Description of document:	US Department of Justice (DOJ) Professional Responsibility Advisory Office (PRAO) Office Manual and New Attorney Notebook
Requested date:	10-October-2007
Appeal date:	13-October-2011
Released date:	30-September-2011
Appeal release date:	17-October-2014
Posted date:	16-April-2012
Update post date:	03-November-2014
Date/date range of document:	Records undated
Note:	Records released 17-October-2014 start on PDF page 221
Source of document:	FOIA Officer Professional Responsibility Advisory Office Suite 12000, 1425 New York Avenue, NW Department of Justice Washington, D.C. 20530 Fax: (202) 353-7483 Email: PRAO.FOIA@usdoj.gov

U.S. Department of Justice

Professional Responsibility Advisory Office

Washington, D.C. 20530

September 30, 2011

RE: Freedom of Information Act (FOIA) Request 09-019 (Remand of 07-015)

I write on behalf of the Professional Responsibility Advisory Office (PRAO) to respond to your October 10, 2007 Freedom of Information Act request for, among other things, "an electronic copy of each manual or handbook issued by PRAO since January 1, 2005." PRAO initially responded to your request on February 5, 2008 and informed you of two items responsive to your fourth request, an internal Office Manual and an internal New Attorney Notebook. The Office Manual was withheld in full pursuant to Exemption 2. The New Attorney Notebook was withheld in full pursuant to FOIA Exemptions 2, 5 and 7(e).

You appealed PRAO's response to the Office of Information and Policy (OIP) on February 9, 2008. On August 17, 2009, OIP remanded your request for "Manuals or Handbooks Issued by PRAO since January 1, 2005" for further processing of responsive records. After consideration of guidance provided by OIP, PRAO is releasing portions of the Office Manual and New Attorney Notebook as described below.

PRAO's Office Manual

The PRAO Office Manual is distributed only to PRAO employees, does not affect a member of the public, and consists solely of internal personnel policies and procedures. After further review of the PRAO Office Manual and consistent with guidance from OIP, enclosed are 2 pages that are appropriate for release in full.

The remainder of the manual, consisting of approximately ninety-five pages, is withheld in full pursuant to Exemption 2 of FOIA as records "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2). Additionally, portions of the withheld materials are protected by Exemption 5 of the FOIA as inter-agency or intra-agency communications "which would not be available by law to a party other than an agency in litigation with the agency," 5 U.S.C. § 552(b)(5), and by Exemption 6 as information about individuals the disclosure of which "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

PRAO's New Attorney Notebook

After further review of PRAO's New Attorney Notebook and consideration of guidance from OIP, enclosed are approximately 198 pages that are appropriate for release in full. Also enclosed are 3 pages of materials with redactions made pursuant to Exemption 5.

The remainder of the manual, consisting of approximately 675 pages, is withheld in full pursuant to Exemption 5 of the FOIA. Additionally, portions of these materials are subject to Exemption 7(e) of the FOIA as law enforcement information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(e).

If you are not satisfied with this response to your request you may administratively appeal by writing to the Director, Office of Information and Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, N.W., Washington, D.C. 20530 within sixty days from the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Michael Kingsley
FOIA Officer
Professional Responsibility Advisory Office

U.S. Department of Justice

Professional Responsibility Advisory Office

Washington, D.C. 20530

October 17, 2014

RE: Freedom of Information Act (FOIA) Request PRAO 12-034 (Remand of PRAO 09-019)

I write on behalf of the Professional Responsibility Advisory Office (PRAO) to respond to your October 10, 2007 Freedom of Information Act request for, among other things, "an electronic copy of each manual or handbook issued by PRAO since January 1, 2005." On September 30, 2011, PRAO released 2 pages in full from the Office Manual, approximately 198 pages in full from PRAO's internal New Attorney Notebook, and 3 pages of materials consisting of the redacted New Attorney Notebook table of contents.

On October 13, 2011 you appealed PRAO's September 30, 2011 response to the Department of Justice Office of Information and Policy (OIP), limiting your appeal to the table of contents for the two manuals identified as responsive to your initial request. By letter dated September 18, 2012, OIP informed you that the PRAO Office Manual did not have a table of contents and remanded the New Attorney Notebook table of contents request to PRAO for further processing.

Please find enclosed 3 pages consisting of the table of contents for the New Attorney Notebook.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you are not satisfied with my response to this request, you may administratively appeal by writing to the Director, Office of Information Policy, United States Department of Justice,

Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, or you may submit an appeal through the Office of Information Policy's eFOIA portal at http://www.justice.gov/oip/efoia-portal.html. Your appeal must be received within sixty days from the date of this letter. If you submit your appeal by mail, both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Cordially,

Michael Kingsley
FOIA Officer
Professional Responsibility Advisory Office

Professional Responsibility Advisory Office

Office Manual

INTRODUCTION

Welcome to the Professional Responsibility Advisory Office[1] of the United States Department of Justice.

In 1994, the Department recognized the need for a program dedicated to resolving professional responsibility issues faced by Department attorneys and Assistant United States Attorneys. As a result, on April 19, 1999, the Department officially established the Professional Responsibility Advisory Office (PRAO) as an independent component within the Department of Justice.

The mission of the PRAO is to ensure prompt, consistent advice to Department attorneys and Assistant United States Attorneys with respect to professional responsibility and choice-of-law issues. PRAO complies with the rules of professional conduct that impose on lawyers and their staff a duty to preserve and protect confidential information. Information regarding any ethical advice given shall not be disclosed to any person outside of this office.

PRAO is a service component. Employees are expected to carry out their assigned duties in a professional and responsible manner. The success of PRAO is dependent upon individual performance, team work and customer satisfaction.

The PRAO Office Manual is intended to serve as a source of information on the functions of PRAO, and other administrative matters. Additional information on Department of Justice policies can be found at http://www.usdoj.gov/jmd/ps/empobdorient.htm.

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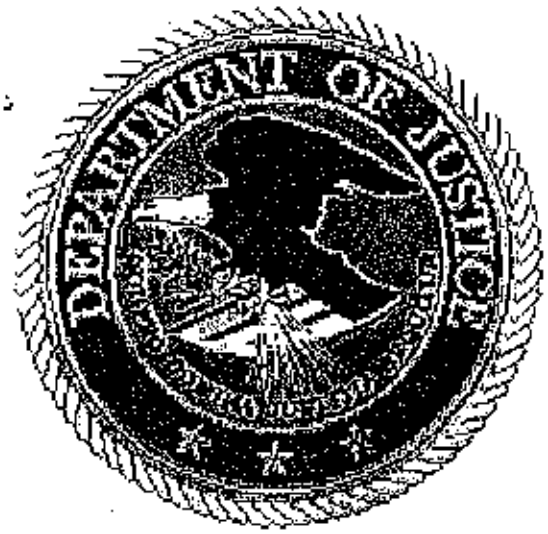
[1] PRAO frequently receives receives calls and e-mails intended for the Office of Professional Responsibility (OPR). PRAO and OPR are two separate components. OPR has jurisdiction to investigate allegations of misconduct by Department of Justice attorneys, investigators and law enforcement personnel that relate to the exercise of an attorney's authority to investigate, litigate or provide legal advice. Other allegations of misconduct by Department attorneys that do not fall within the jurisdiction of OPR are investigated by the Office of the Inspector General (OIG). OIG is required to notify OPR of the existence and results of any OIG investigation that reflects upon the professional ethics, competence or integrity of a Department attorney. In such cases, OPR is directed to take appropriate action. In addition to reporting its findings and conclusions in individual investigations, OPR is also charged with providing advice to the Attorney General and Deputy Attorney General concerning the need for changes in policies and procedures which become evident during the course of OPR's investigations.



Professional Responsibility Advisory Office (PRAO)

New Attorney Notebook

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U. S. Department of Justice
Professional Responsibility Advisory Office

Mission & Functions

The mission of the PRAO is to ensure prompt, consistent advice to Department attorneys and Assistant United States Attorneys with respect to professional responsibility and choice-of-law issues.

The major functions of PRAO are to:

* Provide definitive advice to government attorneys and the leadership at the Department on issues relating to professional responsibility.

* Assemble and maintain the codes of ethics, including, inter alia, all relevant interpretative decisions and bar opinions of the District of Columbia and every state and territory, and other reference materials, and serve as a central repository for briefs and pleadings as cases arise.

* Provide coordination with the litigating components of the Department to defend Department attorneys and Assistant United States Attorneys in any disciplinary or other hearing where it is alleged that they failed to meet their ethical obligations.

* Serve as liaison with the state and federal bar associations in matters related to the implementation and interpretation of 28 U.S.C. 530B (the Ethical Standards for Attorneys for the Government Act) and any amendments and revisions to the various state ethics codes.

* Coordinate with other Department components to conduct training for Department attorneys and client agencies to provide them with the tools to make informed judgments about the circumstances that require their compliance with 28 U.S.C. 530B (the Ethical Standards for Attorneys for the Government Act) or that otherwise implicate professional responsibility concerns.

* Perform such other duties and assignments as determined from time to time by the Attorney General or the Deputy Attorney General.

(Added Pub. L. 100–690, title VI, § 6281(a), Nov. 18, 1988, 102 Stat. 4368.)

REFERENCES IN TEXT

Sections 901 and 904 of the Foreign Service Act of 1980, referred to in pars. (1) and (2), are classified to sections 4081 and 4084, respectively, of Title 22, Foreign Relations and Intercourse.

§ 530B. Ethical standards for attorneys for the Government

(a) An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

(b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.

(c) As used in this section, the term "attorney for the Government" includes any attorney described in section 77.2(a) of part 77 of title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.

(Added Pub. L. 105–277, div. A, § 101(b) [title VIII, § 801(a)], Oct. 21, 1998, 112 Stat. 2681–50, 2681–118.)

EFFECTIVE DATE

Pub. L. 105–277, div. A, § 101(b) [title VIII, § 801(c)], Oct. 21, 1998, 112 Stat. 2681–50, 2681–119, provided that: "The amendments made by this section [enacting this section] shall take effect 180 days after the date of the enactment of this Act [Oct. 21, 1998] and shall apply during that portion of fiscal year 1999 that follows that taking effect, and in each succeeding fiscal year."

§ 530C. Authority to use available funds

(a) IN GENERAL.—Except to the extent provided otherwise by law, the activities of the Department of Justice (including any bureau, office, board, division, commission, subdivision, unit, or other component thereof) may, in the reasonable discretion of the Attorney General, be carried out through any means, including—

(1) through the Department's own personnel, acting within, from, or through the Department itself;

(2) by sending or receiving details of personnel to other branches or agencies of the Federal Government, on a reimbursable, partially-reimbursable, or nonreimbursable basis;

(3) through reimbursable agreements with other Federal agencies for work, materials, or equipment;

(4) through contracts, grants, or cooperative agreements with non-Federal parties; and

(5) as provided in subsection (b), in section 524, and in any other provision of law consistent herewith, including, without limitation, section 102(b) of Public Law 102–395 (106 Stat. 1838), as incorporated by section 815(d) of Public Law 104–132 (110 Stat. 1315).

(b) PERMITTED USES.—

(1) GENERAL PERMITTED USES.—Funds available to the Attorney General (i.e., all funds available to carry out the activities described in subsection (a)) may be used, without limitation, for the following:

(A) The purchase, lease, maintenance, and operation of passenger motor vehicles, or police-type motor vehicles for law enforcement purposes, without regard to general purchase price limitation for the then-current fiscal year.

(B) The purchase of insurance for motor vehicles, boats, and aircraft operated in official Government business in foreign countries.

(C) Services of experts and consultants, including private counsel, as authorized by section 3109 of title 5, and at rates of pay for individuals not to exceed the maximum daily rate payable from time to time under section 5332 of title 5.

(D) Official reception and representation expenses (i.e., official expenses of a social nature intended in whole or in predominant part to promote goodwill toward the Department or its missions, but excluding expenses of public tours of facilities of the Department of Justice), in accordance with distributions and procedures established, and rules issued, by the Attorney General, and expenses of public tours of facilities of the Department of Justice.

(E) Unforeseen emergencies of a confidential character, to be expended under the direction of the Attorney General and accounted for solely on the certificate of the Attorney General.

(F) Miscellaneous and emergency expenses authorized or approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or the Assistant Attorney General for Administration.

(G) In accordance with procedures established and rules issued by the Attorney General—

(i) attendance at meetings and seminars;

(ii) conferences and training; and

(iii) advances of public moneys under section 3324 of title 31: *Provided*, That travel advances of such moneys to law enforcement personnel engaged in undercover activity shall be considered to be public money for purposes of section 3527 of title 31.

(H) Contracting with individuals for personal services abroad, except that such individuals shall not be regarded as employees of the United States for the purpose of any law administered by the Office of Personnel Management.

