STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 61
(January __, 2025)

Question Presented

The Committee is presented with an opinion request involving Nevada Rule of Professional Conduct 4.2, which it has reframed into the following hypothetical questions:

Question 1: Attorney X is the CEO of a non-profit advocacy organization that engages in education, lobbying, and litigation. Even though Attorney X is a Nevada-licensed attorney, he does not represent his organization as its legal counsel and he does not represent any clients on behalf of the organization or in the course of his duties as CEO.

Attorney X engages in communications with a local government agency sued by his organization, who is also represented by legal counsel. Does Attorney X, a Nevada-licensed attorney, violate Rule 4.2 of the Nevada Rules of Professional Conduct by directly contacting a managing-speaking agent of a local government agency with whom his organization has pending litigation? Stated differently, should Attorney X's communications to a managing-speaking agent of the government agency proceed through the government agency's legal counsel?

Question 2: Using the hypothetical above, Attorney X would like to make public comment during a publicly-noticed meeting by the local government agency against whom his non-profit advocacy organization has pending litigation. Does Rule 4.2 of the Nevada Rules of Professional Conduct prohibit Attorney X from making public comment on the subject of his organization's litigation against the local government agency?

Short Answer

Answer to Question 1: So long as Attorney X is not representing his non-profit advocacy organization as its legal counsel or in the subject of the litigation against the government agency, Attorney X does not run afoul of Rule 4.2 by contacting a managing-speaking agent of the government agency. Attorney X's position is CEO, not legal counsel, for the non-profit advocacy organization; therefore, he is not acting in the course of representing a client during the contact in question.

Answer to Question 2: Attorney X does not violate Rule 4.2 because he is not serving as legal counsel for the non-profit advocacy organization – he is making public comment on behalf of the company as its CEO, and he has a First Amendment right to petition the government at the publicly-noticed meeting. Even then, Nevada-licensed attorneys representing clients in suits against local governmental agencies may generally provide public comment at publicly-noticed meetings of those local governmental agencies under Rule 4.2's exception for communications

that are "authorized [by] law," so long as the attorney is not seeking to obtain facts from a represented managing-speaking agent of the local governmental agency for the purpose of litigation.

Rule

Nevada Rule of Professional Conduct 4.2, ("Communication With Person Represented by Counsel"), provides in full as follows:

> 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.

Nevada Rule of Professional Conduct 4.2 is a verbatim adoption of ABA Model Rule 4.2, which Nevada adopted in 2006. *See ABA Jurisdictional Rules Comparison Charts*.[1]

Discussion

A. Background and Purpose of Rule 4.2

Rule 4.2 is known as the "no-contact" rule for attorneys communicating with represented persons. "The purpose of the rule is generally regarded as twofold: first, it prevents lawyers from taking advantage of laypersons, and second, it preserves the integrity of the attorney-client relationship." *In re Discipline of Schaefer*, 117 Nev. 496, 25 P.3d 191 (Nev., June 21, 2001) (enforcing Rule 4.2 when *pro se* attorney contacted represented persons during the course of litigation) *modified on other grounds by In re Discipline of Schaefer*, 31 P.3d 365 (Nev., Sept. 10, 2001)

Comment 1 to Rule 4.2 of the ABA Model Rules of Professional Conduct ("ABA Model Rules") explains that the Rule contributes to proper functioning of the legal system by protecting represented persons from possible overreach, interference in the attorney-client relationship, and uncounseled disclosure of information relating to the representation.[2] The rule also prevents inadvertent disclosure of privileged information by the layperson to the opposing attorney. *In re Discipline of Schaefer*, 117 Nev. at 507, 25 P.3d at 199; *see also* ABA Model Rule 4.2, cmt. 1.

This Committee has issued three previous opinions concerning Rule 4.2. The first opinion is Formal Opinion 8, which bars a self-represented lawyer in a matter from directly contacting represented persons without the consent of their counsel. The second opinion is Formal Opinion 27, which addresses whether opposing counsel may contact low-level employees of a corporate

[1] Located at: https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/.

