

Rule 4-4.2 – the Anti-Contact Rule

July 2024

Connectivity/Technical Issues

- Audio Issues – If you have audio issues on computer, please try accessing by phone at
(701) 801-6121
****No Access Code Required****
- *If problems persist*, contact Paige Tungate at ptungate@DowneyLawGroup.com
- Watch the slides at <https://join.freeconferencecall.com/downeycle>
- Download the slides at <http://www.downeyethicscle.com/>
- Questions – Please submit questions during or after the program by emailing Paige Tungate at ptungate@DowneyLawGroup.com

CLE Information

- *Kansas Credit* – If you are seeking Kansas credit, you will need to enter the two Attendance Verification Words and your Kansas Bar information into the Program Survey
 - Please complete the Survey *within this week*, so we can ensure you receive proper credit
- *Certificate of Completion* – Available through the Program Survey
- Three ways to access Program Survey:
 1. Link available in the *CHAT*
 2. Link at the *end of the slides* (here or at www.DowneyEthicsCLE.com)
 3. Link sent to you in an *email within 30 minutes* of program ending



<https://www.surveymonkey.com/r/rule442>

Rule 4-4.2 – The Anti-Contact Rule

Rule 4-4.3 – Dealing with Unrepresented Persons

Rule 4-4.2 Communication 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.

Elements of Anti-Contact Rule

- 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
 - Lawyer has the consent of the other lawyer or
 - Authorized by law or a court order.

Missouri Informal Opinion 20000140

Attorney represents the seller in a purchase and sale agreement that expressly requires that the seller send certain documents and notices to the buyer.

Does Rule 4-4.2 concerning communications with persons represented by counsel prohibit the Attorney, acting on the seller's behalf, from sending such notices and documents directly to the buyer when the buyer is represented by counsel?

Informal Opinion 20000140 - Answer

Attorney should ask the buyer's attorney whether the buyer's attorney would accept the documents and notices on behalf of the buyer. If the buyer's attorney does not indicate that he or she will accept the documents and notices on behalf of the buyer, Attorney may send them directly to the buyer.

Missouri Informal Opinion 20000108

Attorney represents Client, who was injured as a passenger traveling in vehicle 1. Client was allegedly injured as a result of negligence of the driver of vehicle 2. **Attorney has been in contact with and is in the process of negotiating with the insurance company** which has liability coverage applicable for vehicle 2.

Attorney is now interested in contacting the driver of vehicle 2 directly. To Attorney's knowledge, the driver of vehicle 2 is not represented personally by an attorney. May Attorney contact the driver of vehicle 2?

Informal Opinion 20000108 – Answer

If an attorney hired by the insurance company currently represents the driver of vehicle 2, Attorney may not contact the driver of vehicle 2, directly. If Attorney is not aware of an attorney representing the driver of vehicle 2, through the insurance company or otherwise, Attorney may contact the driver of vehicle 2, directly.

Missouri Informal Opinion 2011-03

May Attorney **communicate with Attorney's parents about the parents' litigation**, where the parents' counsel does not consent to the communication, **Attorney is seeking to intervene in the matter pro se**, and further litigation concerning the matter is likely in the future?

Informal Opinion 2011-03 - Answer

No. In representing a party, Rule 4-4.2 prevents a lawyer from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer, unless the other lawyer consents or unless authorized to do so by law or court order.

The rule's prohibition applies to a lawyer who is involved in a matter as a party or a person with interests.

Missouri Informal Opinion 20090003

Attorney represents Defendant in a personal injury case.

Plaintiff maintains an account on a social networking site such as MySpace or Facebook. Plaintiff is allegedly making statements on the social networking site that would hurt Plaintiff's case. A third party witness is unwilling to print said information off of the networking site.

Can Attorney create an account on the social networking site and send a message to Plaintiff asking to be invited as Plaintiff's friend?

After being accepted as Plaintiff's friend Attorney would have access to Plaintiff's statements. **Plaintiff is represented by counsel.**

If Attorney created an account on a social networking site and asked Plaintiff to be invited as a friend what ethical problems arise? Would said contact constitute communication with a person known to be represented?

Informal Opinion 20090003 - Answer

Attorney's request to be invited as a friend of Plaintiff's Facebook/MySpace account would be a "communication" for purposes of Rule 4-4.2. Attorney may not send such a communication directly to plaintiff, in light of that rule.

Missouri Informal Opinion 2021-11

Lawyer B has been contacted by Client regarding possible representation in a dissolution of marriage matter.

Client is represented by Lawyer A in the dissolution of marriage but is seeking a **second opinion** as to the representation, as Client believes that matter should be moving faster.

May Lawyer B meet with Client without the permission of Lawyer A?

Informal Opinion 2021-11 - Answer

Yes, Lawyer B may meet with Client regarding possible representation in the dissolution of marriage matter without the consent of Lawyer A. See also Mo. Informal Opinion 980173. Comment [4] to Rule 4-4.2 provides that this [Rule 4-4.2](#) does not “preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.”

Client may choose to engage the services of Lawyer B or remain with Lawyer A. **Client is a prospective client pursuant to Rule 4-1.18 when meeting with Lawyer B**, and remains as such if no client-lawyer relationship ensues with Lawyer B for future conflicts of interest. If Client chooses to engage the services of Lawyer B, Lawyer A shall withdraw in accordance with Rule 4-1.16. Whether a lawyer-client relationship exists is a matter of fact and beyond the scope of the Rules of Professional Conduct. Scope [17].