(I) Payment of interpreters and translators who are not citizens of the United States, in accordance with procedures established and rules issued by the Attorney General.

(J) Expenses or allowances for uniforms as authorized by section 5901 of title 5, but without regard to the general purchase price limitation for the then-current fiscal year.

(K) Expenses of—

(i) primary and secondary schooling for dependents of personnel stationed outside the United States at cost not in excess of those authorized by the Department of Defense for the same area, when it is determined by the Attorney General that schools available in the locality are unable to provide adequately for the education of such dependents; and

§ 76.39 Compromise or settlement after Decision and Order of a Judge.

(a) The United States Attorney having jurisdiction over the case may, at any time before the Attorney General issues an order, compromise, modify, or remit, with or without conditions, any civil penalty imposed under this section.

(b) Any compromise or settlement must be in writing.

§ 76.40 Records to be public.

All documents contained in the records of formal proceedings for imposing a penalty under this part may be inspected and copied, unless ordered sealed by the Judge.

§ 76.41 Expungement of records.

(a) The Attorney General shall expunge all official Department records created pursuant to this part upon application of a respondent at any time after the expiration of three (3) years from the date of the final order of assessment if:

(1) The respondent has not previously been assessed a civil penalty under this section;

(2) The respondent has paid the penalty;

(3) The respondent has complied with any conditions imposed by the Attorney General;

(4) The respondent has not been convicted of a federal or state offense relating to a controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802); and

(5) The respondent agrees to submit to a drug test, and such test shows the individual to be drug free.

(b) A non-public record of a disposition under this part shall be retained by the Department solely for the purpose of determining in any subsequent proceeding whether the person qualifies for a civil penalty or expungement under this part.

(c) If a record is expunged under this part, the individual for whom such an expungement was made shall not be held guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge a proceeding under this part or the results thereof in response to an inquiry made of him for any purpose.

§ 76.42 Limitations.

No action under this part shall be entertained unless commenced within five (5) years from the date on which the violation occurred.

PART 77—ETHICAL STANDARDS FOR ATTORNEYS FOR THE GOVERNMENT

Sec.

AUTHORITY: 28 U.S.C. 530B.

SOURCE: Order No. 2216–99, 64 FR 19275, Apr. 20, 1999, unless otherwise noted.

§ 77.1 Purpose and authority.

(a) The Department of Justice is committed to ensuring that its attorneys perform their duties in accordance with the highest ethical standards. The purpose of this part is to implement 28 U.S.C. 530B and to provide guidance to attorneys concerning the requirements imposed on Department attorneys by 28 U.S.C. 530B.

(b) Section 530B requires Department attorneys to comply with state and local federal court rules of professional responsibility, but should not be construed in any way to alter federal substantive, procedural, or evidentiary law or to interfere with the Attorney General's authority to send Department attorneys into any court in the United States.

(c) Section 530B imposes on Department attorneys the same rules of professional responsibility that apply to non-Department attorneys, but should not be construed to impose greater burdens on Department attorneys than those on non-Department attorneys or to alter rules of professional responsibility that expressly exempt government attorneys from their application.

(d) The regulations set forth in this part seek to provide guidance to Department attorneys in determining the rules with which such attorneys should comply.

§77.2 Definitions.

As used in this part, the following terms shall have the following meanings, unless the context indicates otherwise:

(a) The phrase *attorney for the government* means the Attorney General; the Deputy Attorney General; the Solicitor General; the Assistant Attorneys General for, and any attorney employed in, the Antitrust Division, Civil Division, Civil Rights Division, Criminal Division, Environment and Natural Resources Division, and Tax Division; the Chief Counsel for the DEA and any attorney employed in that office; the Chief Counsel for ATF and any attorney employed in that office; the General Counsel of the FBI and any attorney employed in that office or in the (Office of General Counsel) of the FBI; any attorney employed in, or head of, any other legal office in a Department of Justice agency; any United States Attorney; any Assistant United States Attorney; any Special Assistant to the Attorney General or Special Attorney duly appointed pursuant to 28 U.S.C. 515; any Special Assistant United States Attorney duly appointed pursuant to 28 U.S.C. 543 who is authorized to conduct criminal or civil law enforcement investigations or proceedings on behalf of the United States; and any other attorney employed by the Department of Justice who is authorized to conduct criminal or civil law enforcement proceedings on behalf of the United States. The phrase *attorney for the government* also includes any independent counsel, or employee of such counsel, appointed under chapter 40 of title 28, United States Code. The phrase *attorney for the government* does not include attorneys employed as investigators or other law enforcement agents by the Department of Justice who are not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings.

(b) The term *case* means any proceeding over which a state or federal court has jurisdiction, including criminal prosecutions and civil actions. This term also includes grand jury investigations and related proceedings (such as motions to quash grand jury subpoenas and motions to compel testimony), applications for search warrants, and applications for electronic surveillance.

(c) The phrase *civil law enforcement investigation* means an investigation of possible civil violations of, or claims under, federal law that may form the basis for a civil law enforcement proceeding.

(d) The phrase *civil law enforcement proceeding* means a civil action or proceeding before any court or other tribunal brought by the Department of Justice under the authority of the United States to enforce federal laws or regulations, and includes proceedings related to the enforcement of an administrative subpoena or summons or civil investigative demand.

(e) The terms *conduct* and *activity* means any act performed by a Department attorney that implicates a rule governing attorneys, as that term is defined in paragraph (h) of this section.

(f) The phrase *Department attorney[s]* is synonymous with the phrase "attorney[s] for the government" as defined in this section.

(g) The term *person* means any individual or organization.

(h) The phrase *state laws and rules and local federal court rules governing attorneys* means rules enacted or adopted by any State or Territory of the United States or the District of Columbia or by any federal court, that prescribe ethical conduct for attorneys *and* that would subject an attorney, whether or not a Department attorney, to professional discipline, such as a code of professional responsibility. The phrase does not include:

(1) Any statute, rule, or regulation which does not govern ethical conduct, such as rules of procedure, evidence, or substantive law, whether or not such rule is included in a code of professional responsibility for attorneys;

(2) Any statute, rule, or regulation that purports to govern the conduct of any class of persons other than attorneys, such as rules that govern the conduct of all litigants and judges, as well as attorneys; or

(3) A statute, rule, or regulation requiring licensure or membership in a particular state bar.

(i) The phrase *state of licensure* means the District of Columbia or any State

or Territory where a Department attorney is duly licensed and authorized to practice as an attorney. This term shall be construed in the same manner as it has been construed pursuant to the provisions of Pub. L. 96–132, 93 Stat. 1040, 1044 (1979), and Sec. 102 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agency Appropriations Act, 1999, Pub. L. 105–277.

(j)(1) The phrase *where such attorney engages in that attorney's duties* identifies which rules of ethical conduct a Department attorney should comply with, and means, with respect to particular conduct:

(i) If there is a case pending, the rules of ethical conduct adopted by the local federal court or state court before which the case is pending; or

(ii) If there is no case pending, the rules of ethical conduct that would be applied by the attorney's state of licensure.

(2) A Department attorney does not "engage[] in that attorney's duties" in any states in which the attorney's conduct is not substantial and continuous, such as a jurisdiction in which an attorney takes a deposition (related to a case pending in another court) or directs a contact to be made by an investigative agent, or responds to an inquiry by an investigative agent. Nor does the phrase include any jurisdiction that would not ordinarily apply its rules of ethical conduct to particular conduct or activity by the attorney.

(k) The phrase *to the same extent and in the same manner as other attorneys* means that Department attorneys shall only be subject to laws and rules of ethical conduct governing attorneys in the same manner as such rules apply to non-Department attorneys. The phrase does not, however, purport to eliminate or otherwise alter state or federal laws and rules and federal court rules that expressly exclude some or all government attorneys from particular limitations or prohibitions.

[Order No. 2216–99, 64 FR 19275, Apr. 20, 1999, as amended by Order No. 2850–2003, 68 FR 4829, Jan. 31, 2003]

§ 77.3 Application of 28 U.S.C. 530B.

In all criminal investigations and prosecutions, in all civil investigations and litigation (affirmative and defensive), and in all civil law enforcement investigations and proceedings, attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State, as these terms are defined in §77.2 of this part.

§ 77.4 Guidance.

(a) *Rules of the court before which a case is pending.* A government attorney shall, in all cases, comply with the rules of ethical conduct of the court before which a particular case is pending.

(b) *Inconsistent rules where there is a pending case.* (1) If the rule of the attorney's state of licensure would prohibit an action that is permissible under the rules of the court before which a case is pending, the attorney should consider:

(i) Whether the attorney's state of licensure would apply the rule of the court before which the case is pending, rather than the rule of the state of licensure;

(ii) Whether the local federal court rule preempts contrary state rules; and

(iii) Whether application of traditional choice-of-law principles directs the attorney to comply with a particular rule.

(2) In the process of considering the factors described in paragraph (b)(1) of this section, the attorney is encouraged to consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(c) *Choice of rules where there is no pending case.* (1) Where no case is pending, the attorney should generally comply with the ethical rules of the attorney's state of licensure, unless application of traditional choice-of-law principles directs the attorney to comply with the ethical rule of another jurisdiction or court, such as the ethical rule adopted by the court in which the case is likely to be brought.

(2) In the process of considering the factors described in paragraph (c)(1) of

this section, the attorney is encouraged to consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(d) *Rules that impose an irreconcilable conflict.* If, after consideration of traditional choice-of-law principles, the attorney concludes that multiple rules may apply to particular conduct and that such rules impose irreconcilable obligations on the attorney, the attorney should consult with a supervisor or Professional Responsibility Officer to determine the best course of conduct.

(e) *Supervisory attorneys.* Each attorney, including supervisory attorneys, must assess his or her ethical obligations with respect to particular conduct. Department attorneys shall not direct any attorney to engage in conduct that violates section 530B. A supervisor or other Department attorney who, in good faith, gives advice or guidance to another Department attorney about the other attorney's ethical obligations should not be deemed to violate these rules.

(f) *Investigative Agents.* A Department attorney shall not direct an investigative agent acting under the attorney's supervision to engage in conduct under circumstances that would violate the attorney's obligations under section 530B. A Department attorney who in good faith provides legal advice or guidance upon request to an investigative agent should not be deemed to violate these rules.

§ 77.6 No private remedies.

The principles set forth herein, and internal office procedures adopted pursuant hereto, are intended solely for the guidance of attorneys for the government. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States, including criminal defendants, targets or subjects of criminal investigations, witnesses in criminal or civil cases (including civil law enforcement proceedings), or plaintiffs or defendants in civil investigations or litigation; or any other person, whether or not a party to litigation with the United States, or their counsel; and shall not be a basis for dismissing criminal or civil charges or proceedings or for excluding relevant evidence in any judicial or administrative proceeding. Nor are any limitations placed on otherwise lawful litigative prerogatives of the Department of Justice as a result of this part.

PART 79—CLAIMS UNDER THE RADIATION EXPOSURE COMPENSATION ACT

Subpart A—General

Sec.

Subpart B—Eligibility Criteria for Claims Relating to Leukemia

Subpart C—Eligibility Criteria for Claims Relating to Certain Specified Diseases Contracted After Exposure in an Affected Area ("Downwinders")

6 U.S. Op. Off. Legal Counsel 47, 1982 WL 170670 (O.L.C.)

(Cite as: 6 U.S. Op. Off. Legal Counsel 47)

Office of Legal Counsel
U.S. Department of Justice

THE ATTORNEY GENERAL'S ROLE AS CHIEF LITIGATOR FOR THE UNITED STATES

January 4, 1982

[The following memorandum describes the development and present scope of the Attorney General's role in representing the United States and its agencies in litigation. It discusses the policy reasons for the centralization of litigation authority in the Department of Justice, and analyzes the Attorney General's relationship with client agencies. It also touches on the Attorney General's authority to settle and compromise cases, and on his authority over litigation in international courts. It concludes that, absent clear legislative directives to the contrary, the Attorney General has plenary authority and responsibility over all litigation to which the United States or one of its agencies is a party, and that his discretion is circumscribed only by the President's constitutional duty to "take Care that the Laws be faithfully executed."]

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have asked this Office to outline the role and responsibilities of the Attorney General in representing the United States in litigation in which the United States, or a federal agency or department, is a party. In particular, you asked that we consider the Attorney General's authority and responsibility to make decisions with respect to litigation, even if those decisions may conflict with the views, desires, or legal analyses of other departments or agencies of the United States, including those which may be "clients" in the particular litigation. Litigation involving agencies which have been granted express exclusive authority by Congress to conduct their own litigation is not within the scope of this memorandum. [FN1] Rather, the focus of this memorandum is litigation involving *48 those agencies whose litigating authority is clearly subject to the Attorney General's direction, or whose statutory grants of authority are ambiguous or insufficient to remove them from the Attorney General's supervision.

