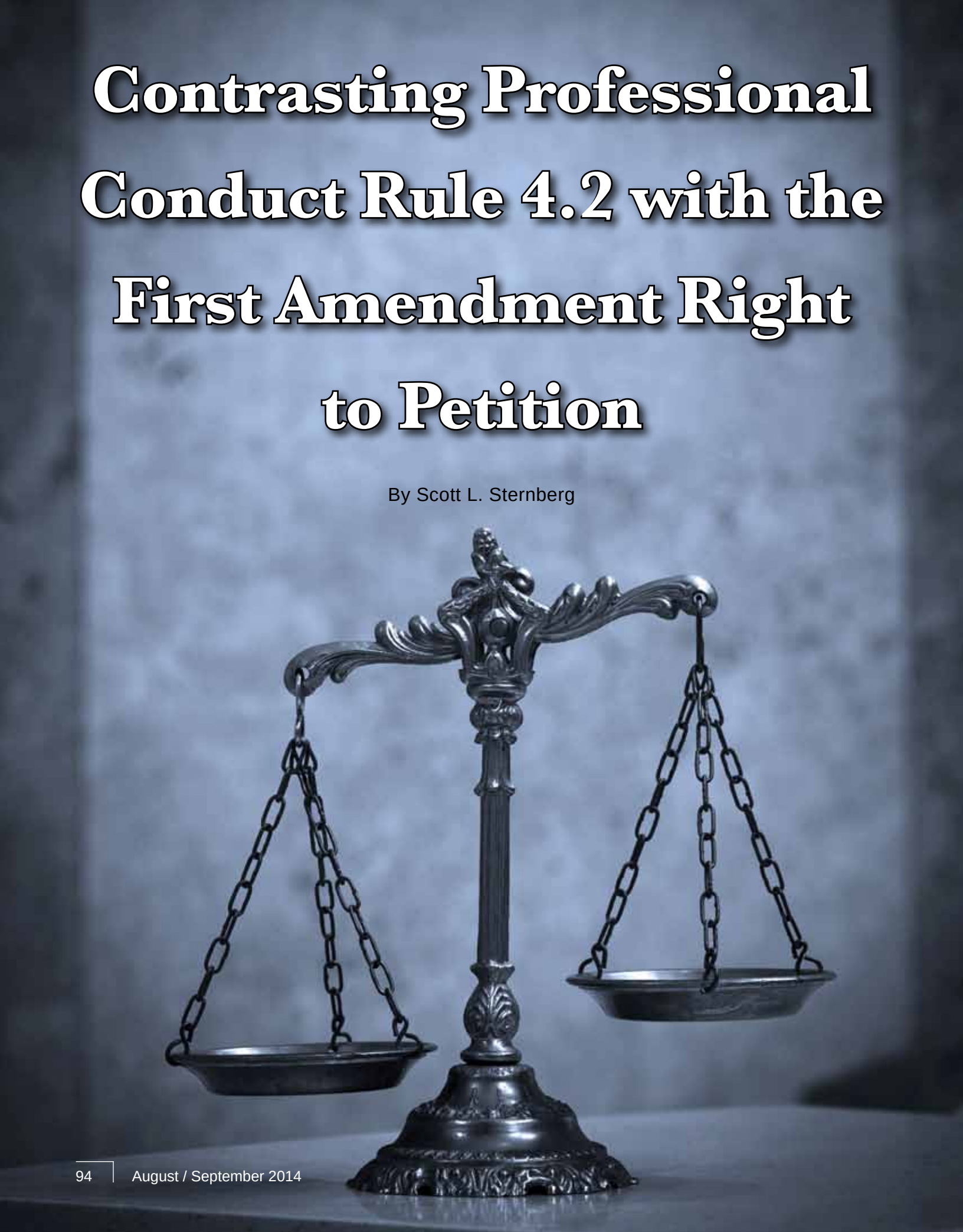
Contrasting Professional Conduct Rule 4.2 with the First Amendment Right to Petition

By Scott L. Sternberg



Attorneys often deal with the government as the adverse party in representation. This presents an interesting quandary as the government — created by the people — can sometimes (often?) be adverse to a certain citizen's interest in law or in fact. Citizens have the right to petition their government, secured by the First Amendment to the United States Constitution.[1] The Louisiana Constitution of 1974 also expressly protects this right.[2]

Lawyers' representation of clients makes the right of citizens to petition the government much more complicated, particularly when an attorney is engaged but no litigation is pending. The right of a lawyer to represent a client before the government seems almost elementary. Attorneys often appear before governmental entities and meet with public officials, not necessarily as "registered lobbyists"[3] but rather as advocates or dealmakers. However, what complicates these matters is the fact that often the public official or governmental entity is represented by an attorney as well.