Missouri Informal Opinion 20050059

Attorney was hired to get Client's sick leave benefits from former employer and to apply them retroactively to Client's retirement. Client was advised that the retainer would not cover filing fees. Attorney offered to prepare a petition and first set of discovery, after which Client would have 60 days to decide if more legal assistance was needed. Attorney immediately prepared the documents and sent them to Client. When Client later inquired about the status of the case, Attorney advised Client of the situation over the phone and again in writing. Client replied with a letter stating that Attorney was to file the petition. Attorney informed Client that Attorney's office would not be further involved.

Client responded by threatening to file a bar complaint against Attorney if Client's retainer fee was not refunded. Attorney feels uncomfortable with further direct contact with Client and solicits advice and guidance.

Informal Opinion 20050059 – Answer

The Rules of Professional Conduct do not prohibit Attorney from having further direct contact with Client, based on the information presented.

Even if Client files a fee dispute or bar complaint, Attorney is not prohibited from direct contact unless Client is represented by counsel in that matter. In that event, any contact would have to be through Client's counsel or with the counsel's consent, under Rule 4-4.2.

Under 4-4.2, Client would not be considered to be represented by disciplinary counsel in a bar complaint, nor would Client be considered to be represented by the fee dispute program if Client filed a fee dispute.

There are no “nonrefundable” fees in Missouri. The only fee where a client is not entitled to a refund is a fee that has been earned by the attorney. In determining whether the fee has been earned, all factors set forth in Rule 4-1.5(a) may be considered.

Missouri Informal Opinion 20030061

Can attorneys for custodial parents have contact with children who have had a guardian ad litem appointed for them?

Informal Opinion 20030061 – Answer

Although a GAL is not always the attorney for the child, **generally an attorney who is a GAL is treated as functioning as an attorney.**

Without facts that would indicate otherwise, the initial approach would be that the attorney for a party should not communicate with the child about the matter.

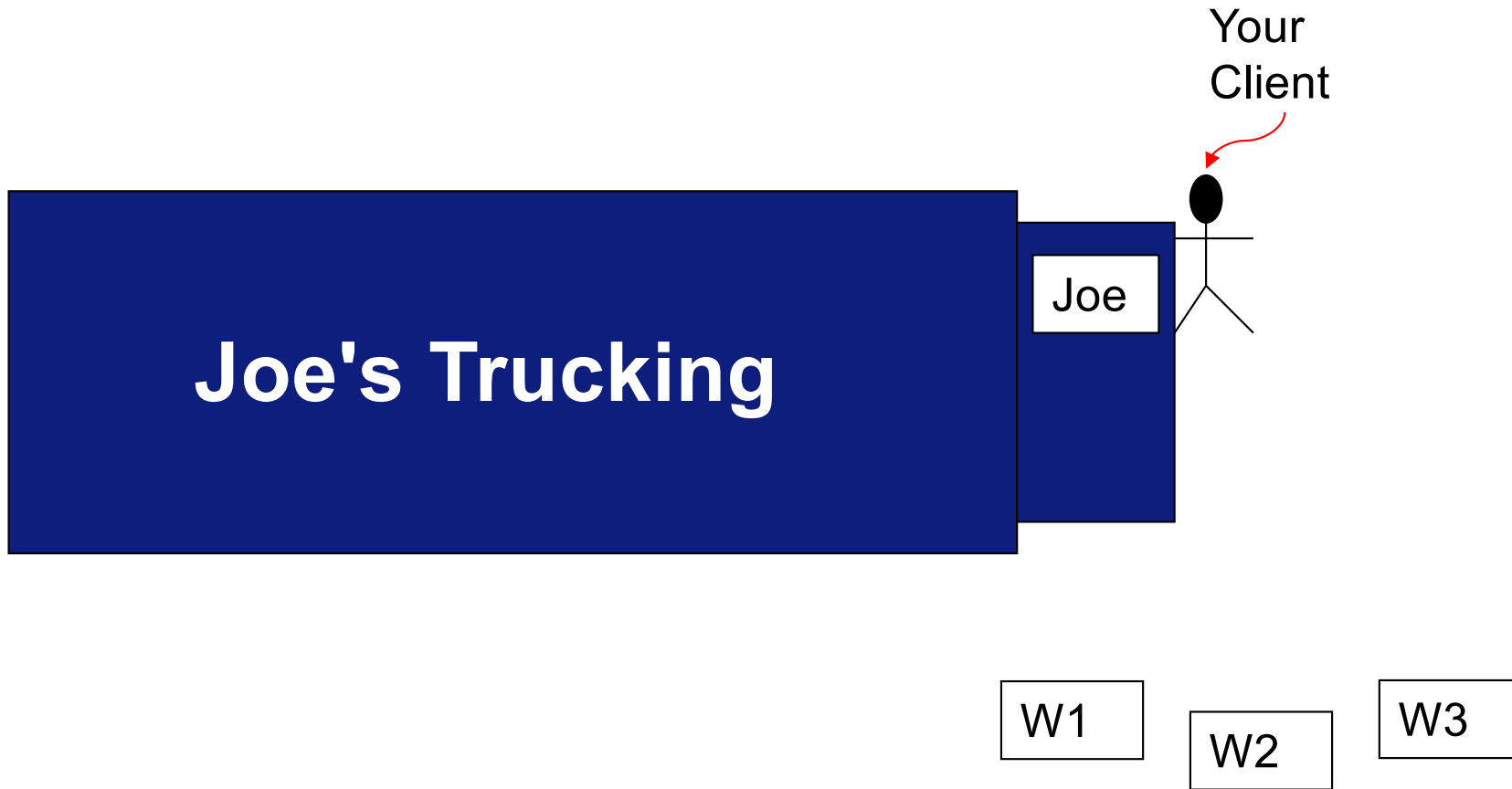
The key word, in relation to Rule 4-4.2, is “communicate.” **Rule 4-4.2 does not prohibit an attorney from being in the presence of a represented party; it prohibits communication about the subject of the representation.** The attorney for either parent could be in the presence of the child who has a guardian ad litem but should not communicate with the child regarding the matter. This may mean that the child would need to be kept outside the hearing of the conversation between the attorney and parent.