We conclude that, absent clear legislative directives to the contrary, the Attorney General has full plenary authority over all litigation, civil and criminal, to which the United States, its agencies, or departments, are parties. Such authority is rooted historically in our common law and tradition, see Confiscation Cases, 74 U.S. (7 Wall.) 454, 458-59 (1868); The Gray Jacket, 72 U.S. (5 Wall.) 370 (1866) and, since 1870, has been given a statutory basis. See 5 U.S.C. § 3106, and 28 U.S.C. §§ 516, 519. See generally United States v. San Jacinto Tin Co., 125 U.S. 273 (1888). The Attorney General's plenary authority is

6 U.S. Op. Off. Legal Counsel 47, 1982 WL 170670 (O.L.C.)

(Cite as: 6 U.S. Op. Off. Legal Counsel 47)

circumscribed only by the duty imposed on the President under Article II, § 3 of the Constitution to "take Care that the Laws be faithfully executed."

I. Historical Development of the Role of the Attorney General

Plenary power over the legal affairs of the United States was vested in the Attorney General when the Office of the Attorney General of the United States was first created by the Judiciary Act of 1789. Act of September 24, 1789, ch. 20, § 35, 1 Stat. 92. [FN2]

The Attorney General's statutory authority to conduct litigation to which the United States, its departments, or agencies, is a party was more fully developed by Congress in 1870, in the same legislation that provided for the creation of the Department of Justice. Act of June 22, 1870, ch. 150, 16 Stat. 162. Prior to 1870, however, the Attorney General's authority in litigation matters involving the United States had been recognized by the Supreme Court. In The Gray Jacket, 72 U.S. (5 Wall.) 370 (1866), the Court held that no counsel would be heard for the United States in opposition to the views of the Attorney General. In the Confiscation Cases, 74 U.S. (7 Wall.) 454 (1868), the Court concluded that:

> Whether tested, therefore, by the requirements of the Judiciary Act, or by the usage of the government, or by the decisions of this *49 court, it is clear that all such suits, so far as the interests of the United States are concerned, are subject to the direction, and within the control of, the Attorney-General.

74 U.S. (7 Wall.) at 458-59.

The 1870 Act established the Department of Justice and designated the Attorney General as its chief legal officer. The Act provided that certain specified "solicitors" performing legal functions within the various agencies "shall be transferred from the Departments with which they are now associated to the Department of Justice, ... and shall exercise their functions under the supervision and control of the head of the Department of Justice." (§ 3, 16 Stat. 162.) [FN3] The Act also authorized the Attorney General to designate any officer of the Department of Justice, including himself, to conduct and argue any case in which the government is interested, in any court of the United States, whenever he deems it necessary for the interest of the United States. (§ 5, 16 Stat. 162.) In addition, the Act gave the Attorney General supervisory authority over the conduct and proceedings of the various attorneys for the United States in the respective judicial districts, "and also of all other attorneys and counsel[l]ors employed in any cases or business in which the United States may be concerned." (§ 16, 16 Stat. 164.) And finally, the Act forbade the Secretaries of the Executive Departments to employ other attorneys or outside counsel at government expense, but "shall call upon the Department of Justice ..., and no counsel or attorney fees shall hereafter be allowed to any person ..., besides the respective district attorneys ..., for services in such capacity to the United States, ... unless hereafter authorized by law, and then only on the certificate of the Attorney-General that such services ... could not be performed by the Attorney-General, ... or the officers of the Department of Justice." (§ 17, 16 Stat. 164.) 16 Stat. 162.

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The initial motivation for this legislation was the desire to centralize the conduct and supervision of all litigation in which the government was involved, as well as to eliminate the need for highly paid outside counsel when government-trained attorneys could perform the same function. Other objectives of the legislation that were advanced in the congressional debates were to ensure the presentation of uniform positions with respect to the laws of the United States ("a unity of decision, a unity of jurisprudence ... in the executive law of the United States"), [FN4] and to provide the Attorney General with authority over lower court proceedings involving the United States, so that litigation would be better handled on appeal, and before the Supreme Court. See Cong. Globe, 41st Cong., 2d Sess., Pt. IV, 3035-39, 3065-66 (1870). See generally Bell, The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?, 46 Fordham L.Rev. 1049 (1978); Key, The Legal Work of the Federal Government, 25 Va.L.Rev. 165 (1938).

*50 The Supreme Court considered this legislation in United States v. San Jacinto Tin Co., 125 U.S. 273 (1888) and concluded that the Attorney General was "undoubtedly the officer who has charge of the institution and conduct of the pleas of the United States, and of the litigation which is necessary to establish the rights of the government." Id. at 279. Emphasizing the centralizing function of the Department of Justice and the Attorney General, the Court reasoned that the power to control government litigation must lie somewhere--that there must exist some officer with authority to decide when the United States should sue, and to oversee the execution of such a decision--and that the Attorney General was designated such appropriate officer, in the Judiciary Act of 1789, by reference to the historical practice in England. [FN5] 125 U.S. at 278-80. In 1921, the Court added that the Attorney General's authority to conduct such litigation could be affected only by clear legislative direction to the contrary. Kern River Co. v. United States, 257 U.S. 147, 155 (1921). See also 21 Op.Att'y Gen. 195 (1895). (The Secretary of the Navy was not warranted in employing counsel in a foreign country to institute suit in behalf of the United States, but should have referred the matter to the Department of Justice, "which is charged with the duty of determining when the United States shall sue, for what it shall sue, and that such suits shall be brought in appropriate cases," id. at 198.)

Lower courts reached similar conclusions with respect to subsequent recodifications of the 1870 legislation. The Court of Claims summarized the legislation in the following manner:

> These provisions are too comprehensive and too specific to leave any doubt that Congress intended to gather into the Department of Justice, under the supervision and control of the Attorney-General, all the litigation and all the law business in which the United States are interested, and which previously had been scattered among different public officers, departments, and branches of the Government, and to break up the practice of frequently employing unofficial attorneys in the public service.

Perry v. United States, 28 Ct.Cl. 483, 491 (1893). Speaking for the Second Circuit Court of Appeals, Judge Learned Hand emphasized the centralizing function of the Attorney General's role as chief litigator for the United States and the necessity

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that that role be committed exclusively to the Attorney General:

The government has provided legal officers, presumably competent, charged with the duty of protecting its rights in its *51 courts.... Congress, having so provided for the prosecution of civil suits, can scarcely be supposed to have contemplated a possible duplication in legal personnel. The cost of this is one consideration, but far more important is the centering of responsibility for the conduct of public litigation. The Attorney General has powers of "general superintendence and direction" over district attorneys (title 5, U.S.Code, § 317 (5 USCA § 317)), and may directly intervene to "conduct and argue any case in any court of the United States" (title 5, U.S.Code, § 309 [5 USCA § 309])).... Thus he may displace district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press. No such system is capable of operation unless his powers are exclusive, or if the Departments may institute suits which he cannot control. His powers must be coextensive with his duties. Sutherland v. International Insurance Co., 43 F.2d 969, 970 (2d Cir.1930), cert. denied, 282 U.S. 890 (1930) (emphasis added).

In 1933, as part of a crusade to consolidate as much of the government's business as necessary to increase operating efficiency, President Roosevelt issued an executive order to supplement the existing legislative mandate of centralized litigation authority. Executive Order No. 6166 (June 10, 1933), which requires all claims by or against the United States to be litigated by, and under the supervision of, the Department of Justice, is still in effect. The order provides in pertinent part:

Claims by or against the United States.

The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer, is transferred to the Department of Justice.

Reprinted in 5 U.S.C. § 901 note (1976).

II. Present Statutory Bases of the Attorney General's Authority

These attempts to centralize the litigating function and authority of the federal government in the Department of Justice, with the Attorney General at its helm, *52 are now codified in 5 U.S.C. § 3106 and 28 U.S.C. §§ 515-516. Section 3106 of Title 5 forbids the employment of outside counsel by executive agencies for litigation involving the United States unless Congress has provided otherwise, requiring instead that the matter be referred to the Department of Justice. [FN6] Although we have found no case law interpreting this provision, the language of §

3106 appears to limit the prohibition of payment to outside counsel for litigation, and litigation-related matters. However, in view of the centralization and uniformity purposes underlying the 1870 Act and its progeny, we believe that, absent statutory authority to the contrary, the prohibition should be broadly interpreted to preclude payments to non-agency or non-Justice Department attorneys for (legal) advisory functions as well. See Scalia, Assistant Attorney General, Office of Legal Counsel, Letter to Hoffman, General Counsel, Department of Defense (Mar. 26, 1975). [FN7] See also Boyle v. United States, 309 F.2d 399, 402 (Ct.Cl.1962) (quoting from a 1957 letter by the Comptroller General: "[I]n the absence of urgent and compelling reasons, a Government agency may not procure from an independent contractor services normally susceptible of being performed by Government employees."). Nevertheless, the Attorney General may employ outside counsel to perform legal duties under his direction. Sections 515 and 543 of Title 28 [FN8] authorize the Attorney General to commission "special attorneys" to assist United States Attorneys, or to "conduct any kind of legal proceeding, civil or criminal, ... which United States attorneys are authorized by law to conduct...."

*53 Sections 515-519 of Title 28 codify the law growing out of the 1870 Act which consolidated the power to conduct litigation involving the United States in the Department of Justice, and granted the Attorney General supervisory authority over such litigation. The principal provisions granting such authority are §§ 516 and 519. Section 516 provides that

> [e]xcept as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

Section 519 provides that

> [e]xcept as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

However, as with the previous legislative and executive efforts designed to centralize the litigating functions of the United States, these provisions have been undercut by exceptions authorized by Congress which grant agencies or departments litigating authority independent of the Department of Justice. See Bell, The Attorney General: The Federal Government's Chief Lawyer and Chief Litigator, or One Among Many?, 46 Fordham L.Rev. 1049 (1978); Memorandum to the Attorney General, from William D. Ruckelshaus (Mar. 5, 1970); Key, The Legal Work of the Federal Government, 25 Va.L.Rev. 165 (1938). [FN9] As of 1978, some 31 Executive Branch and independent agencies were authorized to conduct at least some of their own litigation. Bell, supra, at 1057. Although this memorandum does not address those cases in which agencies have been granted independent litigating authority, the lines between the Attorney General's authority and that which has been delegated to the agencies have at times been drawn ambiguously, and in those cases, the Attorney General frequently asserts his historic authority over the

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litigation proceedings.

*54 III. Supervisory Authority in the Context of Jointly Conducted Litigation

A. Policy Considerations

The policy considerations which support the centralization of federal litigating authority in the Department of Justice, under the supervision of the Attorney General, are many. In addition to the "unity of decision, unity of jurisprudence" goals that were articulated in the 1870 congressional debates, the centralization of authority and supervision over federal litigation in the Department of Justice meets several other objectives: (1) the coordination of lower court proceedings, which enhances the ability of government lawyers to select test cases presenting the government's positions in the best possible light; (2) the facilitation of presidential supervision, through the Attorney General, over Executive Branch policies that are implicated in litigation; (3) the allowance for greater objectivity in the filing and handling of cases by attorneys who are not themselves the affected litigants; and (4) the increased effectiveness in the handling of appeals and Supreme Court litigation which results from centralized control over lower court proceedings. See generally Memorandum to the Attorney General from William D. Ruckelshaus, Re: Encroachments upon the Authority of the Attorney General to Supervise and Control the Government's Litigation (Mar. 5, 1970). See also Harmon, Office of Legal Counsel, Memorandum for the Associate Attorney General (Dec. 11, 1980).

Centralization of federal litigating authority in the Department of Justice, under the supervision of the Attorney General, is vitally necessary to ensure the Attorney General's proper discharge of his duty to oversee the legal affairs of the United States with which Congress has entrusted him. Centralization ensures that the Attorney General is properly informed of the legal involvements of each of the agencies for which he is responsible; supervisory authority permits him to act on that knowledge. In this way, the Attorney General is better able to coordinate the legal involvements of each "client" agency with those of other "client" agencies, as well as with the broader legal interests of the United States overall. Yet, while the "client" agencies may be involved, to varying degrees, in carrying out the litigation responsibilities necessary to assist the Attorney General in representing the agency's particular interests, it is essential that the Attorney General not relinquish his supervisory authority over the agency's litigation functions, for the Attorney General alone is obligated to represent the broader interests of the Executive. It is this responsibility to ensure that the interests of the United States as a whole, as articulated by the Executive, are given a paramount position over potentially conflicting interests between subordinate segments of the government of the United States which uniquely justifies the role of the Attorney General as the chief litigator for the United States. Only the Attorney General has the overall perspective to perform this function.

