



Negotiator's Duties to Others

Summary of Lecture 6 Rules 4.1, 4.2 and 4.3

[Kahoot Study Module Link Here](#)

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MODEL RULE 4.1

Truthfulness in Statements to Others

Model Rule 4.1 establishes fundamental standards for attorney conduct during negotiations, prohibiting lawyers from knowingly making false statements of material fact or law to third parties. The rule also requires disclosure of material facts when necessary to avoid assisting a client's criminal or fraudulent acts, unless such disclosure conflicts with Rule 1.6 confidentiality protections. While this prohibition overlaps with Model Rule 8.4's broader restrictions against dishonesty and misrepresentation, Rule 4.1 specifically addresses statements made during client representation and negotiation contexts.

The complexity of Rule 4.1 emerges when attorneys unknowingly relay false information provided by their clients. An attorney who makes a false statement based on client-provided information does not initially violate the rule because the violation requires knowing misrepresentation. However, the situation becomes ethically precarious if the attorney later discovers the statement was false. According to the Supreme Court of New Hampshire in *Carpentino's Case*, failure to correct a previously made statement that the attorney later learns is false can be equivalent to making a false statement itself, particularly when a negotiated settlement depends on the truth of that fact.

This creates a potential conflict between the duty to correct false statements and the duty to maintain client confidentiality under Rule 1.6. Rule 4.1(b) further complicates matters by requiring disclosure of material facts when necessary to avoid assisting criminal or fraudulent client conduct, unless confidentiality rules prohibit such disclosure. Attorneys must carefully navigate these competing obligations, recognizing that the duty to avoid misrepresentation may sometimes conflict with confidentiality duties. Before revealing facts to avoid a Rule 4.1 violation, practitioners must thoroughly consider whether such disclosure would constitute a violation of other ethical rules, making this a nuanced area requiring careful judgment and analysis.

The No-Contact Rule

MODEL RULE 4.2

Communication with Represented Parties

Model Rule 4.2 prohibits attorneys from communicating about the subject of representation with persons known to be represented by counsel, unless the opposing lawyer consents or legal authorization exists. This rule protects parties who have chosen legal representation from potential overreaching by opposing counsel. The underlying theory recognizes that parties retain attorneys to best represent their interests, and allowing opposing counsel to bypass this representation creates opportunities for manipulation and unfair agreements, even within the permissible scope of other ethical rules.

Universal Application

The rule applies regardless of the represented party's sophistication, mental capacity, or vulnerability. Even competent, knowledgeable parties cannot waive this protection.

Attorney's Right

According to *State v. Miller*, the right belongs to the party's attorney, not the party. Only the attorney can approve direct contact or waive the right to be present during communications.

No Client Waiver

Comment 3 explicitly states the rule applies even when the represented person initiates or consents to communication. Written waivers from clients are ineffective without attorney consent.

The rule's application to corporate clients presents additional complexity. In litigation involving corporations where shareholders, officers, and the company itself are parties with opposing interests and separate counsel, attorneys must understand which communications require consent. Comment 7 to Model Rule 4.2 clarifies that when corporate officers are represented by their own counsel in matters where their interests conflict with the corporation's interests, the organization's counsel need not consent to communications if the officer's attorney approves. This distinction is critical in complex corporate litigation where multiple parties within a single corporate structure may have divergent interests and separate legal representation, requiring careful navigation of the no-contact rule's boundaries.

Dealing with Unrepresented Parties

MODEL RULE 4.3

Protecting Those Without Counsel

Core Prohibitions

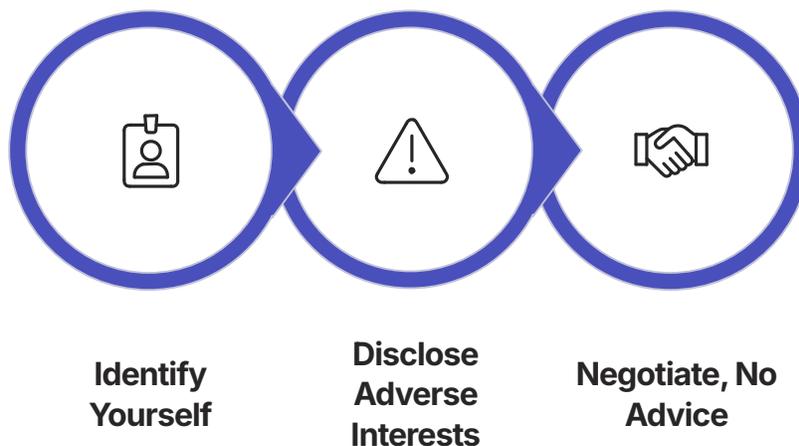
Attorneys must not state or imply disinterest when dealing with unrepresented parties. They cannot give legal advice to unrepresented persons whose interests conflict with their client's interests.

Required Disclosures

Lawyers must identify their client and explain opposing interests when an unrepresented person might misunderstand the lawyer's role. The only permissible advice is to recommend securing counsel.