Scenario – the Accident

Representing an Entity – Rule 4-1.13(a)

A lawyer employed or retained by an organization **represents the organization** acting through its **duly authorized constituents**.

The Accident



Elements of Anti-Contact Rule

- 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
 - Lawyer has the consent of the other lawyer or
 - Authorized by law or a court order.

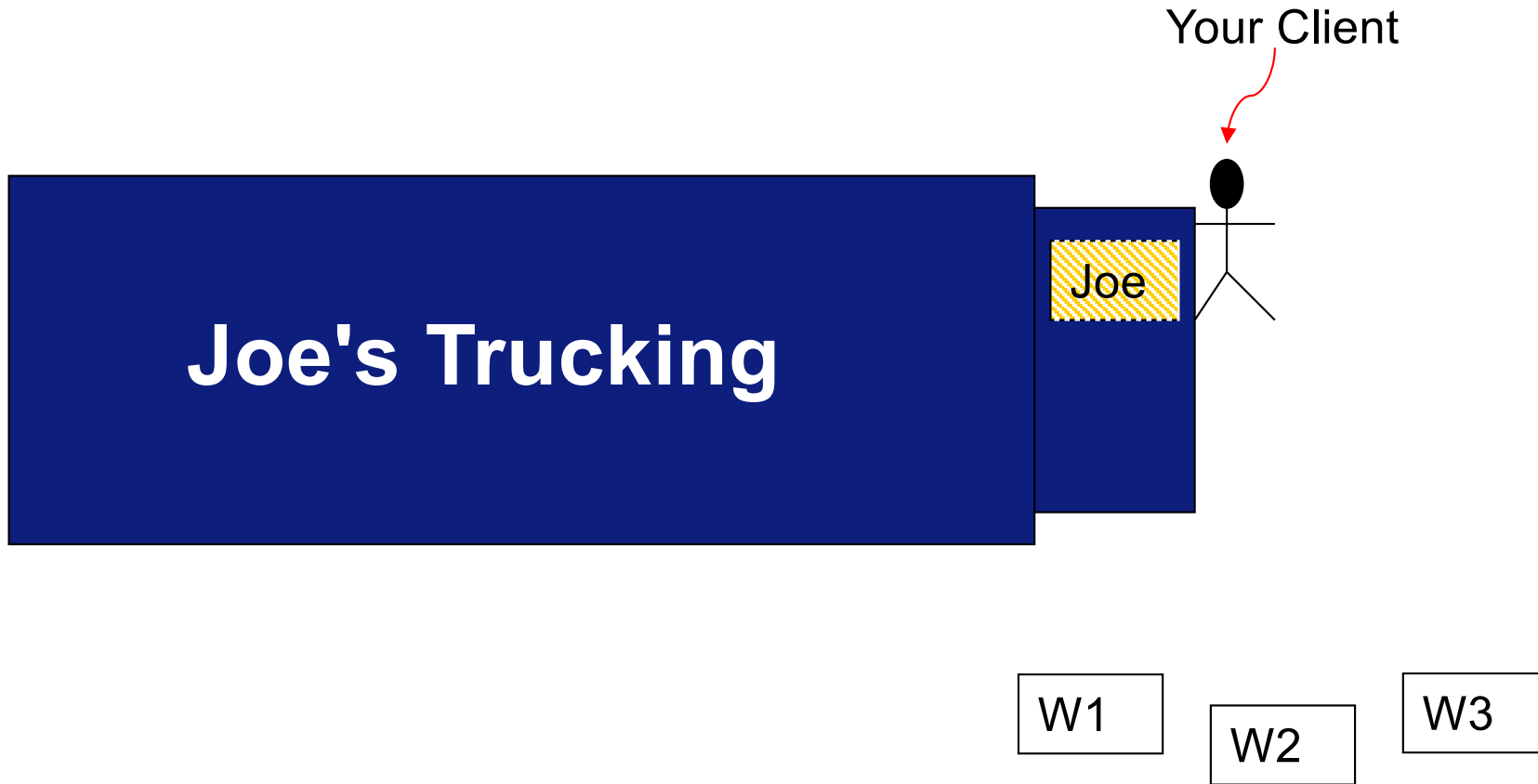
Rule 4-4.3 Dealing With Unrepresented Person

- 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**.
- 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.

Unrepresented Persons – Rule 4-4.3

- ***No (falsely) implying disinterested.***
 - 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.
- ***Must clarify role when misunderstood.***
 - 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.
- ***No giving legal advice if conflicting interests.***
 - 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.

