



Dear Ethics Lawyer™

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Dear Ethics Lawyer starts its second year of publication! We want to say thank you for reading and engaging with this content. Please continue to share this column with others who may find it interesting, and invite them to subscribe.

Q: Dear Ethics Lawyer,

I am in-house counsel in a growing company. However, as I rise in the ranks of my in-house position, I am gaining the confidence of others, and find myself being asked to attend more and more meetings as a business executive, not a lawyer. This has not been an issue for internal meetings as there is typically a clear delineation between when I'm raising business questions versus providing legal advice.

Recently, however, I was asked to attend an external meeting between a senior executive at my company and a senior executive at another company that we are thinking of doing business with. The senior executive made it clear that he was asking for my attendance as a business person and not as a lawyer because he wants to expand my business acumen/judgment. I am concerned because even though I'd be attending solely as a business person, my company role is as in-house counsel. The other company does not have in-house counsel and likely will not have legal representation at the meeting. Given the possible ethical issue of attending a meeting where the other party will not be represented by counsel, is there a way for me to attend (disclosure, etc.) without running afoul of the ethics rules or requiring the other company to have outside counsel attend?

A: Excellent Model Rule 4.2 question! Rule 4.2 prohibits a lawyer, when "representing a client," from communicating about the subject of the representation with a person the lawyer knows to be represented by a lawyer in the matter, without the consent of the other lawyer or other authorization by law or court order. One threshold question here is whether you know the other counsel has counsel on the subject to be under discussion at the meeting (you note that it does not have in-house counsel). If not, there is no issue, unless and until you acquire knowledge to the contrary.

The other key issue is whether in attending the meeting you are "representing a client" as a lawyer. You indicate that your appearance would only be as a business person. Although the authority is a bit sparse, the case law suggests that if, in attending the meeting you are not acting in the capacity of a lawyer, the anti-contact prohibition of Rule 4.2 does not apply. See, e.g., *HTC Corp. v. Tech. Props. Ltd.*, 715 F.Supp.2d 968 (N.D.Ca. 2010) (in patent infringement case, defendant's CEO, who was a lawyer could nonetheless contact other parties when acting strictly as business office, over the objection of their counsel); *In re Rock Rubber & Supply of Conn.*,

Inc., 345 B.R.37 (Bankr. D. Conn. 2006) (Rule 4.2 not violated when Chapter 7 bankruptcy trustee, a lawyer, communicated with bank he knew to be represented by counsel in capacity as trustee).

To prevent any misunderstanding or issue, I would recommend that you advise the other party in advance or at the outset of the meeting that you are not attending in a legal capacity, and then, of course, refrain from acting as a lawyer in the matter. Also, please remember, if you are participating in a discussion or analysis as a business person, not a lawyer, your communications with others in your company on that subject are likely not to be privileged—privilege protection requires a nexus to seeking or receiving legal (not business) advice.

The Ethics Lawyer

About Dear Ethics Lawyer

The twice-monthly "Dear Ethics Lawyer" column is part of a training regimen of the Legal Ethics Project, authored by [Mark Hinderks](#), former managing partner and counsel to an AmLaw 125 firm; Fellow, American College of Trial Lawyers; and speaker/author on professional responsibility for more than 25 years. Mark leads Stinson LLP's [Legal Ethics & Professional Responsibility](#) practice, offering advice and "second opinions" to lawyers and law firms, consulting and testifying expert service, training, mediation/arbitration and representation in malpractice litigation. The submission of questions for future columns is welcome: please send to mark.hinderks@stinson.com.

Discussion presented here is based on the ABA Model Rules of Professional Conduct, but the Model Rules are adopted in different and amended versions, and interpreted in different ways in various places. Always check the rules and authorities applicable in your relevant jurisdiction – the result may be completely different.