

Ethics in IP Practice

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Today's Two Topics: Paper Covers More

1. How the rule against *ex parte* communications with any person “represented by counsel” in a matter can be violated during routine transactions, pre-suit investigations, and after filing suit.

2. Conflicts of interest and client identity, including ethical representation forming a start-up.

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Two Types of People

If a person is “represented by counsel” in a “matter,” Model Rule 4.2 applies, and lawyer shall not communicate with that person about that matter.

If a person is not “represented by counsel” in a “matter” a lawyer may communicate with that person about the matter, but subject to Model Rule 4.3.

Communicating with Unrepresented Persons: Model Rule 4.3

- “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.”

Communicating With a Represented Person: Model Rule 4.2

Model Rule 4.2

“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.”

Note: No exception for the person to consent!

When is there a “matter”?

- After suit, a “matter” exists.
 - A “matter” can exist before suit, but no bright lines, but as of date of anticipation of litigation, there likely is a “matter.”
- In negotiating terms of forming a start-up, likely a “matter” exists.

Who is Represented by an Entity’s Counsel?

Represented by Company’s Counsel

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

Not Represented by Company’s Counsel

- Other current employees
- All former employees.
- But as to them: Rule 4.3 applies.

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