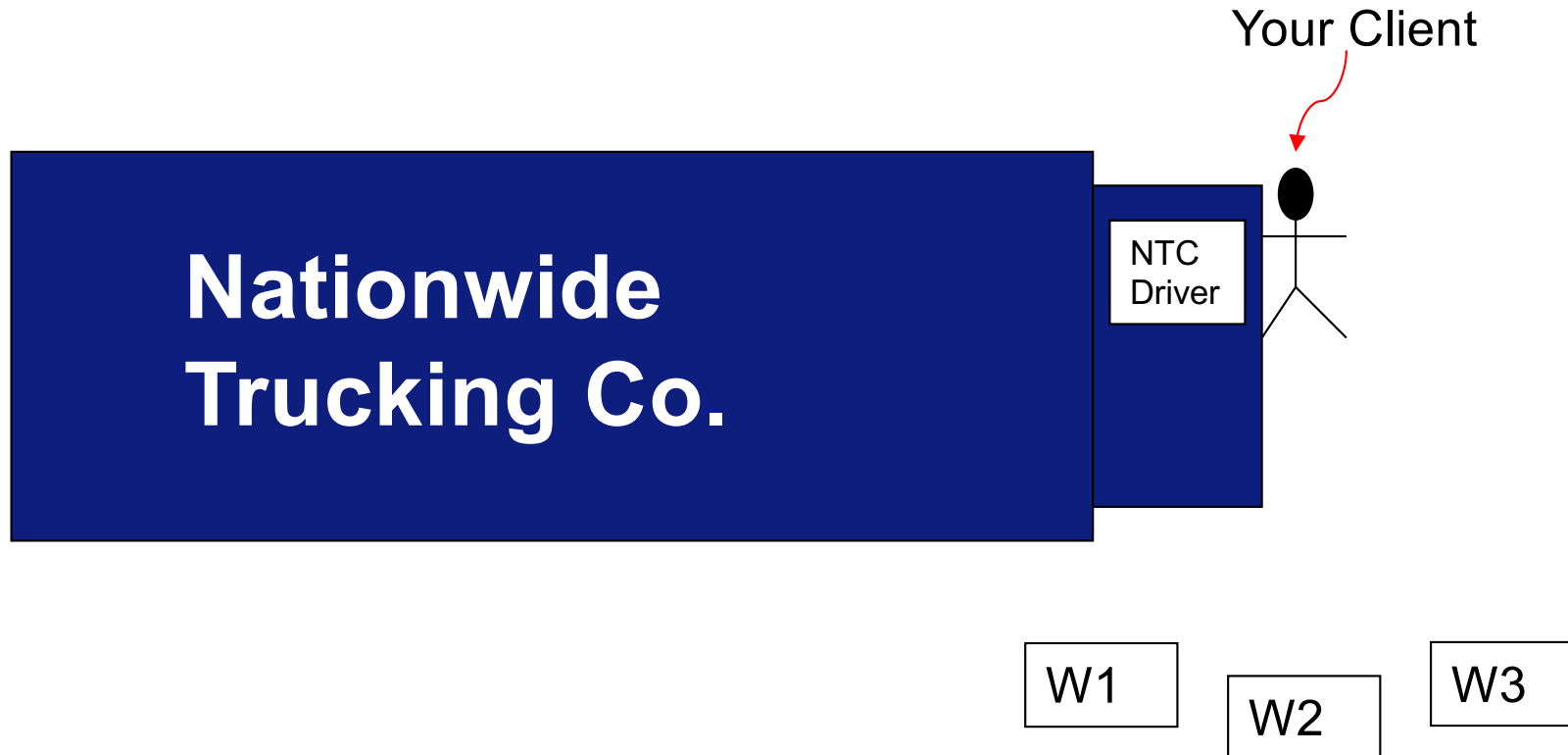
The Accident – Joe with Lawyer



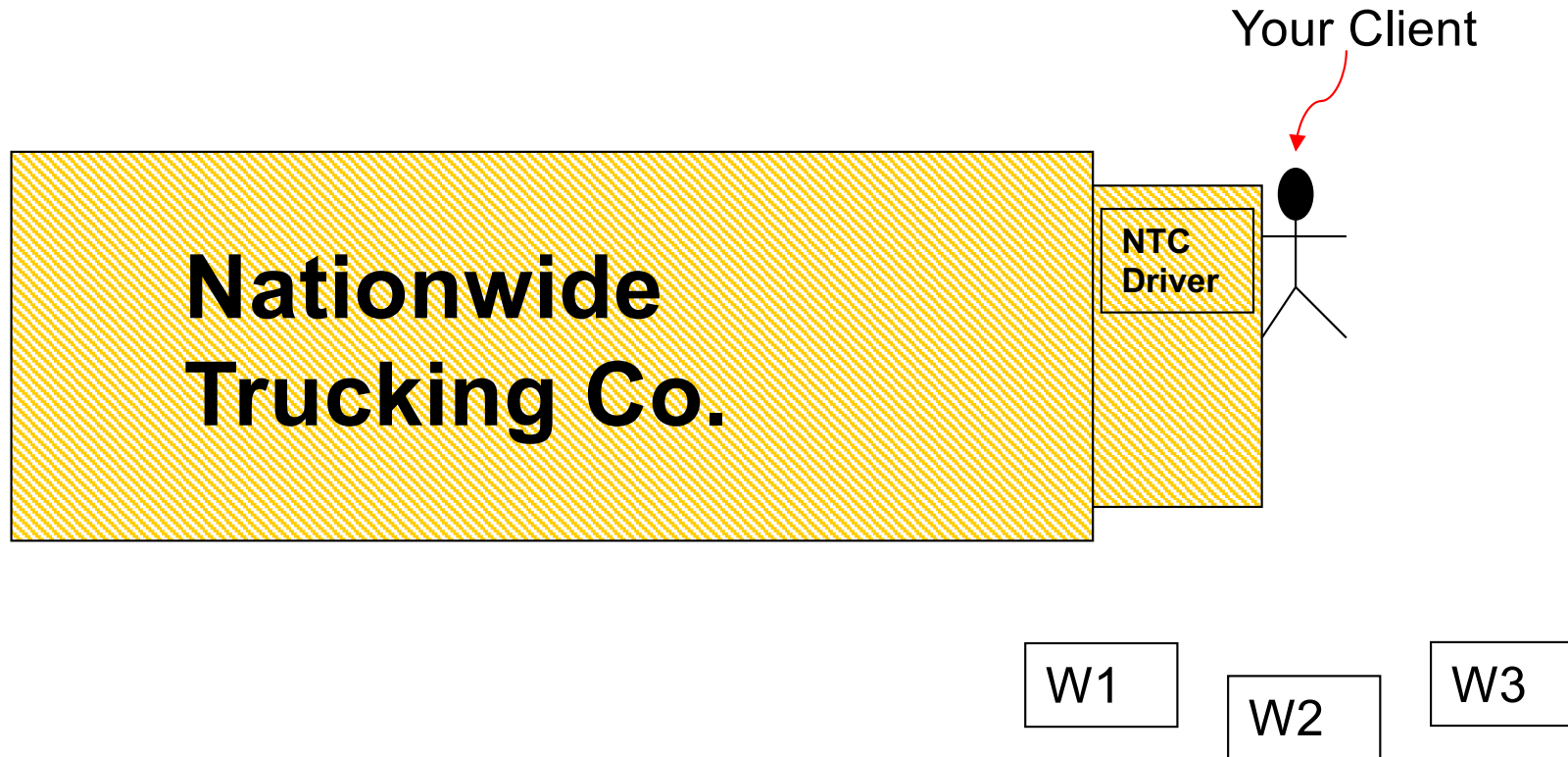
Elements of Anti-Contact Rule

- 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
 - Lawyer has the consent of the other lawyer or
 - Authorized by law or a court order.

The Accident #2 – Corporate Context (No Lawyer)



The Accident #2 – NTC with Lawyer



Corporate Employees (Constituents)

Rule 4-4.2 cmt [7] – In the case of a represented organization, Rule 4-4.2 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**.

Missouri Informal Opinion 2015-07

May Attorney ethically make a **public records request** of a state agency where the state agency is an adverse party in a current claim by Attorney's client against the agency and where the agency is **represented by counsel** in the matter?

Elements of Anti-Contact Rule

- 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
 - Lawyer has the consent of the other lawyer or
 - Authorized by law or a court order.

Informal Opinion 2015-07 - Answer

The prohibition in Rule 4-4.2 of communication by an attorney about the subject of the litigation with a person the lawyer knows to be represented by counsel, absent consent of the other lawyer, or certain exceptions, extends to employees of a represented organization who supervise, direct, or consult with the organization's lawyer; employees who have authority to bind the organization; and employees whose acts or omissions may be imputed to the organization. Comment [7]. Represented organizations whose employees are protected from contact by the rule include both public and private entities. Comment [1].

To the extent the public records request would constitute communication with an individual in one of the above categories, the communication is governed by Rule 4-4.2.

Per Rule 4-4.2, communication by Attorney with represented persons without the other lawyer's consent is not prohibited **where the communication is authorized by law or court order**. See also Comments [4] and [5].