[2] Rule 1.0A of the Nevada Rules of Professional Conduct provides that comments to the ABA Model Rules may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, unless there is a conflict between Nevada's Rules and the ABA Model Rules. This Committee does not find a conflict between Nevada Rule of Professional Conduct 4.2 and the policy reasons described in Comment 1 of ABA Model Rule 4.2.

defendant when that corporate defendant is represented by counsel. As relevant here, Formal Opinion 27 was revised and reissued by this Committee on September 18, 2020 to discuss the Nevada Supreme Court's decision in *Palmer v. Pioneer Inn Associates, Ltd.*, 118 Nev. 943, 59 P.3d 1237 (2002), which establishes Nevada's test for contacting employees of a represented entity. The third opinion is Formal Opinion 54, which addresses whether an attorney violates Rule 4.2 by making a public records request to a government agency or department against whom the attorney's client is actively involved in litigation.

This new request for an opinion, however, addresses an attorney's role and relationship with Rule 4.2 when the attorney is not serving as legal counsel or representing clients in a matter but is still a Nevada-licensed attorney.

B. Whether a Nevada-licensed attorney employed by a legal entity may contact represented persons or represented entities depends on the attorney's role for the legal entity and whom the attorney contacts.

Rule 4.2 is clear: while representing a client, whether that client is an individual or a legal entity, the lawyer shall not communicate about the subject of the representation with a person whom the lawyer knows is represented by another lawyer in the matter, unless the communication falls under one of Rule 4.2's exceptions.[3]

As noted above, this Committee recently reissued Formal Opinion 27, which discusses the "managing-speaking agent" test as adopted by the Nevada Supreme Court in *Palmer*. This Committee references that opinion here because **with whom** an attorney seeks to speak at a represented organization is critical. If the opposing party that the attorney wishes to contact is a managing-speaking agent of the represented legal entity, then the contact is not permissible. *See Formal Opinion 27* (revised and reissued Sept. 18, 2020).[4] This Committee incorporates herein Formal Opinion 27 and the "managing-speaking agent" from *Palmer* for purposes of this Opinion.

The no-contact prohibition also includes situations where the Nevada-licensed attorney is representing themselves *pro se* and even if the attorney is the principal of his or her own legal entity and representing that legal entity in the matter. *See In re Discipline of Schaefer,* 117 Nev. at 508, 25 P.3d at 200; *and see Formal Opinion 8.* In *In re Discipline of Schaefer*, for example, the attorney appeared as counsel of record for his own corporation, "Schaefer Ltd." in a variety of matters, including pre-suit negotiations, administrative proceedings, and judicial proceedings. The attorney argued that he was not subject to discipline under Supreme Court Rule 182 (predecessor to Nevada RPC 4.2) because he was acting in his capacity as principal of his corporation, not as a lawyer, and thus he could contact the opposing party directly. *Id.*, 508-509, 25 P.3d at 200. The Nevada Supreme Court rejected this argument. It observed that because a legal entity cannot

[3] Those exceptions are: 1) the other lawyer has consented to the direct contact, or 2) the contact is authorized by law or court order. Nevada RPC 4.2.

[4] It is important to note that the Nevada Supreme Court specifically considered and declined to adopt Comment 7 to ABA Model Rule 4.2 with respect to communications with represented organizations, because Comment 7 espouses a rule different than the "managing-speaking agent" test. *See Palmer,* 118 Nev. at 961, 59 P.3d at 1248. Consequently, prudent Nevada practitioners will carefully review the *Palmer* decision when determining whether to contact an employee of a represented organization.

appear except through counsel, "a lawyer principal who appears on behalf of his corporation is clearly acting in his capacity as a lawyer representing a client, not as a principal of the corporation." *Id.*, at 509, 25 P.3d at 200. Consequently, an attorney who represents themselves or their own legal entity must follow the no-contact provisions of Rule 4.2. Most states also adhere to the principle that a *pro se* attorney may not contact a represented person.