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Nevertheless, it must be stressed that in exercising supervisory authority over the conduct of agency litigation, the Attorney General will generally defer to the *55 policy judgments of the client agency. This deference reflects a recognition of the agency's considerable expertise in the substantive area with which it is primarily concerned. Strictly speaking, "policy" judgments are confined to those substantive areas in which the agency has developed a special expertise and in which the agency is vested by law with the flexibility and discretion to make policy judgments. However, it is increasingly the case that policy concerns are implicated in decisions dealing with litigation strategy, and in such cases, the Attorney General will accommodate the agency's policy judgments to the greatest extent possible without compromising the law, or broader national policy considerations.

It is in the context of these dual representation functions--in which there exists inherent potential for conflict between "clients"--that questions of representation arise. Circumstances frequently develop in which the Attorney General and client agencies disagree as to the proper course of the litigation--including strategy, legal judgments, settlement negotiations, and policy judgments which impact on the litigation. Such circumstances frequently present the question whether the Attorney General should continue to represent the client.

The simple answer is yes. The Attorney General has not only the statutory authority to represent the agencies over whose litigation he exercises supervisory authority, but, indeed, the duty to do so, "[e]xcept as otherwise authorized by law." 28 U.S.C. §§ 516, 519. The Attorney General's authority and duty to represent these agencies are described more particularly by the specific legislation which sets forth his and the agencies' respective litigation responsibilities, and occasionally, in "Memoranda of Understanding" entered into by the Attorney General and specific agencies apportioning such responsibilities. Nevertheless, unlike the private attorney, the Attorney General does not have the option of withdrawing altogether from the representation of client agencies, as long as interests of the United States for which he is held responsible are at stake.

However, recognition of the very real difficulties which are posed in the context of litigation jointly conducted by the Attorney General and "client" agencies--particularly in view of the agencies' greater staffing resources, more intimate familiarity with the subject matter of the litigation, greater visibility to the public as a litigant, and more involvement in the day-to-day administration of field offices--tends to suggest that a more practical understanding of the Attorney General's authority and duty to represent client agencies may be needed. Distinguishing policy judgments from legal judgments in litigation matters--the former being primarily the province of the agencies and the latter being reserved to the Attorney General--helps to provide not only a more reasonable and efficient use of government resources, but a workable framework for resolving most disputes that may result in representation crises. Nevertheless, because of his unique responsibilities in representing government-wide interests as well as those of

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particular "client" agencies, the final judgment concerning the best interests of the United States must be reserved to the Attorney General.

B. Legislative Exceptions to the Attorney General's Authority

Although Congress has over the years responded, in varying degrees, to the multitude of pressures exerted by agencies seeking independent litigating authority, *56 the courts have continued to give greater weight to the strong policy objectives which recommend centralization. As a result, the "otherwise authorized by law" language creating the exception to the Attorney General's authority in 28 U.S.C. §§ 516 and 519 has been narrowly construed to permit litigation by agencies only when statutes explicitly provide for such authority. See Marshall v. Gibson's Products, Inc., 584 F.2d 668, 676 n. 11 (5th Cir.1978); ICC v. Southern Railway, 543 F.2d 534, 535-38 (5th Cir.1976); In re Grand Jury Subpoena of Persico, 522 F.2d 41, 54 (2d Cir.1975); FTC v. Guignon, 390 F.2d 323 (8th Cir.1968); United States v. Tonry, 433 F.Supp. 620 (E.D.La.1977).

Although the legislative history of Sections 516 and 519 is relatively sparse--in fact, the "history" is contained almost entirely in the "Historical and Revision Notes" prepared by the revisers of Title 5 in 1966--the courts' strict interpretation of these provisions is supported not only by the historical antecedents of these statutes and the policy considerations discussed above, but also by the Reviser's Notes to the 1966 amendments. [FN10] The revisers state, with respect to both Sections 516 and 519, that the sections were revised to express the effect of existing law, which does permit agency heads, "with the approval of Congress, [to employ] attorneys to advise them in the conduct of their official duties...." 28 U.S.C. § 516 note (emphasis added). The revisers further state that "[t]he words 'Except as otherwise authorized by law,' are added to provide for existing and future exceptions (e.g., section 1037 of title 10)." § 516 note; 28 U.S.C. § 519 note. Thus the revisers have indicated that existing and future grants of litigating authority that are at least as express as the language contained in 10 U.S.C. § 1037 are to be excepted from the Attorney General's broad grant of authority under §§ 516 and 519 of Title 28. Section 1037 of Title 10 permits the Secretaries of the various military departments to "employ [private] counsel" for the "representation" of persons subject to the Uniform Code of Military Justice "before the judicial tribunals and administrative agencies" of foreign nations. While nothing in the legislative history of § 1037 indicates a congressional intent to create an exception to the predecessors of §§ 516 and 519, Congress made clear in 1966 that the operative language, "the Secretary concerned may employ counsel ... incident to the representation before ... judicial tribunals" was sufficient to trigger the exception. [FN11] See H.R.Rep. No. 1863, 84th Cong., 2d Sess. (1956); S.Rep. No. 2544, 84th Cong., 2d Sess. (1956). See generally Office of Legal Counsel, Memorandum to Peter R. Taft (Aug. 27, 1976).

In order to come within the "as otherwise authorized by law" exception to the Attorney General's authority articulated in 28 U.S.C. §§ 516 and 519, it is necessary that Congress use language authorizing agencies to employ outside *57 counsel (or to use their own attorneys) to represent them in court. See, e.g., 49

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U.S.C. § 16(11) (Interstate Commerce Commission); 16 U.S.C. § 825m(c) (Federal Power Commission); 12 U.S.C. § 1464(d)(1) (Federal Home Loan Bank Board); 29 U.S.C. § 154(a) (National Labor Relations Board); [FN12] 5 U.S.C. § 7105(h) (Supp. IV 1980) (Federal Labor Relations Authority). [FN13] However, even agencies to which Congress has granted independent litigating authority may be prohibited from conducting their own litigation in the Supreme Court. See, e.g., 42 U.S.C. § 2000e-4(b)(2) (Equal Employment Opportunity Commission); 5 U.S.C. § 7105(h) (Supp. IV 1980) (Federal Labor Relations Authority). [FN14] More ambiguous language, which, for example, authorizes an agency to "sue and be sued," [FN15] "bring a civil action," or "invoke the aid of a court," has been considered by some courts to be insufficient to confer independent litigating authority. See, e.g., ICC v. Southern Railway, 543 F.2d 534 (5th Cir.1976); *58FTC v. Guignon, 390 F.2d 323 (8th Cir.1968). See generally Harmon, Office of Legal Counsel, Memorandum for the Associate Attorney General (Dec. 11, 1980); Meador, Office for Improvements in the Administration of Justice, Draft Memorandum (May 21, 1979); Office of Legal Counsel, Relationship of Proposed Amendments to the Administrative Procedure Act ... to the Department of Justice Policy of Opposition to Litigation Power Outside of the Department (Apr. 29, 1974); Memorandum to the Attorney General from William D. Ruckelshaus, supra; but see SEC v. Robert Collier & Co., 76 F.2d 939 (2d Cir.1935).

Other language which does grant agency attorneys authority to litigate, but provides that such authority shall be exercised under the direction and control of the Attorney General, provides the framework for "Memoranda of Understanding" (MOUs) between the agencies and the Department of Justice, which apportion the litigation responsibilities between the Department and the agencies. See, e.g., 29 U.S.C. § 204(b) (Fair Labor Standards Act); the Age Discrimination Employment Act of 1967, Pub.L. No. 90-202, 81 Stat. 602. [FN16] These memoranda usually specify both the categories of cases in which agency counsel may appear and the nature of the Attorney General's continuing control and supervision over such cases. We believe that the sharing of litigation responsibilities under MOUs is proper, as long as the Attorney General retains ultimate authority over the litigation. Moveover, the rationale underlying these arrangements is an eminently sensible one. The efficiency and expertise objectives in government litigation are thereby maximized, without sacrificing the Attorney General's statutory role as chief government litigator, and the responsibilities and prerogatives which attach thereto.

Nevertheless, as a practical matter, MOUs do compromise the Attorney General's control, if not authority, over the conduct of agency litigation. Agencies eager to control their own litigation may proceed to negotiate settlement agreements, send out "no action" letters, depose witnesses, and otherwise represent the agency's position to the public without consultation or assistance from the Attorney General, leaving the Attorney General with a fait accompli and a potential equitable barrier to his subsequent assertion of control over the litigation. [FN17] Such occurrences effectively undermine the Attorney General's *59 ability to perform the dual litigating functions with which he is charged. Recognizing that the efficiency and expertise objectives in government litigation

necessitate the sharing of litigation responsibilities in most cases, care should be taken to make explicit in these arrangements the Attorney General's overriding authority in directing the litigation. While the Attorney General may delegate some litigating authority under the MOUs, he may not delegate the ultimate responsibility which is by law vested exclusively in the Attorney General. See Harmon, Office of Legal Counsel, Memorandum for the Associate Attorney General (Dec. 11, 1980). Thus, the Attorney General should make clear to the client agency his willingness to support the Assistant Attorney General and line attorneys in the enforcement of his prerogatives under the MOU. [FN18]

IV. Settlement and Compromise Authority

Included within this broad grant of plenary power over government litigation is the power to compromise and settle litigation over which the Attorney General exercises supervisory authority. This power "to compromise any case over which he has jurisdiction upon such terms as he may deem fit" is "in part inherent in [the Attorney General's] office and in part derived from statutes and decisions." 38 Op. Att'y Gen. 124 (1934). This authority was the subject of President Roosevelt's Executive Order No. 6166, (June 10, 1933), reprinted in 5 U.S.C. § 901 note (1976), which provided that "... the function of decision whether ... to compromise ... appeal ... [or] abandon prosecution or defense, now exercised by any agency or officer [of the United States], is transferred to the Department of Justice." See infra at 7-8. With respect to the power to compromise, Attorney General Cummings observed that

> it is a power, whether attaching to the office or conferred by statute or Executive order, to be exercised with wise discretion and resorted to only to promote the Government's best interest or to prevent flagrant injustice, but that it is broad and plenary may be asserted with equal assurance, and it attaches, of course, immediately upon the receipt of a case in the Department of Justice, carrying with it both civil and criminal features, if both exist, and any other matter germane to the case which the Attorney General may find it necessary or proper to consider before he invokes the aid of the courts; nor does it end with the entry of judgment, but embraces execution (United States v. Morris, 10 Wheat. 246). *60 38 Op. Att'y Gen. 98, 102 (1934). [FN19] In these opinions, Attorney General Cummings concluded that the Attorney General's authority to settle cases extended even beyond that which would have been available to the agency charged with administering the underlying law. [FN20]

Executive Order No. 6166, together with Sections 516 and 519 of Title 28 of the U.S. Code (and their predecessor provisions), have been interpreted consistently by the courts to vest the Attorney General with virtually absolute discretion to determine whether to compromise or abandon claims made in litigation on behalf of the United States. See New York v. New Jersey, 256 U.S. 296, 308 (1921); United States v. Newport News Shipbuilding & Dry Dock Co., 571 F.2d 1283 (4th Cir.), cert. denied, 439 U.S. 875 (1978); Smith v. United States, 375 F.2d 243 (5th Cir.), cert. denied, 389 U.S. 841 (1967); Halbach v. Markham, 106 F.Supp. 475, 479-81 (D.N.J.1952), aff'd, 207 F.2d 503 (3d Cir.1953). In deciding to settle or abandon a claim, or not to prosecute at all, the Attorney General is not restricted to

considerations only of litigative probabilities, but rather may make a decision, in his discretion, on the basis of national policies espoused by the Executive. Smith v. United States, supra. The only limitations placed on the Attorney General's settlement authority are those which pertain to his litigating authority generally--i.e., explicit statements by Congress circumscribing his settlement authority, [FN21] see, e.g., 8 U.S.C. § 1329 (1976) (prohibiting settlement of suits and proceedings brought under Title II of the Immigration Act without consent of the court in which the suit or proceeding is pending), and the duty imposed on the President by Article II, § 3 of the Constitution to "take Care that the Laws be faithfully executed...." See generally Office of Legal Counsel, Memorandum for Sanford Sagalkin (Sept. 4, 1980); Office of Legal Counsel, Memorandum to James W. Moorman (Oct. 30, 1979). To guide the Attorney General in the exercise of his settlement discretion, the 1934 opinions of Attorney General Cummings proposed a "promote the Government's best interest, or ... prevent flagrant injustice" standard. See 38 Op. Att'y Gen. at 102.

*61 V. Litigation in International Courts

Similarly, the Attorney General's authority over litigation involving the United States before the International Court of Justice (ICJ) is plenary. Although the Attorney General's supervisory authority has been challenged only once since the 1966 codification of the broad grant of authority contained in 28 U.S.C. §§ 516 and 519, that challenge was resolved by reference to the broad scope of the statutory provisions as well as Department of Justice regulations contained in Title 28 of the Code of Federal Regulations.