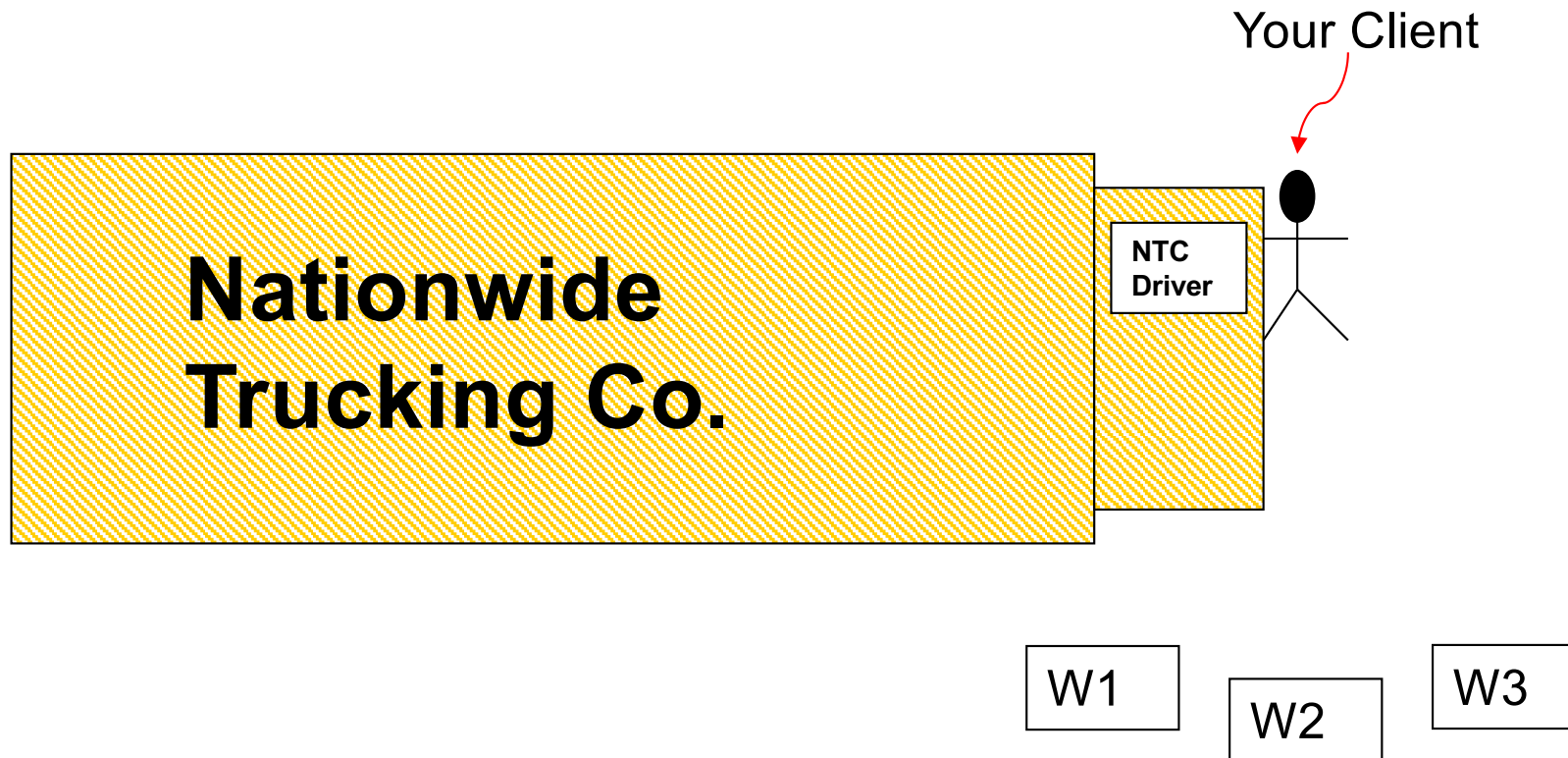
Informal Opinion 2015-07 - Answer

Whether any law authorizes Attorney's client to request the information is a matter outside the scope of an informal opinion. Attorney is prohibited from violating Rule 4-4.2 through the acts of another. Comment [4].

If Attorney is unsure whether a communication with a represented person is permissible, Attorney may seek a court order. Comment [6].

If the person with whom Attorney would be communicating is not an individual in one of the three categories of Comment [7] or otherwise represented, Attorney must take care to ensure the communication complies with Rule 4-4.3. Any conduct in the course of representing a client, including communication, must also comply with Rule 4-4.4(a).

The Accident #2 – NTC with Lawyer – Driver Fired – Scenario 11-10



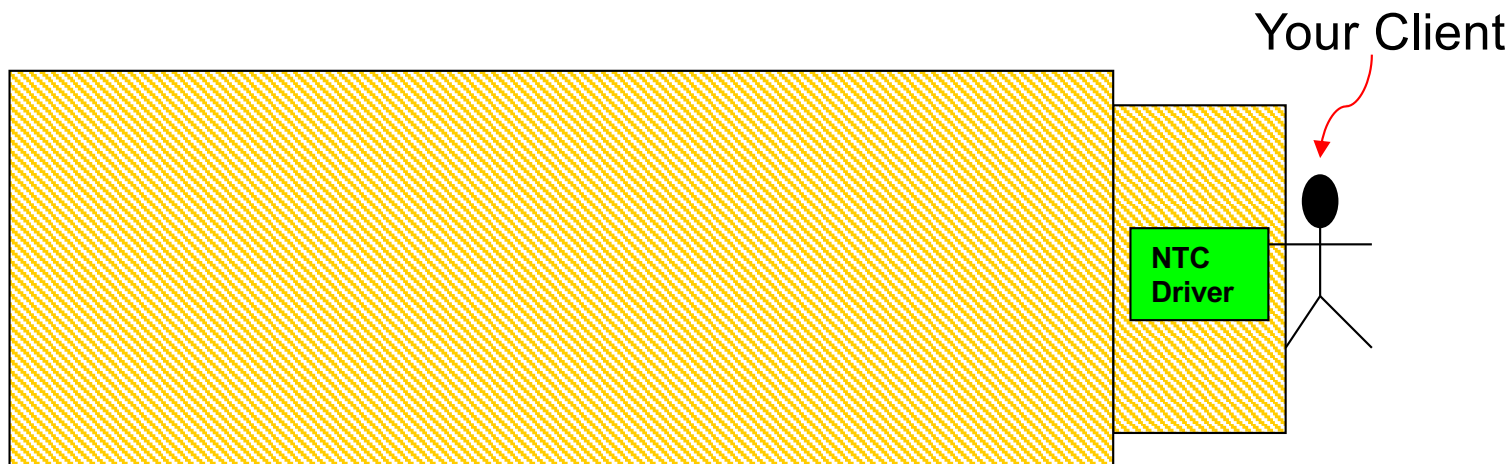
No Coverage for Former Constituents

Rule 4-4.2 cmt [7] "Consent of the organization's lawyer is **not required** for communication with a **former constituent.**"

May Not Invade Privilege

Rule 4-4.2 cmt [7] "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. See Rule 4-4.4."

The Accident #2 – NTC with Lawyer – Driver with Separate Lawyer



W1

W2

W3

Constituent with Separate Counsel

Rule 4-4.4 cmt [7] 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. Compare Rule 4-3.4(f).

Missouri Informal Opinion 2013-01

Attorney represents Plaintiffs in employment discrimination actions against a represented organization.

Does Rule 4-4.2 prohibit Attorney from contacting **unrepresented former managerial employees** of Defendant without the consent of Defendant's counsel?

Informal Opinion 2013-01 - Answer

Provided Attorney does not know that the former employees are represented by counsel, [Rule 4-4.2 does not prohibit Attorney from communicating with Defendant's former managerial employees](#) about the subject of the representation without consent of Defendant's counsel, as explained in Comment [7].