In the hypothetical posed by Question 1 above, however, Attorney X is not representing clients or his organization in any legal capacity. Notably, Attorney X does not hold the position as in-house counsel or staff counsel, or a similar legal role for his non-profit advocacy organization. Rather, Attorney X is the CEO of his non-profit (and also, presumably, an employee of the non-profit). As the Chief Executive Officer, Attorney X's responsibilities would include directing and overseeing the non-profit's strategic goals and objectives, typically subject to the direction of any board of directors and in the best interests of the non-profit.

While some of these tasks may encompass overseeing, directing, and advising on the goals and outcomes of pending litigation, this Committee is of the belief that such conduct does not equate to "representing a client" for the purposes of Rule 4.2. If such a position were taken, then Nevada-licensed attorneys could effectively be hampered in serving as officers or executives for legal entities when those attorneys do not engage in the practice of law for those entities or represent a client, including the entity for whom they are employed. For example, an attorney in this state could be effectively precluded from taking employment as a CEO or director of an organization when the responsibilities of that role include communicating, on behalf of the organization, with other represented persons or entities about litigation or settlement of a contested matter, simply by virtue of the attorney CEO holding a Nevada law license. This Committee does not interpret Rule 4.2 as encompassing such a broad prohibition.

This conclusion is supported by *HTC Corp. v. Tech. Props. Ltd*., 715 F. Supp. 2d 968 (N.D. Cal. 2010). In *HTC Corp*, the Northern District of California concluded that a California-licensed attorney, who was the CEO and chairman of a company, did not violate the no-contact rule by directly communicating with an opposing party in litigation. The attorney CEO had never represented his company in any legal capacity, had never appeared its as counsel of record, was not its legal advisor, and had never held a legal position with his company. *Id.* at 970. He communicated with the opposing party about potential settlement opportunities in light of the costs of litigation and attempts to transfer the case to a different venue as part of his role as CEO. *Id.*, at 970-71. The opposing party sought a protective order and sanctions under the no-contact rule and the court denied the request. Citing to ABA Model Rule 4.2 and California's no-contact rule, the court concluded that simply because the attorney was a member of the state bar, that did not transform his position in the litigation to that of an attorney representing a client. *Id.* at 972. Rather, the attorney's position with his company was that of CEO and no other role. He did not represent his company in the litigation, so his contact with the executive of the opposing party fell under the scope of "expressly permitted communications between parties themselves." *Id.* at 973. Also significant to the court's decision is that the company did not claim any attorney-client privilege with respect to any communications with its attorney CEO.[5] *Id.*

[5] The *HTC Corp* court cited to and distinguished the *In re Discipline of Schaefer* case, correctly observing that in *Schaefer*, the attorney appeared on behalf of his own corporation (of which he was the principal) as its legal counsel in the pending matters. *See HTC Corp.*, 715 F. Supp. 2d at 973.

Similarly, in *Halverson v. Hardcastle*, 123 Nev. 245, 163 P.3d 428 (2007), the Nevada Supreme Court in a lengthy footnote addressed the application of Rule 4.2 in the context of different occupations for attorneys. In *Halverson*, a district court judge was precluded from accessing her office and performing her judicial functions by the chief judge of the district court. During the resulting conflict, the district court judge argued that the chief judge was "ethically obligated" to contact her through her attorney with respect to the dispute. *Id.* at 277, fn. 103, 163 P.3d at 450, fn. 103. This Committee presumes that all judges discussed in the decision held Nevada law-licenses as a function of their positions. *See* NRS 3.060.[6] In examining Rule 4.2, the Nevada Supreme Court disagreed with the district court judge's argument that she could not be contacted directly by the chief judge. The *Halverson* court observed that the chief judge, the committee judges, and the court administrator "were not acting as lawyers representing a client" – therefore, Rule 4.2 did not preclude their direct communications to the district court judge about the subject of the dispute (her position on the bench). *Id.*, 123 Nev. at 277, fn. 103, 163 P.3d at 450, fn. 103.