In the connection with the litigation between the United States and Iran in 1980, a dispute arose between the Department of State and the Department of Justice concerning the Attorney General's authority to represent the United States before the ICJ. The Legal Adviser expressed the view that the State Department, by virtue of its premier role in United States foreign policy and international relations, had been historically charged with the responsibility for international affairs involving the United States, including legal matters. In response, Attorney General Civiletti cited the unambiguous language of §§ 516 and 519, and noted the absence of both statutory law and formal opinions which would "otherwise authorize" the Department of State to conduct litigation independent of the Attorney General's supervision. Attorney General's letter to the Legal Adviser, Department of State (Apr. 21, 1980). [FN22] In addition, 28 C.F.R. § 0.46 (1980) [FN23] makes clear that the Attorney General's litigation authority is not limited to domestic matters, but rather includes litigation "in foreign courts, special proceedings, and similar civil matters not otherwise assigned." See generally D. Deener, The United States Attorneys General and International Law (1957). [FN24]

VI. Conclusion

In short, the Attorney General, as the chief litigation officer for the United States, has broad plenary authority over all litigation in which the United States, *62 or its federal agencies or departments, are involved. This authority

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is wideranging, embracing all aspects of litigation, including subpoena enforcement, settlement authority, and prosecutorial discretion. The reservation of these powers to the Attorney General is grounded in our common law tradition, Acts of Congress (principally, 5 U.S.C. § 3106, and 28 U.S.C. §§ 516 and 519), various executive orders, and a long line of Supreme Court precedent. These powers can be eroded only by other Acts of Congress, and the Executive's constitutional command to faithfully execute the laws.

Implicit in this broad grant of authority is the recognition that the Attorney General must serve the interests of the "client" agency as well as the broader interests of the United States as a whole in carrying out his professional duties. The Attorney General is obligated to administer and enforce the Constitution of the United States and the will of Congress as expressed in the public laws, as well as the more "private" legal interests of the "client" agency. It is because of this diversity of functions that situations may arise where the Attorney General is faced with conflicting demands, e.g., where a "client" agency desires to circumvent the law, or dissociate itself from legal or policy judgments to which the Executive subscribes; where a "client" agency attempts to litigate against another agency or department of the federal government; or where a "client" agency desires a legal result that will benefit the narrow area of law administered by the agency, without regard to the broader interests of the United States government as a whole. In such cases, the Attorney General's obligation to represent and advocate the "client" agency's position must yield to a higher obligation to take care that the laws be executed faithfully. In every case, the Attorney General must satisfy himself that this constitutional duty, delegated from the Executive, has not been compromised in any way, and that the legal positions advocated by him do not adversely affect the interests of the United States.

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FN1 Circumstances in which the Attorney General lacks supervisory authority over litigation on behalf of the United States include: (1) Litigation in United States courts where the Attorney General has no authority to determine who shall represent the United States, such as the United States Tax Court (26 U.S.C. § 7452 specifies that the United States shall be represented by the Chief Counsel for the Internal Revenue Service or his delegate) and the United States Court of Military Appeals (10 U.S.C. § 870 specifies that the United States shall be represented by the Judge Advocate General or his delegate); (2) Litigation involving independent regulatory agencies which have been given the express statutory authority to conduct their own litigation using agency attorneys, e.g., the National Labor Relations Board (29 U.S.C. § 154(a)); the Federal Power Commission (16 U.S.C. § 825m(c) power transferred to Federal Energy Regulatory Commission (42 U.S.C. § 7172(a)(2)(A) (Supp. IV 1980)); the Interstate Commerce Commission (49 U.S.C. §

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16(11) (Supp. IV 1980)); and (3) Litigation involving Executive Branch agencies which have been granted independent litigating authority by Congress, e.g., the Secretary of Labor is authorized to appoint attorneys to represent the Secretary or the Benefits Review Board in actions under the Longshoremen's and Harbor Workers' Compensation Act, except in the Supreme Court, under 33 U.S.C. § 921a.

There are also circumstances in which certain agencies have assumed, notwithstanding their lack of express statutory authority, full responsibility for their own trial and appellate litigation, so far without objection from the Attorney General. These agencies, such as the Tennessee Valley Authority and the Federal Deposit Insurance Corporation, have not been required to submit to the Attorney General's supervisory authority, apparently for historical reasons, some of which relate to their financial independence as government corporations. See Daniel J. Meador, Assistant Attorney General, Office for Improvements in the Administration of Justice, Draft Memorandum to the Attorney General and the Assistant Attorneys General Re: Government Relitigation Policies (May 21, 1979); Memorandum to the Attorney General from William D. Ruckelshaus (Mar. 5, 1970). The operative statutes in these two cases, 16 U.S.C. § 831c(h), 831x (TVA) and 12 U.S.C. § 1817(g) (FDIC), merely give the agencies the authority to sue and be sued--not to litigate independently of the Department of Justice. Presumably, the Attorney General may reassert his supervisory authority at any time.

FN2 Section 35 of the Judiciary Act provided in pertinent part that:

[T]here shall ... be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the Supreme Court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the President of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments.... "District attorneys," now known as "United States Attorneys," were to be appointed to conduct litigation in the lower courts of the United States but were not placed under the Attorney General's authority until 1861. Act of Aug. 2, 1861, ch. 37, 12 Stat. 285. From 1820 until 1861, the "district attorneys" were supervised by the Department of the Treasury. Act of May 15, 1820, ch. 107, 3 Stat. 592.

FN3 Prior to the Act, Congress had provided for the existence of "solicitors" in the various departments and agencies, who were responsible for the legal affairs of their respective departments. See generally Key, The Legal Work of the Federal Government, 25 Va.L.Rev. 165 (1938).

FN4 Cong. Globe, 41st Cong., 2d Sess., Pt. IV, 3035, 3036 (1870).

FN5 This reference is to the origin of the office of Attorney General, which was first created in the Judiciary Act of 1789, and derived its function from the role of the Attorney General in England. The Court stated:

The judiciary act of 1789 ... which first created the office of Attorney General, without any very accurate definition of his powers, in using the words that "there shall also be appointed a meet person, learned in the law, to act as

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Attorney General for the United States," 1 Stat. 93, c. 21, § 35, must have had reference to the similar office with the same designation existing under the English law. And though it has been said that there is no common law of the United States, it is still quite true that when acts of Congress use words which are familiar in the law of England, they are supposed to be used with reference to their meaning in that law.
125 U.S. at 280.

FN6 5 U.S.C. § 3106 provides in pertinent part that:

[e]xcept as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice.

FN7 Although the Scalia letter was written in response to an inquiry regarding the use of outside counsel by an agency in connection with the investigation or prosecution of administrative claims, the principles expressed therein are broadly applicable:

In prohibiting the use of outside counsel by the several departments, Congress concentrated all the Government's law business in the Department of Justice--not only litigation, but also advisory functions. This was thought to be necessary in order to provide for uniform legal interpretations throughout the Executive branch.... Congress later departed from the principle that all legal activities of the Government were to be carried out by the Department of Justice; subsequent legislation, authorizing and funding agency legal staffs, permitted legal matters not involving litigation to be handled in the various agencies. Those changes were taken into account when Congress, in 1966, codified the various provisions of the law going back to the Department of Justice Act of 1870. See, e.g., Historical and Revision Notes to 5 U.S.C. 3106 and 28 U.S.C. 516. There is, however, no indication of a Congressional intent to relax the prohibition against engagement of outside counsel by agencies other than the Department of Justice. This principle remains in effect with respect to both litigation reserved to the Department of Justice and nonlitigative matters handled within the several agencies.
Letter at 4-5 (footnotes and citations omitted) (emphasis added).

FN8 28 U.S.C. § 515(a), provides in pertinent part that:

[t]he Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal ... which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.
28 U.S.C. § 543 provides:

(a) The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires.

(b) Each attorney appointed under this section is subject to removal by the

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Attorney General.

FN9 Congress has thus far maintained virtually unimpaired the Attorney General's control over the initiation of criminal proceedings. See, e.g., 15 U.S.C. § 77t(b) (SEC); 16 U.S.C. § 825m(a) (FPC). The preservation of such authority in the Attorney General is, we believe, sound constitutional policy, in view of the Executive's constitutional mandate to take care that the laws be executed faithfully. Such a responsibility carries with it the vindication of public rights through the institution of criminal proceedings against those who violate the laws which the Executive administers. As the Executive's chief legal officer, the Attorney General is singularly suited to carry out this responsibility.

Similarly, the Attorney General's authority to conduct cases in the Supreme Court has remained undiluted. Section 518 of Title 28, which reserves the conduct and argument in the Supreme Court of suits and appeals "in which the United States is interested" to the Attorney General and Solicitor General, does not contemplate existing or future statutory authorizations to the agencies, as do §§ 516 and 519. However, § 518 does permit the Attorney General to "direct otherwise," in particular cases.

FN10 28 U.S.C. §§ 515-526 (1976), Pub.L. No. 89-554, § 4(c), 80 Stat. 613 is the most recent codification of the provisions contained in the 1870 Act creating the Department of Justice. Prior to 1966, these provisions were codified in Title 5.

FN11 10 U.S.C. § 1037 was adopted in 1956, prior to the 1966 adoption of 28 U.S.C. §§ 516 and 519, and provides in pertinent part:

(a) Under regulations to be prescribed by him, the Secretary concerned may employ counsel, and pay counsel fees, court costs, bail, and other expenses incident to the representation, before the judicial tribunals and administrative agencies of any foreign nation, of persons subject to the Uniform Code of Military Justice.

FN12 These statutes provide as follows:

I.C.C.--49 U.S.C. § 16(11):

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission ... or for proper representation of the public interests in investigations made by it ... or to appear for or represent the Commission in any case in court.

F.P.C.--16 U.S.C. § 825m(c)--language substantially similar to that provided for I.C.C.

Federal Home Loan Bank Board--12 U.S.C. 1464(d)(1):

The Board shall have power to enforce this section and rules and regulations made hereunder. In the enforcement of any provision of this section or rules and regulations made hereunder ... the Board is authorized to act in its own name and through its own attorneys....

National Labor Relations Board--29 U.S.C. § 154(a):

Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court.

(Emphases added.) Of course, these authorizations must be read within the context

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of the whole statutory scheme of which they are a part--in some instances these agencies are represented by the Department of Justice.

FN13 Language similar to that contained in the statutes cited in n. 12, supra was recently held by the District Court for the District of Columbia to confer independent litigating authority on the Federal Labor Relations Authority (FLRA), including the litigation of proceedings under the Freedom of Information Act, 5 U.S.C. § 552. See AFGE v. Gordon, C.A. No. 81-1737 (D.D.C. Oct. 23, 1981). The statute construed by the court as granting the FLRA independent litigating authority, 5 U.S.C. § 7105(h) (Supp. IV 1980), provides:

Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

The Appellate Section of the Civil Division has recommended that the Department of Justice not appeal this decision. Nevertheless, the Department has maintained vigorously in the past, and will continue to maintain, that broad grants of independent litigating authority, similar to those discussed above, do not encompass cases arising under administrative statutes that apply government-wide. This view is supported by the strong policy imperatives of "unity ... in the executive law of the United States," infra at 5, as well as some legislative history. See H.R.Conf.Rep. No. 539, 95th Cong., 1st Sess. 72 (1977), reporting on the Department of Energy Organization Act, Pub.L. No. 95-91, 91 Stat. 565, which established the Federal Energy Regulatory Commission.

FN14 42 U.S.C. § 2000e-4(b)(2) provides:

Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this subchapter.

5 U.S.C. § 7105(h) (Supp. IV 1980) provides:

Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

(Emphases added.)

FN15 The Office of Legal Counsel views "sue and be sued" language as merely designating the agency as a "jural entity" which may sue or be sued in its own name, and not as removing the agency's representation from the domain of the Department of Justice pursuant to 28 U.S.C. §§ 516 and 519. See Meador, Draft Memorandum Re: Government Relitigation Policies, supra, at 19, n. 51, citing an interview with H. Miles Foy III, Department of Justice, Office of Legal Counsel.

FN16 29 U.S.C. § 204(b) permits Department of Labor attorneys to "appear for and represent" the Administrators of the FLSA and ADEA "in any litigation," but

subjects all such litigation "to the direction and control of the Attorney General." The Secretary of Labor and the Attorney General have entered into a series of understandings which provide that Department of Labor attorneys will ordinarily handle all appellate litigation pursuant to the Acts, but permit the Attorney General to take part in the conduct of such cases as he deems to be in the best interest of the United States.