In accordance with Rule 4-4.3, Attorney must clearly identify Attorney's role in the matter and ask whether the former managerial employees are represented by counsel. If any of the former managerial employees are represented by counsel, then Attorney must have that counsel's consent or be authorized by law or court order to communicate with the former employees.

This opinion does not address any limitations at law on Attorney's contact with former employees, but Comment [7] to Rule 4-4.2 prohibits the use of methods of obtaining evidence that violate the legal rights of the organization as set forth in Rule 4-4.4(b).

Missouri Informal Opinion 2020-10

May Attorney communicate with a witness who is a **former** member and director of an association **without the consent of the association's counsel** about facts related to Client's defamation claim against the association?

The witness was a **member of the association at the time** of the allegedly defamatory statements but had resigned from its board of directors prior to the date the statements were made.

Counsel for the association asserted a client-lawyer relationship with all members of the association, including the witness by name, but the membership of the witness in the association has since been terminated.

Informal Opinion 2020-10 - Answer

The association is a represented organization. See Rules 4-1.13 and 4-4.2, Comment [7].

Rule 4-4.2 prohibits direct contact about the subject of the representation with a person Attorney knows to be represented by another lawyer in the matter, unless Attorney has consent of the other lawyer or is authorized to do so by law or court order.

The witness's status as a **former constituent of the organization** does not place the witness within a category of individuals with whom communication is prohibited without consent of the organization's lawyer, per the guidance in Comment [7] to Rule 4-4.2. See Informal Opinion 2013-01.

Informal Opinion 2020-10 - Answer

However, if Attorney knows the **witness is represented** in this matter by the association's lawyer or another lawyer, Rule 4-4.2 prohibits Attorney from communicating with the witness without the consent of the other lawyer, authorization by law, or a court order. *See* Rule 4-1.0(e),

Terminology (defining "knows" as "actual knowledge, which can be inferred from the circumstances").

Whether a client-lawyer relationship exists between counsel for the association and the witness is a question of fact and law outside the scope of the Rules of Professional Conduct.

If Attorney communicates with the witness, the lawyer must not use methods of obtaining evidence that violate the legal rights of the organization, such as engaging in unwarranted intrusions into a privileged relationship. *See* Rule 4-4.2, Comment [7], and Rule 4-4.4 and Comment [1].

If Attorney knows the witness is not represented by counsel in the matter, any communication with the witness must comply with Rule 4-4.3, Dealing With Unrepresented Person.