The inquiry presented by this hypothetical, however, is very fact-dependent. This Committee certainly could foresee other scenarios which may present ethical issues for Nevada-licensed attorneys under Rule 4.2, and thus provides the following hypothetical scenarios:

> Lawyer A is employed as in-house counsel for a Nevada corporation, Casino Corp. Casino Corp. is involved in active litigation against another corporation, Silver Corp. Silver Corp. does not have in-house counsel but is represented by outside counsel, Lawyer B. Lawyer A, however, is counsel of record for Casino Corp. in this case and has represented Casino Corp. in past litigation. Lawyer A's communications with the managing-speaking agents of Silver Corp. about the subject of representation or litigation are impermissible under Rule 4.2, absent Lawyer B's consent or an exception under the law or a court order. Lawyer B's communications with Lawyer A, however, do not violate Rule 4.2 because Lawyer A is counsel of record for Casino Corp. and there is no outside counsel with whom Lawyer B should first seek consent for the communication.[7]
>
> Same scenario as above, except Lawyer A is employed as both Senior Vice President and General Counsel for Casino Corp. In his role as Senior Vice President of Casino Corp, Lawyer A wants to contact the CEO of Silver Corp. to discuss pending litigation and potential settlement opportunities. Lawyer A has represented Casino Corp. as General Counsel in past disputes and gives general legal advice to Casino Corp. in his role. Even though Lawyer A wishes to speak with the CEO of Silver Corp. in Lawyer A's capacity as Senior Vice President, his contact with the CEO of Silver Corp. would violate Rule 4.2 if Lawyer A knows

[6] In 1931, the Nevada Legislature enacted the requirement that district court judges be duly licensed and admitted to practice law in all courts in Nevada. *See* 1931 Statutes of Nevada, Page 10, Senate Bill 3 (Feb. 6, 1931).

[7] *See, e.g., New York City Bar Formal Op. 2007-01 (Oct. 19, 2010); and see ABA Formal Op. 06-443 (2006).*

that Silver Corp. is represented by either its own in-house counsel or outside counsel. [8]

The reasons for this are 1) Lawyer A, under the language of Rule 4.2, is representing his client in the course of the communication to discuss potential settlement with a person/entity whom Lawyer A knows is represented by counsel, 2) Lawyer A knows Silver Corp. is represented by counsel, and 3) by Lawyer A's communication with an officer or executive of Silver Corp., the danger for overreach, interference, and uncounseled disclosure is present.

In sum, it is this Committee's opinion that Rule 4.2 does not prohibit Attorney X in Question 1 from communicating with representatives or constituents of the local governmental agency with whom his non-profit advocacy organization has pending litigation because Attorney X, although a Nevada-licensed attorney, is not employed in representing a client or serving as legal counsel for his non-profit. This Committee cautions, however, that a careful analysis of the attorney's position with the legal entity must be undertaken, as the above scenarios illustrate potential pitfalls by communicating with a represented person or legal entity.

C. Whether a Nevada-licensed attorney may make public comment at a publicly-noticed meeting concerning the subject of pending litigation.

The second inquiry presented to this Committee in Question 2 asks whether it is permissible for Attorney X (who is the CEO for his non-profit advocacy organization but does not represent it or any clients for it) to make public comment on the subject of his non-profit's pending litigation against the local government agency. The meeting at which Attorney X wishes to speak is a publicly-noticed meeting.

Again, under the hypothetical presented here, Attorney X is not representing clients or his non-profit in a legal capacity. Although he holds a Nevada law license, Attorney X is employed as the CEO of his non-profit. In this context, Attorney X's desire to give public comment as the CEO of his non-profit is no different than any other private citizen's right to appear and give public comment at a publicly-noticed meeting pursuant to the First Amendment right to petition.[9]

Similarly, this Committee observes that a Nevada lawyer may be retained to speak to local government officials on behalf of a client at a publicly-noticed meeting. Such communications could feasibly include communications with represented managing-speaking government officials on issues affecting current litigation. On its face, Rule 4.2 appears to prohibit such communications. There is, however, an exception to the Rule whereby such communications are permissible if authorized by law.

---

[8] "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. Nevada RPC Rule 1.0(f). Therefore, if Lawyer A knows that Silver Corp is usually represented by Lawyer B in legal disputes between the parties, Lawyer A can infer that Lawyer B may be representing Silver Corp in the present litigation.