FN17 We do not mean to suggest that agencies acting beyond the scope of their litigating authority in settling claims legally bind the United States; rather, we refer only to the confusion, ill will, and lack of confidence that would accrue to the agency in its public relations should the Attorney General reverse the agency's actions, as well as the practical difficulties inherent in such a reversal. See Dresser Indus., Inc. v. United States, 596 F.2d 1231, 1236 (5th Cir.1979), cert. denied, 444 U.S. 1044 (1980):

It is well established that the federal government will not be bound by a contract or agreement entered into by one of its agents unless such agent is acting within the limits of his actual authority.... As the Supreme Court stated in [Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947)]: Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explictly defined by Congress or be limited by delegated legislation, properly exercised through the rulemaking power. And this is so even though ... the agent himself may have been unaware of the limitations upon his authority. 332 U.S. at 384.

FN18 Additional litigating authority, independent of the Attorney General, was granted to certain agencies by the Hobbs Act, 28 U.S.C. §§ 2342, 2348 (1976 & Supp. IV 1980). The Hobbs Act grants specified agencies authority to intervene in appellate proceedings "of their own motion and as of right," even though the Attorney General "is responsible for and has control of the interests of the Government" in the proceedings. Notwithstanding the Attorney General's overall authority, he "may not dispose of or discontinue the proceeding" over the objection of the intervening agency, and the agency "may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General."

FN19 As early as 1831, Attorney General Taney observed that:

An attorney conducting a suit for a party has, in the absence of that party, a right to discontinue it whenever, in his judgment, the interest of his client requires it to be done. If he abuses this power, he is liable to the client whom he injures....

An attorney of the United States, except in so far as his powers may be restrained by particular acts of Congress, has the same authority and control over the suits which he is conducting. The public interest and the principles of justice require that he should have this power.... [S]ince he cannot consult his client (the United States), the sanction of the court is regarded as sufficient evidence that he exercised the power honestly and discretely.

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2 Op. Att'y Gen. 482, 486-87. Attorney General Cummings cited this opinion approvingly. 38 Op. Att'y Gen. at 99.

FN20 The opinions found in 38 Op. Att'y Gen. at 94, 98, 124 discuss the Attorney General's authority to compromise income tax cases in the absence of bona fide disputed questions of fact. Attorney General Cummings concluded that he did possess the authority to settle such cases, even though the Secretary had no statutory authority to compromise income tax cases in those circumstances.

FN21 With respect to actions brought under the Federal Tort Claims Act, 28 U.S.C. § § 2671-2680 (1976), for example, the Attorney General or his designee now has the authority to arbitrate, compromise, or settle claims brought under the Act after January 17, 1967, 28 U.S.C. § 2677 (1976); prior to the 1966 amendments, court approval was required before the Attorney General was permitted to effect a settlement. Congress also prescribed a procedure in the 1966 amendments which granted agencies authority to settle claims under $25,000 without prior written approval by the Attorney General of that specific settlement arrangement, as long as the arrangement was made in accordance with general regulations prescribed by the Attorney General. 28 U.S.C. § 2672 (1976).

FN22 At President Carter's request, Attorney General Civiletti personally conducted the Iran litigation before the ICJ, assisted by the Legal Adviser to the State Department, whom the Attorney General commissioned as a "Special Assistant," pursuant to 28 U.S.C. § 515.

FN23 28 C.F.R. § 0.46 (1980) provides:

The Assistant Attorney General in charge of the Civil Division shall, in addition to litigation coming within the scope of § 0.45, direct all other civil litigation including claims by or against the United States, its agencies or officers, in domestic or foreign courts, special proceedings, and similar civil matters not otherwise assigned, and shall employ foreign counsel to represent before foreign criminal courts, commissions or administrative agencies officials of the Department of Justice and all other law enforcement officers of the United States who are charged with violations of foreign law as a result of acts which they performed in the course and scope of their Government service.

FN24 Deener discusses the historical role of the Attorney General in providing legal advice on questions of international law and concludes:

The Judiciary Act of 1789 did not specifically charge the Attorney General with the duty of giving legal advice on questions of international law. On the other hand, the act did not restrict the "questions of law" that could be referred to the Attorney General to those involving domestic matters only. Actually, almost from the very beginning, the President and the department heads submitted questions involving the law of nations to the chief law officer, and succeeding Presidents and cabinet officers have continued to submit such questions as a matter of established practice. Congress apparently recognized this practical interpretation of the statutes defining the Attorney General's duties. At any rate, Congress has never deemed it necessary to change the statutes in this

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respect.
Deener, supra, at 10-11 (footnotes omitted).

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END OF DOCUMENT

CONTACT RULES

STATE-BY-STATE

October 2007

(INCLUDES RULES THAT BECOME EFFECTIVE THROUGH JANUARY 1, 2008)

ALABAMA

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

1. In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so.

COMMENT

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee 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 3.4(d).

This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

COMPARISON WITH FORMER ALABAMA CODE OF PROFESSIONAL RESPONSIBILITY
This Rule is substantially identical to DR 7-104(A)(1).

ALASKA

Rule 4.2. Communication with Person Represented by Counsel.

1. In representing a client, a lawyer shall not communicate about the subject of the representation with a party or 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 by law to do so. (SCO 1123 effective July 15, 1993)

ALASKA COMMENT

See Rule 1.2(c) regarding communications when limited representation is provided.

COMMENT

This rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communication with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent of that counsel to a communication will be sufficient for purposes of this Rule. *Compare* Rule 3.4(f).

This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

ARIZONA

ER 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 party 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 by law to do so.

ARKANSAS

RULE 4.2. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL.

1. 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.

COMMENT:

[1]This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3]The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[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. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. 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.

[6]A lawyer who is uncertain whether a communication with a represented person is permissible

may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule 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. Consent of the organization's lawyer is not required for communication with a former constituent. 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 3.4(f). Incommunicating 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.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9]In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

CALIFORNIA

Rule 2-100. Communication With a Represented Party

1. (A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

(B) For purposes of this rule, a "party" includes:

(1) An officer, director, or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

(2) An association member or an employee of an association, corporation, or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

(C) This rule shall not prohibit:

(1) Communications with a public officer, board, committee, or body; or

(2) Communications initiated by a party seeking advice or representation from an independent lawyer of the party's choice; or

(3) Communications otherwise authorized by law.

Discussion:

Rule 2-100 is intended to control communications between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule. There are a number of express statutory schemes which authorize communications between a member and person who would otherwise be subject to this rule. These statutes protect a variety of other rights such as the right of employees to organize and to engage in collective bargaining, employee health and safety, or equal employment opportunity. Other applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law.

Rule 2-100 is not intended to prevent the parties themselves from communicating with respect to the subject matter of the representation, and nothing in the rule prevents a member from advising the client that such communication can be made. Moreover, the rule does not prohibit a member who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

Rule 2-100 also addresses the situation in which member A is contacted by an opposing party who is represented and, because of dissatisfaction with that party's counsel, seeks A's independent advice. Since A is employed by the opposition, the member cannot give independent advice.

As used in paragraph (A), "the subject of the representation," "matter," and "party" are not limited to a litigation context.

Paragraph (B) is intended to apply only to persons employed at the time of the communication. (See *Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131 [261 Cal.Rptr. 493].)

Subparagraph (C)(2) is intended to permit a member to communicate with a party seeking to hire new counsel or to obtain a second opinion. A member contacted by such a party continues to be bound by other Rules of Professional Conduct. (See, e.g., rules 1-400 and 3-310.) (Amended by order of Supreme Court, operative September 14, 1992.)

COLORADO

Rule 4.2 Communication with Person Represented by Counsel

1. In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so.

COMMENT

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for the purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee 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 3.4(f).

This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

Committee Comment

This rule is proposed as adopted by the ABA, and is essentially the same as DR 7-104(A) of the Code.

RULE 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.

COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented person, such as a contractually-based right or obligation to give notice, is permitted to do so.

[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. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. 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.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule 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. Consent of the organization's lawyer is not required for communication with a former constituent. 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 3.4(f). 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.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

[9A] A pro se party to whom limited representation has been provided in accordance with C.R.C.P. 11(b) or C.R.C.P. 311(b), and Rule 1.2, is considered to be unrepresented for purposes of this Rule unless the lawyer has knowledge to the contrary.

CONNECTICUT

Rule 4.2. Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of representation with a party 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 by law to do so.

(P.B. 1978-1997, Rule 4.2.)

COMMENTARY

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communication with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the cases of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of a civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee 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 3.4 (6)).

This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

DELAWARE

Rule 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.

District of Columbia

Rule 4.2 - Communication Between Lawyer and Person Represented by Counsel

(a) During the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a person known to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the lawyer representing such other person or is authorized by law or a court order to do so.
(b) During the course of representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of an organization without obtaining the consent of that organization's lawyer. If the organization is an adverse party, however, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party that is adverse to the employee's employer.
(c) For purposes of this rule, the term "party" or "person" includes any person or organization, including an employee of an organization, who has the authority to bind an organization as to the representation to which the communication relates.
(d) This 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.

COMMENT

[1] This rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.
[2] This rule does not prohibit communication with a person or party, or an employee or agent of an organization, concerning matters outside the representation. For example, the existence of a controversy between two organizations does not prohibit a lawyer for either from communicating with representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. In addition, a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client communication is not solely for the purpose of evading restrictions imposed on the lawyer by this rule.
[3] In the case of an organization, and other than as noted in Comment [5], this rule prohibits communication by a lawyer for one party concerning the matter in representation with persons having the power to bind the organization as to the particular representation to which the communication relates. If an agent or employee of the organization with authority to make binding decisions regarding the representation is represented in the matter by separate counsel, the consent by that agent's or employee's counsel to a communication will be sufficient for purposes of this rule.
[4] The rule does not prohibit a lawyer from communicating with employees of an organization who have the authority to bind the organization with respect to the matters

underlying the representation if they do not also have authority to make binding decisions regarding the representation itself. A lawyer may therefore communicate with such persons without first notifying the organization's lawyer. *See* D.C. Bar Legal Ethics Committee Opinion No. 129. But before communicating with such a "nonparty employee," the lawyer must disclose to the employee the lawyer's identity and the fact that the lawyer represents a party with a claim against the employer. It is preferable that this disclosure be made in writing. The notification requirements of Rule 4.2(b) apply to contacts with government employees who do not have the authority to make binding decisions regarding the representation.

[5] Because this rule is primarily focused on protecting represented persons unschooled in the law from direct communications from counsel for an adverse person, consent of the organization's lawyer is not required where a lawyer seeks to communicate with in-house counsel of an organization. If individual in-house counsel is represented separately from the organization, however, consent of that individual's personal counsel is required before communicating with that individual in-house counsel.

[6] Consent of the organization's lawyer is not required where a lawyer seeks to communicate with a former constituent of an organization. In making such contact, however, the lawyer may not seek to obtain information that is otherwise protected.

[7] This rule also 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.

[8] This rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

[9] This rule does not apply to the situation in which a lawyer contacts employees of an organization for the purpose of obtaining information generally available to the public, or obtainable under the Freedom of Information Act, even if the information in question is related to the representation. For example, a lawyer for a plaintiff who has filed suit against an organization represented by a lawyer may telephone the organization to request a copy of a press release regarding the representation, without disclosing the lawyer's identity, obtaining the consent of the organization's lawyer, or otherwise acting as paragraphs (a) and (b) of this rule require.

[10] Paragraph (d) recognizes that special considerations come into play when a lawyer is seeking to redress grievances involving the government. It permits communications with those in government having the authority to redress such grievances (but not with any other government personnel) without the prior consent of the lawyer representing the government in such cases. However, a lawyer making such a communication without the prior consent of the lawyer representing the government must make the kinds of disclosures that are required by paragraph (b) in the case of communications with non-party employees.

[11] Paragraph (d) does not permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of disputes with the government. It is intended to provide lawyers access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty, or that government personnel are conducting themselves improperly with respect to aspects of the dispute. It is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other scheduling matters, or similar

routine aspects of the resolution of disputes.

[12] This rule is not intended to enlarge or restrict the law enforcement activities of the United States or the District of Columbia which are authorized and permissible under the Constitution and law of the United States or the District of Columbia. The "authorized by law" proviso to Rule 4.2(a) is intended to permit government conduct that is valid under this law. The proviso is not intended to freeze any particular substantive law, but is meant to accommodate substantive law as it may develop over time.

FLORIDA

RULE 4-4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) 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. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating The Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of the time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

Comment

This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

The rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between 2 organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See rule 4-8.4(a). 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, provided that the client is not used to indirectly violate the Rules of Professional Conduct. Also, a lawyer having independent justification for communicating with the other party is permitted to do so. Permitted communications include, for example, the right of

a party to a controversy with a government agency to speak with government officials about the matter.