Imagine that a client has asked his attorney to discuss pending legislation with a local parish council member in order to influence a policy outcome. The parish council is also represented by legal counsel since a designated parish attorney attends every meeting and every hearing to give legal advice as issues arise during the meetings. The parish attorney may not react well when he learns that his "client," the parish councilman, had engaged in unmonitored contact with another attorney, especially if litigation is a possibility. It is unlikely that the parish attorney would have much of an argument if the client simply had approached the council member and engaged him in a policy discussion, but this contact involves more direct, one-on-one advocacy separate and apart from the normal course of council meeting business.

The "No-Contact" Rule

Rule 4.2 of the Louisiana Rules of Professional Conduct, "Communication with a Person Represented by Counsel," states, in pertinent part:

> In representing a client, a lawyer shall not communicate about the subject of the representation with: (a) 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.[4]

Without a doubt, Rule 4.2 only applies to "the subject of the representation" and only communication about issues germane to the representation would offend.[5] Every law student who has taken an ethics and professionalism class knows that the attorney is forbidden from talking to another attorney's client *ex parte*. Further, the rule doesn't just apply to litigation; rather, it "covers any person who is represented by an attorney in the matter."[6]

But the rule is easy to forget when there's no litigation pending. Even if no "tangible harm" results from the authorized communications with the adverse party, "Rule 4.2 is prophylactic in nature and is designed to preserve the sanctity of the attorney-client relationship."[7]

So, if a client requests an attorney's assistance, and the attorney knows the public official or body is represented by legal counsel, does the attorney need to first ask permission before approaching the official or other members of the body?

A First Amendment Right?

Nevertheless, Rule 4.2 is subject to limitations. The comments to the ABA Model Rule, which is identical to the Louisiana rule, reveal that the rule is, of course, limited to topics germane to the representation. They state, in relevant part:

> "[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government . . . The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule."[8]

But, as is often stated, the comments are not the law. So can an attorney communicate with a governmental official without running afoul of the Louisiana Rules of Professional Conduct?

The First Amendment to the United States Constitution secures the right of the people to "petition the Government for a redress of grievances." Ostensibly, the First Amendment right of a citizen to tell the government what he thinks about its practices or negotiate for political relief should trump the Rules of Professional Conduct. But is this the case? Not necessarily.

After all, the First Amendment does not prevent the state from regulating and even prohibiting commercial speech, such as solicitation, which merely "proposes a commercial transaction."[9] Nevertheless, the U.S. Supreme Court held in *In re Primus* that the First and 14th Amendments can usurp the right of the state to regulate direct solicitation of clients, particularly when the alleged solicitation involved the exercise of "constitutionally protected expression and association" rights.[10] In that case, Ms. Primus had sent a letter to a woman who she believed had been unconstitutionally sterilized in order to continue receiving Medicaid benefits. The Supreme Court held that, although "[t]he State is free to fashion reasonable restrictions with respect to the time, place, and manner of solicitation by members of its Bar," the actions of the attorney were merely associational and not solicitation which could be prohibited by the state bar association.[11]

However, Rule 4.2 is not directed toward solicitation and it does not deal with associational rights either. In the problem at hand, the client hires counsel to help her achieve some policy goal before a governmental body. If the citizen did

this herself, there would be no question as to the applicability of the right to petition protected by the U.S. and Louisiana Constitutions. But, if she chooses to exercise her First Amendment right through the person of her attorney, the answer becomes a bit more complicated.

Louisiana Rulings

Not surprisingly, there is a dearth of Louisiana cases involving contact with a represented party — especially given that, as noted above, it's a pretty well known "no-no."

Louisiana's rulings often deal with details such as contact with a former employee of an adverse party (not covered by 4.2)[12] or a disciplinary proceeding for an attorney who ignores several warnings from opposing counsel not to contact his client (covered by 4.2).[13]

In re Pardue is the only case to tangentially approach the topic at hand but even its facts are distinguishable.[14] In *Pardue*, the Louisiana Supreme Court suspended an attorney for three years, with all but a year and a day deferred, for multiple violations of the Rules of Professional Conduct. The attorney had pled guilty to filing a false tax return and charged by the Office of Disciplinary Counsel under Rule 8.4. Pardue also was charged by the Office of Disciplinary Counsel with violating Rule 4.2 because he "improperly communicated with a party represented by counsel" — in this case, a claims adjuster in the Louisiana State Office of Risk Management.[15] That dispute was in litigation, and Pardue "thought [the adjuster] was an attorney," although his name did not appear on any pleadings.[16] Pardue also contacted a state representative and asked him to contact the adjuster "in an effort to facilitate settlement."[17]

