.4: COMMUNICATION

(a) A lawyer shall:

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

I.R.P.C. 1.4: COMMUNICATION

(a) A lawyer shall:

(4) promptly comply with reasonable requests for information; including a request for an accounting as required by Rule 1.5(f); and

I.R.P.C. 1.4: COMMUNICATION

(a) A lawyer shall:

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

I.R.P.C. 1.4: COMMUNICATION

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

I.R.P.C. 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) Make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

When is a statement material?

A statement is material for purposes of Rule 4.1(a) if it could or would influence the person hearing the statement.

Examples of false statements of material fact:

- Presenting third parties with invalid subpoenas and telling them they must comply.
- Lawyer falsely claiming to be covered by another attorney's malpractice policy to serve as a closing agent for a lender.

COMMENT [1] TO I.R.P.C. 4.1

... Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.

Examples of misleading omissions:

- Lawyer who was late for court told judge he had to drive to another town for eyeglasses, but not that he also appeared in court in another county.
- Lawyer consulted with a second expert witness without disclosing that the lawyer never intended to use the expert. Instead, they planned to disqualify the second expert from working with the opposing party.

Examples of misleading litigation statements:

- Submitting unsigned sworn statements in support of a TRO motion made to look like they had been signed.
- Orchestrating elaborate “job interview” with a former law clerk to elicit or coerce evidence to seek recusal and reversal of judge’s prior rulings.

COMMENT [2] TO I.R.P.C. 4.1

... Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.

(The term “ordinarily” was added in 2002 to acknowledge that an estimate of price or value or a statement of intention regarding settlement could, under some circumstances, constitute a false statement of fact.)

COMMENT [2] TO I.R.P.C. 4.1 (cont.)

... Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Examples of misleading negotiation statements:

- Attorney negotiating for plaintiff in employment discrimination case used expert's damages report premised on continued unemployment, even though the attorney knew client just accepted a higher-paying job with a different employer.
- Negotiating a settlement without disclosing that the plaintiff died.

I.R.P.C. 4.2: COMMUNICATING WITH PERSON REPRESENTED BY COUNSEL

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.

COMMENT [1] TO I.R.P.C. 4.2

This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

COMMENT [2] TO I.R.P.C. 4.2

This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

COMMENT [3] TO I.R.P.C. 4.2

The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

COMMENT [4] TO I.R.P.C. 4.2

This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter....

COMMENT [4] TO I.R.P.C. 4.2 (cont.)

... Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a)....

COMMENT [4] TO I.R.P.C. 4.2 (cont.)

... Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

COMMENT [7] TO I.R.P.C. 4.2

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent....

Who is off limits for direct contact under Comment [7]?

- Anyone who “supervises, directs or regularly consults with the organization’s lawyer concerning the matter.
- Anyone who “has authority to obligate the organization with respect to the matter.”
- Anyone “whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.”

What about fact witnesses?

- Model Rule 4.2 does not preclude a lawyer from interviewing fact witnesses who are employed by a represented organization but who are not part of the group identified in Comment [7].
- The ability to serve as a fact witness should not be conflated with the witness's authority to obligate the organization.

Does general counsel represent the organization in a matter?

- The fact that an organization has a general counsel does not itself prevent another lawyer from communicating directly with the organization's constituents.
 - See ABA Formal Ethics Op. 95-396 (1995) (general counsel cannot assert blanket representation of all employees).
- But once lawyer knows the organization asked its general counsel to deal with a matter, Rule 4.2 applies.

May the organization's counsel advise employees to not volunteer information?

- Yes. I.R.P.C. 3.4(f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client.
 - See Comment [4] to Rule 3.4(f).

COMMENT [7] TO I.R.P.C. 4.2 (cont.)

... If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

... In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization....

What if the person claims they fired their lawyer?

- ABA Formal Ethics Op. 95-396 (1995) (a lawyer should seek confirmation when confronted with claim that counsel was discharged).
- I.R.P.C. 4.2 (“... unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.”)

Confidentiality issues with organization representation

- The ethical duty of confidentiality typically applies to the organization itself rather than to any of its constituents.

Comment [2] to I.R.P.C. 1.13

When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6.

Comment [2] to I.R.P.C. 1.13 (cont.)

... This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

Examples of confidentiality issues between organization and constituents:

- When constituent advises organization's lawyer about organization's criminal and fraudulent activities, lawyer's duty is to disclose allegations to president and board and keep allegations confidential from others.

Examples of confidentiality issues between organization and constituents (cont.):

- Lawyer may be prohibited from sharing confidential information with entity-employer if the information obtained from a constituent who reasonably appeared to be consulting with the lawyer as a present or prospective client in their individual capacity, and the lawyer failed to warn that the lawyer represents only the organization and could act against the person's interests.

I.R.P.C. 1.13(f)

In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.