In the case of a represented organization, this rule 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. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by the agent's or employee's own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. Compare rule 4-3.4(f). In communication 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 prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See terminology. Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to rule 4-4.3

GEORGIA

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) A lawyer who is representing a client in a matter 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 constitutional law or statute.

(b) Attorneys for the State and Federal Government shall be subject to this Rule in the same manner as other attorneys in this State.

The maximum penalty for a violation of this Rule is disbarment.

Comment

[1] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government entity and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government entity to speak with government officials about the matter.

[2] Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions.

[3] This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[4A] In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee 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 3.4(f): Fairness to Opposing Party and Counsel.

[4B] In administering this Rule it should be anticipated that in many instances, prior to the beginning of the interview, the interviewing lawyer will not possess sufficient information to determine whether or not the relationship of the interviewee to the entity is sufficiently close to place the person in the "represented" category. In those situations the good faith of the lawyer in undertaking the interview should be considered. Evidence of good faith includes an immediate and candid statement of the interest of the person on whose behalf the interview is being taken, a full explanation of why that person's position is adverse to the interests of the entity with which the interviewee is associated, the exploration of the relationship issue at the outset of the interview and the cessation of the interview immediately upon determination that the interview is improper.

[5] The prohibition on communications with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Terminology. Such an inference may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by ignoring the obvious.

[6] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3: Dealing with Unrepresented Person.

[7] The anti-contact rule serves important public interests which preserve the proper functioning of the judicial system and the administration of justice by a) protecting against misuse of the imbalance of legal skill between a lawyer and layperson; b) safe-guarding the client-attorney relationship from interference by adverse counsel; c) ensuring that all valid claims and defenses are raised in response to inquiry from adverse counsel; d) reducing the likelihood that clients will disclose privileged or other information that might harm their interests; and e) maintaining the lawyers ability to monitor the case and effectively represent the client.

[8] This Rule is not intended to affect communications between parties to an action entered into independent of and not at the request or direction of counsel.

GUAM

RULE 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.

IDAHO

RULE 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.

*Commentary

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[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. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. 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.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule 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. Consent of the organization's lawyer is not required for communication with a former constituent. 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 3.4(f). 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, Comment [2].

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

*(Commentary to Rule 4.2 amended 3-17-05)

HAWAII

Rule 4.2. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL.

1. 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 by law to do so.

COMMENT:

[1] This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification or legal authority for communicating with a represented person is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

[2] Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, where there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions.

[3] This Rule also applies to communications with any person whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[4] In the case of an organization, this rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee 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 HRPC 3.4(h).

[5] The prohibition on communications with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Terminology. Such an inference may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[6] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to HRPC 4.3.

Hawai'i Code Comparison

This rule is substantially identical to DR 7-104(A)(1).

(Amended May 7, 2001, effective July 1, 2001.)

ILLINOIS

Rule 4.2. Communication With Person Represented by Counsel

During the course of representing a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party or as may otherwise be authorized by law.

Adopted February 8, 1990, effective August 1, 1990.

INDIANA

Rule 4.2. Communication with Person Represented by Counsel

1. 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 by law or a court order.

Amended Sep. 30, 2004, effective Jan. 1, 2005.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[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. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. 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.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule 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. Consent of the organization's lawyer is not required for communication with a former constituent. 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 3.4(f). 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.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Adopted Sep. 30, 2004, effective Jan. 1, 2005.

IOWA

RULE 32:4.2: 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.

Comment

[1] This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the clientlawyer relationship, and the uncounseled disclosure of information relating to the representation.
[2] This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.
[3] The rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.
[4] This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. *See* rule 32:8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.
[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. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this rule in addition to honoring the constitutional rights of the accused. 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.
[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this rule 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. Consent of the organization's lawyer is not required for communication with a former constituent. 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 32:3.4(f). 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 32:4.4.
[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. *See* rule 32:1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.
[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to rule 32:4.3. [Court Order April 20, 2005, effective July 1, 2005]

Kansas

4.2 Transactions with Persons other than Clients: 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.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.
[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.
[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.
[4] This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). 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. Also, a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.
[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. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. 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.
[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where

communication with a person represented by counsel is necessary to avoid reasonably certain injury.
[7] In the case of a represented organization, this Rule 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. Consent of the organization's lawyer is not required for communication with a former constituent. 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 3.4(f). 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.
[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(g). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.
[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

KENTUCKY

SCR 3.130(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 party 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 by law to do so.

HISTORY: Amended by Order 89-1, eff. 1-1-90

COMMENTARY

Supreme Court
1989

[1] This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

[2] In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. Prior to communication with a nonmanagerial employee or agent of an organization, the lawyer should disclose the lawyer's identity and the fact that the lawyer represents a party with a claim against the organization. See Rule 4.3. If an agent or employee 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 3.4(f).

[3] This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

[4] A person's continued representation after the conclusion of a proceeding or matter is not necessarily presumed. The passage of time may be reasonable ground to believe that a person is no longer represented by a lawyer, and the Rule is not intended to prohibit all direct contact in such circumstances.

LOUISIANA

RULE 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) 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.

(b) a person the lawyer knows is presently a director, officer, employee, member, shareholder or other constituent of a represented organization and

(1) who supervises, directs or regularly consults with the organization's lawyer concerning the matter;
(2) who has the authority to obligate the organization with respect to the matter; or
(3) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Reenacted Jan. 20, 2004, effective March 1, 2004.

MAINE

Rule 3.6 (f) Communication with Person Represented by Counsel

Communicating With Adverse Party.

During the course of representation of a client, a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so. An otherwise unrepresented party to whom limited representation is being provided or has been provided in accordance with Rule 3.4(i) is considered to be unrepresented for purposes of this rule, except to the extent the limited representation attorney provides other counsel written notice of a time period within which other counsel shall communicate only with the limited representation attorney.

MARYLAND

Rule 4.2. Communication with Person Represented by Counsel

(a) Except as provided in paragraph (c), in representing a client, a lawyer shall not communicate about the subject of the representation with a person who the lawyer knows is represented in the matter by another lawyer unless the lawyer has the consent of the other lawyer or is authorized by law or court order to do so.

(b) If the person represented by another lawyer is an organization, the prohibition extends to each of the organization's (1) current officers, directors, and managing agents and (2) current agents or employees who supervise, direct, or regularly communicate with the organization's lawyers concerning the matter or whose acts or omissions in the matter may bind the organization for civil or criminal liability. The lawyer may not communicate with a current agent or employee of the organization unless the lawyer first has made inquiry to ensure that the agent or employee is not an individual with whom communication is prohibited by this paragraph and has disclosed to the individual the lawyer's identity and the fact that the lawyer represents a client who has an interest adverse to the organization.

(c) A lawyer may communicate with a government official about matters that are the subject of the representation if the government official has the authority to redress the grievances of the lawyer's client and the lawyer first makes the disclosures specified in paragraph (b).

Committee note: The use of the word "person" for "party" in paragraph (a) is not intended to enlarge or restrict the extent of permissible law enforcement activities of government lawyers under applicable judicial precedent.

COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the lawyer-client relationship, and the uncounseled disclosure of information relating to the representation.
[2] This Rule does not prohibit communication with a person, or an employee or agent of the person, concerning matters outside the representation. For example, the existence of a controversy between two organizations does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.
[3] Communications authorized by law include communications in the course of investigative activities of lawyers representing governmental entities, directly or through investigative agents, before the commencement of criminal or civil enforcement proceedings if there is applicable judicial precedent holding either that the activity is permissible or that the Rule does not apply to the activity. The term "civil enforcement proceedings" includes administrative enforcement proceedings. Except to the extent applicable judicial precedent holds otherwise, a government

lawyer who communicates with a represented criminal defendant must comply with this Rule.
[4] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order in exceptional circumstances. For example, when a represented criminal defendant expresses a desire to speak to the prosecutor without the knowledge of the defendant's lawyer, the prosecutor may seek a court order appointing substitute counsel to represent the defendant with respect to the communication.
[5] This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by counsel concerning the matter to which the communication relates. The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.
[6] If an agent or employee of a represented person that is an 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 3.4 (f). In communicating with a current agent or employee of an organization, a lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the organization. Regarding communications with former employees, see Rule 4.4(b).
[7] The prohibition on communications with a represented person applies only if the lawyer has actual knowledge that the person in fact is represented in the matter to be discussed. Actual knowledge may be inferred from the circumstances. The lawyer cannot evade the requirement of obtaining the consent of counsel by ignoring the obvious.
[8] Rule 4.3 applies to a communication by a lawyer with a person not known to be represented by counsel.
[9] Paragraph (c) recognizes that special considerations come into play when a lawyer is seeking to redress grievances involving the government. Subject to certain conditions, it permits communications with those in government having the authority to redress the grievances (but not with any other government personnel) without the prior consent of the lawyer representing the government in the matter. Paragraph (c) does not, however, permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of disputes with the government. Rather, the paragraph provides lawyers with access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty or that government personnel are conducting themselves improperly with respect to aspects of the dispute. It does not provide direct access on routine disputes, such as ordinary discovery disputes or extensions of time.

Model Rules Comparison.- This Rule substantially retains Maryland language as it existed prior to the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct except for dividing Rule 4.2(b) into Rule 4.2(b) and (c) with no change in wording.

MASSACHUSETTS

RULE 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 by law to do so.

Comment

[1] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter. Counsel could also prepare and send written default notices and written demands required by such laws as Chapter 93A of the General Laws.

[2] Communications authorized by law also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions.

[3] This rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates. See the definition of "person" in Rule 9.1(h).

[4] In the case of an organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation only with those agents or employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the organization to make decisions about the course of the litigation. If an agent or employee 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 3.4(f).

[5] The prohibition on communications with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has knowledge of the fact of the representation; but such knowledge may be inferred from the circumstances. See the definition of "knowledge" in Rule 9.1(f). Such an inference may arise in circumstances where there is substantial reason to believe that the person with whom communication is sought is represented in the matter to be discussed. Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[6] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

[7] Nothing in this rule prohibits a lawyer from seeking and acting in accordance with a court order permitting communication with a person known to be represented by counsel.

Corresponding ABA Model Rule. Identical to Model Rule 4.2.

Corresponding Former Massachusetts Rule. DR 7-104 (A) (1).

Cross-reference: See definition of "person" in Rule 9.1.

MICHIGAN

RULE 4.2 COMMUNICATION WITH PARTY PERSON REPRESENTED BY COUNSEL [2 ALTERNATIVE PROPOSALS]

ALTERNATIVE (A):
In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented by another lawyer in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a party who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation.
[2] This Rule applies to communications with any party who is represented by counsel concerning the matter to which the communication relates.
[3] The Rule applies even though the represented party initiates or consents to the communication. A lawyer must immediately terminate communication with a party if, after commencing communication, the lawyer learns that the party is one with whom communication is not permitted by this Rule.
[4] This rRule does not prohibit communication with a represented party, or an employee or agent of such a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented party who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Also, 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. Also, a lawyer having independent justification or legal authorization for communicating with the other a represented party is permitted to do so.
[5] Communications authorized by law may include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. 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.

[6] A lawyer who is uncertain whether a communication with a represented party is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a party represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this rRule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposed of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. Compare Rule 3.4(f). with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter, who 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. Consent of the organization's lawyer is not required for communication with a former constituent unless that former constituent supervises, directs or regularly consults with the organization's lawyer concerning the matter; has authority to obligate the organization with respect to the matter; has a continuing relationship with the former employer as a director or member of the corporate-control group; has participated in the litigation or was otherwise exposed to privileged or confidential information concerning the organization or the case during the term of employment; or has performed acts or made omissions in connection with the matter that may be imputed to the organization for purposes of civil or criminal liability. 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 3.4(f). 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.

This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

[8] The prohibition on communications with a represented party only applies in circumstances where the lawyer knows that the party is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the party with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

[10] By virtue of its exemption of communications authorized by law, this rule permits a prosecutor or a government lawyer engaged in a criminal or civil law enforcement

investigation to communicate with, or direct investigative agents to communicate with, a represented person prior to the represented person being arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding against the represented person. A civil law enforcement investigation is one conducted under the government's police or regulatory power to enforce the law. Once a represented person has been arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding, however, prosecutors and government lawyers must comply with this Rule. A represented person's waiver of the constitutional right to counsel does not exempt the prosecutor from the duty to comply with this Rule.
Staff Comment: The proposed rule is substantially similar to the current rule. The words "or a court order" are added to the phrase "unless the lawyer . . . is authorized to do so by law . . . ." In the new Model Rule, the term "party" is replaced with "person." The new proposed MRPC does not adopt that change, however, because the State Bar Representative Assembly voted to retain the current language. "Party" is also used in the Comment, where appropriate. The Representative Assembly also voted to add a "law enforcement" clarification, which is included as Comment [10]. (Comment [10] is identical to the comment adopted by the State of Tennessee.)