The Accident #3 – *In NTC's Yard*

**Nationwide
Trucking Co.**

NTC
Driver

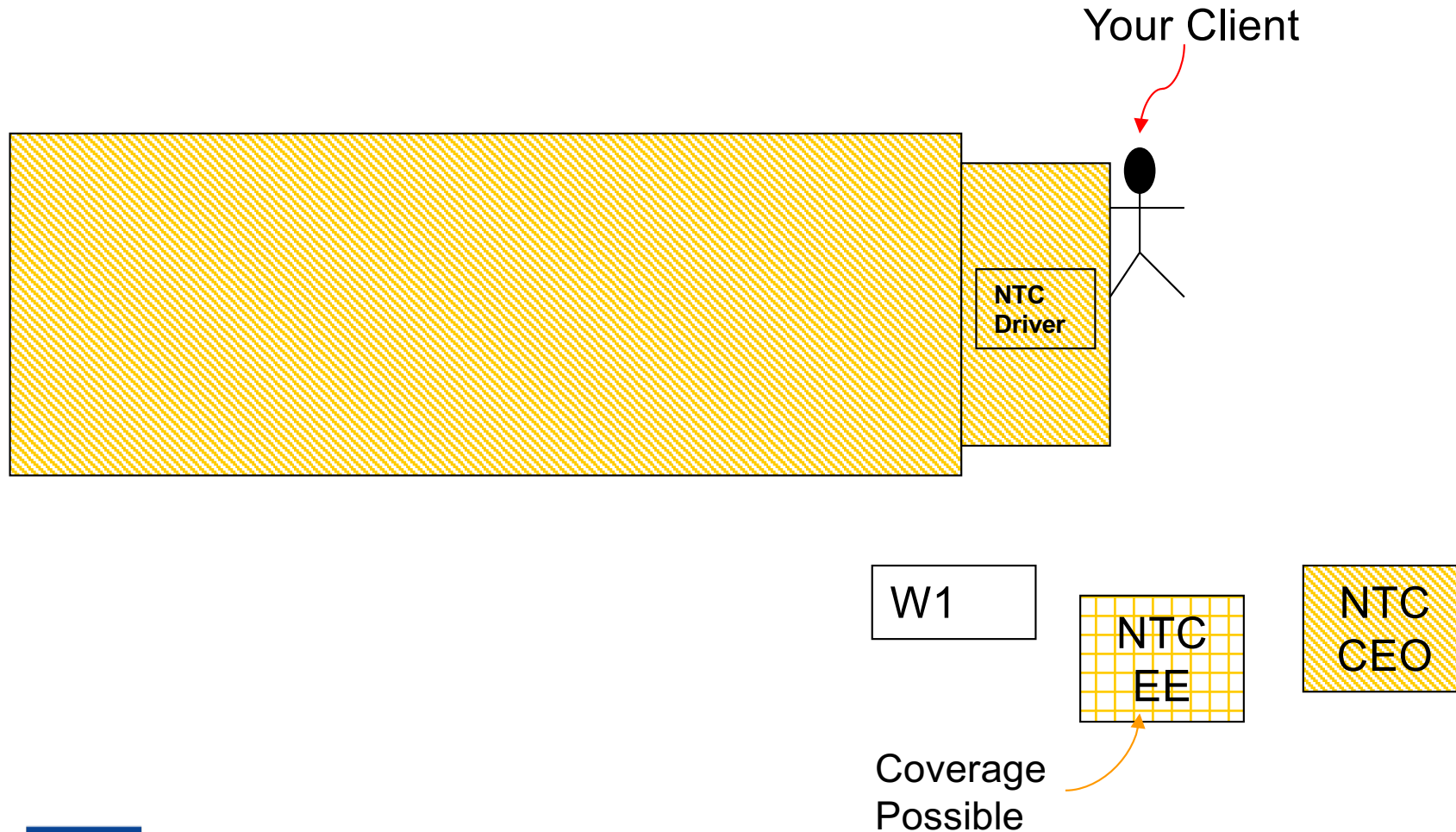


W1

NTC
EE

NTC
CEO

The Accident #3 – NTC with Counsel – Scenario 11-13



Corporate Employees (Constituents)

Rule 4-4.2 cmt [7] In the case of a represented organization, Rule 4-4.2 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**.

Missouri Informal Opinion 20010010

Client brought a suit against a former employer. The Petition alleges that the former employer defamed Client in stating that Client committed “gross misconduct” in Client’s employment. Defendant asserts that the gross misconduct occurred in a couple of conversations.

During these conversations, there were a couple of employees present who may have observed the conversations.

- These employees are not management personnel.
- These employees are still employed by Defendant.
- These employees were not part of the conversation and they did not complain to management about Client’s conduct.
- They were also not involved in the investigation that led to the termination of Client.

Attorney would like to contact these employees and question them about what they witnessed regarding the conversations in question. Should the hourly employees be treated as the “party” for purposes of Rule 4-4.2?

Informal Opinion 20010010 – Answer

Based upon the information Attorney has provided, it is permissible for Attorney to make direct contact with these employees, without violating Rule 4-4.2. Different or additional information could change this opinion.

Is NTC Employee Covered?

- *"Are you represented by your own counsel regarding accident?"*
 - *If "yes," terminate communication*
- *"Have you spoken with NTC's counsel about the accident?"*
 - *If "yes," explain they should tell you nothing about such communications.*

Points to Emphasize

- Protection only about matter of representation
- Irrelevant
 - Method of communication
 - Who initiates communication

Client May Speak to Covered Person

"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." Rule 4-4.2 cmt [4]

Scenario

- Plaintiff Lawyer is suing Company
- Company has retained defense lawyer to handle case
- May Plaintiff Lawyer call in-house counsel directly to discuss settling case

Communication with In-House Counsel

ABA Formal Opinion 06-443 indicates communications between Opposing Counsel and in-house counsel are permitted, even if Litigation Counsel is being circumvented

More on Rule 4-4.3 – Respect for Rights of Unrepresented Persons

Unrepresented Persons – Rule 4-4.3

- ***No (falsely) implying disinterested.***
 - 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.
- ***Must clarify role when misunderstood.***
 - 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.
- ***No giving legal advice if conflicting interests.***
 - 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.

Scenario

- Lawyer is representing Client suing for employment discrimination
- Client may sue Supervisor
- Lawyer contacts Supervisor to set up meeting
- Supervisor asks, “Do I need my own lawyer?”
- What can Lawyer answer?

Rule 4-1.13

- (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.
- (g) A lawyer representing an organization **may also represent** any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 4-1.7. If the organization's consent to the dual representation is required by Rule 4-1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 4-4.4 – Respect for the Rights of Third Persons

Rule 4-4.4 Respect For Rights Of Third Persons

- (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 who **receives a document** relating to the representation of the lawyer's client and knows or reasonably should know that the document was **inadvertently sent** shall promptly **notify** the sender.

Scenario

- Defense Lawyer subpoenas medical records of Plaintiff
- Doctor calls Defense Lawyer and says, “How about if we just send you the records? Can we skip the deposition?”

Rule 4-4.4 Respect For Rights Of Third Persons

(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.

Conclusory Matters

- **Questions** – If you have questions after the program, please email them to Paige Tungate at ptungate@DowneyLawGroup.com
- **Post-Program Survey** – A survey will be emailed to you about 30 minutes after this program. Also, here is the survey link:

<https://www.surveymonkey.com/r/rule442>

- **Certificate of Completion** – Available through the Post-Program Survey
- **Kansas Credit** – If you are seeking Kansas credit, you need to enter the **two Attendance Verification Words** and your Kansas information into the Post-Program Survey. *Please complete this information in the survey **this week**, so we can ensure you receive proper credit*



<https://www.surveymonkey.com/r/rule442>

Future Programs – Free CLEs

July 24 - Wednesday at 12:00 Noon CT - *Legal Ethics in the News*

August 7 - Wednesday at 12:00 Noon CT - *Addressing Bias in the Legal Profession - Cognitive Bias*

August 22 - Thursday at 12:00 Noon CT - *Tracking Trust Account Transactions Thru Clio*

September 10 - Tuesday at 3:00 PM CT - *Legal Ethics Rules Governing Investigations*

September 25 - Wednesday at 12:00 Noon CT - *Risk Management for Law Firm Leaders*



Register at www.downeyethicscle.com

Thank you



Downey Law Group LLC

(314) 961-6644

(844) 961-6644 toll free

Mdowney@DowneyLawGroup.com