Model Rule 4.3 addresses situations where attorneys negotiate with parties who lack legal representation, common in informal proceedings like landlord-tenant court or non-litigation matters. The rule recognizes that unrepresented persons, particularly those inexperienced with legal matters, might assume an attorney is disinterested or represents neutral authority. Comment 1 emphasizes that lawyers should identify their client and explain that the client has interests opposed to the unrepresented person's interests.

The rule does not prohibit negotiating with unrepresented parties or settling disputes, provided the lawyer has explained their representation of an adverse party. However, attorneys must carefully avoid inadvertently providing legal advice. According to *People v. Mascarenas*, telling an unrepresented party that documents are "legal" or "ok," or advising them on their "best legal option," constitutes impermissible legal advice under Rule 4.3. The distinction between permissible negotiation statements and prohibited legal advice can be subtle but carries significant ethical implications.



Real-World Scenarios

Navigating Ethical Dilemmas in Practice

The application of negotiation ethics rules becomes clearest through practical examples that illustrate the nuanced boundaries between permissible advocacy and ethical violations. Consider a day spa ownership dispute where Attorney Sarah represents Sally in negotiations with Jesse's attorney John. Sarah initially conveys Sally's statement that the spa has \$100,000 in cash, information Sally provided as the business's accountant. When Sally later reveals in confidence that she "cooked the books" and the spa is actually broke, Sarah faces competing ethical obligations between truthfulness and confidentiality.

Initial Statement

Sarah's original statement about the spa's finances was not a knowing misrepresentation, so no Rule 4.1 violation occurred initially. She relied on client-provided information she believed to be true.

Duty to Correct

After learning the truth, Sarah's continued silence may constitute a false statement under Carpentino's Case, as failure to correct material misrepresentations can be equivalent to making false statements.

Competing Obligations

Sarah must balance Rule 4.1's truthfulness requirements against Rule 1.6 confidentiality protections and Rule 4.1(b)'s prohibition on assisting client fraud, creating a complex ethical calculus.

The no-contact rule presents equally challenging scenarios. When Attorney Eric, frustrated with stalled negotiations, directly contacts opposing party Grandpa Lou and secures agreement to terms Lou had previously rejected through his attorney Joe, Eric clearly violates Rule 4.2. This violation exists regardless of Lou's mental capacity or sophistication. Even when paralegal Frankie, sophisticated in legal matters, signs a written waiver allowing opposing counsel Johnnie to interview her directly, the communication remains impermissible because Comment 3 establishes that represented parties cannot waive Rule 4.2 protections—only their attorneys can consent to such contact.

In landlord-tenant court, Attorney Arnie's approach to unrepresented tenant Lisa demonstrates Rule 4.3's requirements. Simply approaching Lisa with settlement terms while implying neutrality violates the rule, even without intimidation. However, Arnie can properly negotiate by first clearly identifying himself as Nat's attorney, explaining their adverse interests, recommending Lisa obtain counsel, and then discussing settlement terms. The critical boundary lies in avoiding legal advice: stating Lisa's "best legal option" crosses into prohibited territory under *People v. Mascarenas*, while discussing the likely outcome and settlement terms remains permissible advocacy.

Navigating Ethical Negotiations

Best Practices for Legal Professionals

Successfully navigating the ethical landscape of legal negotiations requires attorneys and paralegals to maintain constant vigilance across multiple rule domains. The Model Rules governing negotiator conduct—Rules 4.1, 4.2, and 4.3—create a framework that protects the integrity of the legal process while allowing legitimate advocacy. However, these rules frequently intersect and sometimes conflict, demanding careful analysis before taking action. The consequences of violations extend beyond professional discipline to potentially invalidating negotiated agreements, rendering even the most favorable settlement worthless if procured through ethical violations.

01

Verify Information Accuracy

Before conveying material facts in negotiations, confirm information accuracy with clients. If you later discover previously stated facts were false, immediately assess your duty to correct the misrepresentation while considering confidentiality obligations.

03

Protect Unrepresented Parties

When negotiating with unrepresented persons, immediately identify yourself as opposing counsel, explain adverse interests, recommend they obtain representation, and scrupulously avoid providing legal advice beyond suggesting they secure counsel.

02

Respect Representation Boundaries

Never communicate directly with represented parties without their attorney's explicit consent. Remember that the right belongs to the attorney, not the party, and cannot be waived by the represented person regardless of their sophistication or willingness.

04

Document Ethical Compliance

Maintain detailed records of communications, consents obtained, and disclosures made during negotiations. This documentation protects against later claims of ethical violations and demonstrates good-faith compliance with professional responsibilities.

The complexity of these rules underscores the importance of seeking guidance when facing ethical dilemmas. Before revealing confidential information to avoid a Rule 4.1 violation, thoroughly analyze whether disclosure would violate other rules. When uncertain about the propriety of contacting a party, err on the side of caution and seek consent from their counsel. In dealings with unrepresented parties, maintain clear boundaries between negotiation advocacy and legal advice. With careful attention to these ethical guardrails, legal professionals can effectively advocate for their clients while maintaining the integrity and fairness that the Model Rules are designed to protect, ensuring that negotiated agreements stand on solid ethical and legal foundations.