The Supreme Court focused on the false tax return, calling it a "serious crime," and noted that the Rule 4.2 "misconduct is relatively minor, and, standing alone, would probably justify no more than a reprimand."[18] Indeed, Justice Lemmon, in dissent, noted that:

> As to the second charge of improperly communicating with a *party* represented by counsel, disciplinary counsel conceded at oral argument that "we would not be here" on this charge alone. Accordingly, I do not address the very troublesome question of whether an adjuster for a governmental agency is a "client" within the contemplation of Rule 4.2.[19]

Perhaps the most compelling distinction between *Pardue* and the instant question is that litigation was filed and the attorney representing the state was bypassed in furtherance of the client's settlement demand.

For the First Amendment advocate, *Pardue* is troubling. But it is clearly limited in scope. It involved direct contact with an adjuster working on the filed lawsuit between a plaintiff and the state as a defendant. As Justice Lemmon noted, there was a real question as to whether Pardue's conversation with the adjuster and the state representative should be a Rule 4.2 violation. There is not any language in the opinion to determine whether the Supreme Court thought the contact with the adjuster or the state representative was dispositive of a violation. Admittedly, the adjuster is employed by the state and possesses the power to redress the client's grievances. Furthermore, what if the state representative represented *Pardue*'s plaintiff's district? Wouldn't the client be able to discuss his pending case against the state with his state representative as part of his right to petition the government to redress his grievances?

Other States' Rules and Rulings

Although Louisiana has not explicitly ruled that Rule 4.2 does not apply to the exercise of the constitutional right to petition, at least one court (in Maryland) has explicitly recognized that Model Rule 4.2 does not apply in the context of communications with government officials, albeit with some caveats.[20]

In *Camden v. Maryland*, the U.S. District Court for the Southern District of Maryland held that a law firm had violated Rule 4.2 when it spoke with a former employee of a state university (a public body). This former claims investigator revealed confidential, attorney-client privileged information to the attorneys after they previously had been warned not to contact the employee while employed by the university. The attorneys did not inform the university that the employee had contacted the plaintiff's lawyers after being terminated from his job as an investigator. The unique circumstances convinced the judge that the actions disqualified the law firm since the fired investigator was like a former employee with confidential information of any private entity.[21] However, the *Camden* court also explicitly stated that:

> Insofar as a party's right to speak *with government officials* about a controversy is concerned, *Rule 4.2 has been uniformly interpreted to be inapplicable*. *See* 2 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 4.2:109 (2d ed. Supps. 1991 & 1994); Charles W. Wolfram, *Modern Legal Ethics* § 11.6.2 (1986). It is questionable whether the authorities had the case of a public educational institution in mind when they crafted this governmental agency exception, particularly where the institution finds itself in the more corporation-like stance of employer rather than its role of enforcer of governmental mandates.[22]

Camden stands for the proposition that, even though a court may say that Rule 4.2 is "uniformly . . . inapplicable," adverse consequences can still occur when the government finds itself acting more like a private corporation and less like a policy-implementing public arm. As compared to the instant situation, *Camden* seems to agree that when the government assumes the position of "enforcer of governmental mandates," Rule 4.2 does not apply to communication with that government.

Further, in New York, where the "Freedom of Information Law [inherently authorizes] such direct contact without

the prior consent of the government's lawyer," the no-contact rule has been held inapplicable.[23] But, New York has also held that, absent a statute to the contrary, contact with a government official who has power to settle a controversy violates the no-contact rule, much like the Louisiana decision in *In re Pardue*.[24]

Several states have codified their stance on the matter, including California whose Rules of Professional Conduct contain a specific exception for "communications with a public officer, board, committee or body." Utah also allows contact so long as the attorney advises the government's lawyer of his representation beforehand.[25] The District of Columbia applies an exemption to First Amendment "redress of grievances" situations.[26] The D.C. Rules of Professional Conduct, Rule 4.2(d), state that: "[t]his rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances or the lawyer's communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in (b) are made to the government official to whom the communication is made."[27]

Finally, the ABA itself has spoken on the issue, stating[28] that when a lawyer is representing a private party and is adverse to the government, he or she can communicate directly with a public official with the authority "to take or recommend action in the matter of communication," but only if the communication meets a two-part test. First, the communication must be for the purpose of addressing a policy issue. Second, the public official's lawyer must be given reasonable advance notice of the intent to communicate. Unless the communication satisfies the test, Rule 4.2 applies "in full force."[29]

Solving the Ethical Dilemma

Attorneys Geoffrey C. Hazard, Jr. and Dana Remus Irwin, in their comment, *"Toward A Revised 4.2 No-Contact Rule,"* argue that the current Rule 4.2 is not practical and that it should be clarified to allow communications if the public official consents to the communication or if the communication is written and copied to government counsel. The idea behind Hazard's and Irwin's solution is simple: government officials are smart enough to know when they need a lawyer and when they do not.