[9] *See* United States Constitution, First Amendment *and* Nevada Constitution, Art. 1, Sec. 9-10.

Under Nevada open meeting laws, meetings of governmental entities are open to the public and all persons must be permitted to attend unless otherwise provided by specific statute. Section 241.020 of the Nevada Revised Statutes provides, "Except as otherwise provided by specific statute, all meetings of public bodies must be open and public, and all persons must be permitted to attend any meeting of these public bodies at a physical location or by means of a remote technology system." NRS 241.020. Similarly, NRS 241.021 states, "Except as otherwise provided in this section, comments by the general public must be taken by a public body…" (listing order of public comment).

The Legislative intent and declaration for Nevada's opening meeting laws specifically finds that, "all public bodies exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." NRS 241.010. Moreover, the action of any public body taken in violation of Nevada's open meeting laws is specifically declared "void." NRS 241.036. For example, if a government official were to preclude an attorney who is acting on behalf of a client from providing public comment on an issue on the basis that there is pending litigation between the government agency and the client, that action could be in violation of NRS 241.021 and be declared void.

Construing these provisions and the Legislative intent accordingly, it is this Committee's position that an attorney's communication with represented government officials by way of public comment is an exception "authorized by law" to Rule 4.2's general no-contact rule. In the setting of public comment, there is less concern for overreach and uncounseled disclosure of information, particularly if the attorney's public comment is agendized. Best practices for Nevada-liensed attorneys will be identification of the attorney as a legal representative of his or her client, in advance of the public meeting, so that represented government officials may determine whether to have counsel present with them.[10] This Committee cautions, however, that comments at publicly-noticed meetings are not an opportunity for fact-finding nor a substitute for formal discovery during litigated or contested proceedings involving the governmental agency or department. The statutory and administrative requirements for public comment must be adhered to, in conformance with related rules governing attorney conduct.

Conclusion

This Committee finds that Nevada-licensed attorneys contemplating contact of a represented person should undertake careful analysis consistent with Nevada law and the Nevada Rules of Professional Conduct when initiating such contact to ensure their actions do not violate Rule 4.2. This Committee also finds that Nevada-licensed attorneys do not run afoul of Rule 4.2 when making public comments before a local governmental entity at or during a publicly-noticed meeting in line with the analysis set forth herein.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada, pursuant to S.C.R. 225. It is advisory only. It is not binding upon

[10] *See Ohio Board of Professional Conduct Formal Op. 2022-03* (April 8, 2022) (finding that Rule 4.2 does not proscribe a lawyer from representing and speaking on behalf of a client at a public meeting when the government's counsel is not present, but advising lawyers to identify themselves and their client in advance of the meeting).

the courts, the State Bar of Nevada, its Board of Governors, any person or tribunal charged with regulatory responsibilities, or any member of the State Bar.

Authorities

Nevada Rule of Professional Conduct 4.2
Nevada Rule of Professional Conduct 1.0A
Nevada Rule of Professional Conduct 1.0(f)
United States Constitution, First Amendment
Nevada Constitution, Art. 1, Sec. 9-10
NRS 3.060
NRS 241.010, .020, .021, and .036.
In re Discipline of Schaefer, 117 Nev. 496, 25 P.3d 191 (2001)
Palmer v. Pioneer Inn Assocs., Ltd., 59 P.3d 1237, 118 Nev. 943 (2002)
Halverson v. Hardcastle, 123 Nev. 245, 163 P.3d 428 (2007)
Standing Committee of Ethics and Professional Responsibility Formal Opinion 27 (reissued Sept. 18, 2020)
ABA Model Rule of Professional Conduct 4.2 and related comments
ABA Formal Ethics Op. 06-443 (2006)
HTC Corp. v. Tech. Props. Ltd., 715 F. Supp. 2d 968 (N.D. Cal. 2010)
New York City Bar Formal Op. 2007-01 (Oct. 19, 2010)
Ohio Board of Professional Conduct Formal Op. 2022-03 (April 8, 2022)