However, Hazard's and Irwin's academic musings are just suggestions, leaving the practitioner with an ethical dilemma when a client asks the question at hand. The ABA's ruling is also a reasonable accommodation — it requires a genuine policy issue and that the government's lawyer be given notice. But without a clearer Rule 4.2, the answer is opaque. Can an attorney contact a public official, such as a board member of, say, a local charter school, in an attempt to settle a client's unfiled grievances with that board?

After laborious First Amendment jurisprudence, we know that "Congress shall make no law abridging . . ." doesn't actually mean "no law abridging."[30] If it did, there would be no question at all: petitioning the government for the redress of grievances — whether slight or monumental — would be left untouched by government action. Ultimately, although an attorney may think he or she stands on the higher constitutional ground, the best practice is to notify the government lawyer of the communication to ensure both counselors share the same opinion.

FOOTNOTES

1. U.S. Const. Amd. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, *and to petition the Government for a redress of grievances."* (emphasis added)).

2. La. Const. Art. 1 § 9 ("No law shall impair the right of any person to assemble peaceably or to petition government for a redress of grievances.")

3. Lobbyists are required to register within five days of employment as a lobbyist with the Louisiana Board of Governmental Ethics. *See* La. R.S. 24:53. A "lobbyist" is defined by one whose principal duty (or that more than 20 percent of their compensated time) is to "act in a representative capacity for the purpose of lobbying if lobbying constitutes one of the principal duties of such employment or engagement." La. R.S. 51(5)(a)(i).

4. La. State Bar Art. 16 RPC Rule 4.2.

5. *Id.*

6. 21 La. Civ. L. Treatise, Louisiana Lawyering § 9.3.

7. In re Bilbe, 02-1740 (La. 2/7/03), 841 So.2d 729, 739; (*citing* State v. Gilliam, 98-1320 (La. App. 4 Cir. 12/15/99), 748 So.2d 622, *writ denied*, 00-0493 (La. 9/29/00), 769 So.2d 1215.

8. Model Rule 4.2 cmt.

9. *See, e.g.,* Virginia State Pharmacy Board v. Virginia Citizens Consumer Council, 428 U.S. 748 (1976).

10. In re Primus, 436 U.S. 412, 421 (U.S. 1978).

11. *Id.* at 438.

12. Jenkins v. Wal-Mart Stores, Inc., 956 F. Supp. 695 (W.D. La. 1997).

13. In re Bilbe, 02-1740 (La. 2/7/03), 841 So.2d 729.

14. 98-3017 (La. 3/26/99), 731 So.2d 224, *reinstatement granted,* 03-0294 (La. 4/4/03), 845 So.2d 353.

15. *Id.* at 225.

16. *Id.* at 226.

17. *Id.* at 225.

18. *Id.* at 227, n.7.

19. *Id.* at 228, n. 1.

20. Camden v. Maryland, 910 F. Supp. 1115, 1118 (D. Md. 1996).

21. *Id.* at 1123.

22. *Id.* at n. 8.

23. Fusco v. City of Albany, 509 N.Y.S.2d 763, 766 (Sup. Ct. 1986).

24. Frey v. Department of Health & Human Serv., 106 F.R.D. 32, 35 (E.D.N.Y. 1985).

25. Utah St. B. Opin. 115 (1993).

26. D.C. Rules of Professional Conduct, Rule 4.2(d).

27. *See generally* Restatement (Third) of Law Governing Law § 101 (2000).

28. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-408 (1997).

29. *See* Geoffrey C. Hazard, Jr. and Dana Remus Irwin, "Toward A Revised 4.2 No-Contact Rule," 60 Hastings L.J. 797 (2009).

30. "The First Amendment's language leaves no room for inference that abridgements of speech and press can be made just because they are slight. That Amendment provides, in simple words, that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.' I read 'no law . . . abridging' to mean no law abridging." Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring.).

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