ALTERNATIVE (B):
In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom 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. This Rule does not apply to otherwise lawful investigative actions of lawyers employed by the government who are engaged in investigating and/or prosecuting violations of civil or criminal law.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a party who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation.
[2] Unless the law enforcement exception is applicable, tThis Rule applies to communications with any party who is represented by counsel concerning the matter to which the communication relates.
[3] The Rule applies even though the represented party initiates or consents to the communication. A lawyer must immediately terminate communication with a party if, after commencing communication, the lawyer learns that the party is one with whom communication is not permitted by this Rule.
[4] This Rule does not prohibit communication with a represented party, or an employee or agent of such a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this

Rule preclude communication with a represented party who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented party is permitted to do so.

[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. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. 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.

[6] A lawyer who is uncertain whether a communication with a represented party is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a party represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter, who 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. Consent of the organization's lawyer is not required for communication with a former constituent unless that former constituent supervises, directs or regularly consults with the organization's lawyer concerning the matter; has authority to obligate the organization with respect to the matter; has a continuing relationship with the former employer as a director or member of the corporate-control group; has participated in the litigation or was otherwise exposed to privileged or confidential information concerning the organization or the case during the term of employment; or has performed acts or made omissions in connection with the matter that may be imputed to the organization for purposes of civil or criminal liability. 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 3.4(f). 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.

[8] The prohibition on communications with a represented party only applies in circumstances where the lawyer knows that the party is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation, but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the party with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

[10] By virtue of its exemption of communications authorized by law, this rule permits a prosecutor or a government lawyer engaged in a criminal or civil law enforcement investigation to communicate with, or direct investigative agents to communicate with, a represented person prior to the represented person being arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding against the represented person. A civil law enforcement investigation is one conducted under the government's police or regulatory power to enforce the law. Once a represented person has been arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding, however, prosecutors and government lawyers must comply with this Rule. A represented person's waiver of the constitutional right to counsel does not exempt the prosecutor from the duty to comply with this Rule.

Staff Comment: The proposed rule is similar to the current rule. The words "or a court order" are added to the phrase "unless the lawyer . . . is authorized to do so by law . . . ." In the new Model Rule, the term "party" is replaced with "person." The new proposed MRPC does not adopt that change, however, because the State Bar Representative Assembly voted to retain the current language. "Party" is also used in the Comment, where appropriate. The Representative Assembly also voted to add a "law enforcement" clarification. An express exception for otherwise lawful investigative actions of lawyers employed by the government, who are engaged in investigating or prosecuting violations of civil or criminal law, is included in the body of the rule.

MINNESOTA

RULE 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.

Comment

1. [1] This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

[4] This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See Rule 8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[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. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this rule in addition to honoring the constitutional rights of the accused. 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.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to

authorize a communication that would otherwise be prohibited by this rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this rule 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. The term "constituent" is defined in Comment [1] to Rule 1.13. Consent of the organization's lawyer is not required for communication with a former constituent. 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 3.4(f). 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.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(g). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

MISSISSIPPI

MISSISSIPPI RULES OF PROFESSIONAL CONDUCT

Effective July 1, 1987

RULE 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 party 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 by law to do so.

Comment

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee 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 3.4(f).

This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

Code Comparison

This Rule is substantially identical to DR 7-104(A)(1).

Missouri

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.

COMMENT

[1] Rule 4-4.2 contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation.

[2] Rule 4-4.2 applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] Rule 4-4.2 applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule 4-4.2.

[4] Rule 4-4.2 does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule 4-4.2 preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule 4-4.2 through the acts of another. See Rule 4-8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[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. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule 4-4.2 in addition to honoring the constitutional rights of the accused. 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 4-4.2. A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction, may communicate with a person known by the government lawyer to be represented by a lawyer in the matter if the

communication occurs after the represented person has been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding brought by the governmental agency that seeks to engage in the communication, and the communication is:

> (1) made to protect against a risk of death or bodily harm that the government lawyer reasonably believes may occur; or
>
> (2) initiated by the represented person, either directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel for that communication.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule 4-4.2.

[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. Consent of the organization's lawyer is not required for communication with a former constituent. 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 4-4.2. Compare Rule 4-3.4(f). 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.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 4-1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4-4.3.

(Adopted September 28, 1993, eff. July 1, 1995, Rev. July 1, 2007)

MONTANA

RULE 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.

NEBRASKA

RULE 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.

COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[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 withthe government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. 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.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to

authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule 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. Consent of the organization's lawyer is not required for communication with a former constituent. 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 3.4(f). 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.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

NEVADA

Rule 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.

Model Rule Comparison—2006

Rule 4.2 (formerly Supreme Court Rule 182) is the same as ABA Model Rule 4.2. While the text of the two rules is identical, the rules are applied differently in two respects. First, Nevada has adopted the managing-speaking agent test to determine which constituents of an organization are covered by the no-contact rule. Palmer v. Pioneer Inn Assocs., Ltd., 118 Nev. 943, 59 P.3d 1237 (2002). The comments to the Model Rule adopt a different test. Model Rules of Prof'l Conduct R. 4.2 cmt.7 (2004). Second, Nevada has interpreted the Rule to prohibit a lawyer who is representing himself from contacting a represented person in the matter. In re Discipline of Schaefer, 117 Nev. 496, 25 P.3d 191, as modified, 31 P.3d 365 (2001). The comments to the Model Rule suggest that it may not prohibit contact when the lawyer represents himself. See Model Rules of Prof'l Conduct R. 4.2 cmt. 4 (2004) ("Parties to a matter may communicate directly with each other . . . ."); Pinsky v. Statewide Grievance Committee, 578 A.2d 1075 (Conn. 1990) (holding that Connecticut rule based on Model Rule 4.2 does not prohibit contact when lawyer represents himself). But see Runsvold v. Idaho State Bar, 925 P.2d 1118 (Idaho 1996) (holding that Idaho rule based on Model Rule 4.2 applies when lawyer represents himself).

NEW HAMPSHIRE

Rule 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. An otherwise unrepresented party to whom limited representation is being provided or has been provided in accordance with Rule 1.2(f)(1) is considered to be unrepresented for purposes of this Rule, except to the extent the limited representation lawyer provides other counsel written notice of a time period within which other counsel shall communicate only with the limited representation lawyer.

NEW JERSEY

RPC 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, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

Note: Adopted September 10, 1984, to be effective immediately; amended June 28, 1996, to be effective September 1, 1996; amended November 17, 2003 to be effective January 1, 2004.

Official Comment by Supreme Court (November 17, 2003)

1. Concerning organizations, RPC 4.2 addresses the issue of who is represented under the rule by precluding a lawyer from communicating with members of the organization's litigation control group. The term "litigation control group" is not intended to limit application of the rule to matters in litigation. As the Report of the Special Committee on RPC 4.2 states, "... the 'matter' has been defined as a 'matter whether or not in litigation.'" The primary determinant of membership in the litigation control group is the person's role in determining the organization's legal position. *See Michaels v. Woodland*, 988 *F.Supp.* 468, 472 (D.N.J. 1997).

In the criminal context, the rule ordinarily applies only after adversarial proceedings have begun by arrest, complaint, or indictment on the charges that are the subject of the communication. *See State v. Bisaccia*, 319 *N.J. Super.* 1, 22-23 (App. Div. 1999).

Concerning communication with governmental officials, the New Jersey Supreme Court Commission on the Rules of Professional Conduct agrees with the American Bar Association's Commission comments, which state:

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 a governmental official. For example, the constitutional right to petition and the public policy of ensuring a citizen's right of access to government decision makers, may permit a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or recommend action in the matter.

NEW MEXICO

RULE 16-402. COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so. Except for persons having a managerial responsibility on behalf of the organization, an attorney is not prohibited from communicating directly with employees of a corporation, partnership or other entity about the subject matter of the representation even though the corporation, partnership or entity itself is represented by counsel.

NEW YORK

DR 7-104 [§1200.35] Communicating with Represented and Unrepresented Parties

A. During the course of the representation of a client a lawyer shall not:

1. Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

2. Give advice to a party who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such party are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

B. Not withstanding the prohibitions of DR 7-104 [1200.35] (A), and unless prohibited by law, a lawyer may cause a client to communicate with a represented party, if that party is legally competent, and counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented party's counsel that such communications will be taking place.

NORTH CAROLINA

Rule 4.2 Communication with Person Represented by Counsel

1. (a) During the representation of 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. It is not a violation of this rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy.

(b) Notwithstanding section (a) above, in representing a client who has a dispute with a government agency or body, a lawyer may communicate about the subject of the representation with the elected officials who have authority over such government agency or body even if the lawyer knows that the government agency or body is represented by another lawyer in the matter, but such communications may only occur under the following circumstances:

(1) in writing, if a copy of the writing is promptly delivered to opposing counsel;

(2) orally, upon adequate notice to opposing counsel; or

(3) in the course of official proceedings.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule does not prohibit a lawyer who does not have a client relative to a particular matter from consulting with a person or entity who, though represented concerning the matter, seeks another opinion as to his or her legal situation. A lawyer from whom such an opinion is sought should, but is not required to, inform the first lawyer of his or her participation and advice.

[3] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[4] A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). However, parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client or, in the case of a government lawyer, investigatory personnel, concerning a communication that the client, or such investigatory

personnel, is legally entitled to make. The Rule is not intended to discourage good faith efforts by individual parties to resolve their differences. Nor does the Rule prohibit a lawyer from encouraging a client to communicate with the opposing party with a view toward the resolution of the dispute.

[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. When a government agency or body is represented with regard to a particular matter, a lawyer may communicate with the elected government officials who have authority over that agency under the circumstances set forth in paragraph (b).

[6] Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. 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.

[7] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[8] This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation, who is represented by counsel concerning the matter to which the communication relates. The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[9] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or 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. It also prohibits communications with any constituent of the organization, regardless of position or level of authority, who is participating or participated substantially in the legal representation of the organization in a particular matter. Consent of the organization's lawyer is not required for communication with a former constituent unless the former constituent participated substantially in the legal representation of the organization in the matter. If an employee or agent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication would be sufficient for purposes of this Rule. Compare Rule 3.4(f). 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, Comment [2].

[10] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(g). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[11] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

History Note: Statutory Authority G. 84-23

Adopted July 24, 1997; Amended March 1, 2003.

ETHICS OPINION NOTES

CPR 2. An attorney generally does not need the consent of the adverse party to talk to witnesses.

CPR 138. An attorney representing a party may not send copies of motions to another party he knows has counsel.

RPC 15. An attorney may interview a person with adverse interest who is unrepresented and make a demand or propose a settlement.

RPC 30. A district attorney may not communicate or cause another to communicate with a represented defendant without the defense lawyer's consent.

RPC 39. An attorney may not communicate settlement demands directly to an insurance company which has employed counsel to represent its insured unless that lawyer consents.

RPC 61. A defense attorney may interview a child who is the prosecuting witness in a molestation case without the knowledge or consent of the district attorney.

RPC 67. An attorney generally may interview a rank and file employee of an adverse corporate party without the knowledge or consent of the corporate party or its counsel.

RPC 81. A lawyer may interview an unrepresented former employee of an adverse corporate party without the permission of the corporation's lawyer. (But see 97 FEO 2)

RPC 87. A lawyer wishing to interview a witness who is not a party, but who is represented by counsel, must obtain the consent of the witness' lawyer.

RPC 93. Opinion concerns several situations in which an attorney who represents a criminal defendant wishes to interview other individuals who are represented by attorneys who will not agree to permit the attorney to interview their clients.

RPC 110. An attorney employed by an insurer to defend in the name of the defendant pursuant to underinsured motorist coverage may not communicate with that individual without the consent of another attorney employed to represent that individual by her liability insurer.

RPC 128. A lawyer may not communicate with an adverse corporate party's house counsel, who appears in the case as a corporate manager, without the consent of the corporation's independent counsel.

RPC 132. A lawyer for a party adverse to the government may freely communicate with government officials concerning the matter until notified that the government is represented in the matter.

RPC 162. A lawyer may not communicate with the opposing party's nonparty treating physician about the physician's treatment of the opposing party unless the opposing party consents.

RPC 180. A lawyer may not passively listen while the opposing party's nonparty treating physician comments on his or her treatment of the opposing party unless the opposing party consents.

RPC 184. The lawyer for opposing party may communicate directly with the pathologist who performed an autopsy on plaintiff's decedent without the consent of the personal representative of the decedent's estate.

RPC 193. The attorney for the plaintiffs in a personal injury action arising out of a motor vehicle accident may interview the unrepresented defendant even though the uninsured motorist insurer, which had elected to defend the claim in the name of the defendant, is represented by an attorney in the matter.

RPC 202. An attorney may communicate in writing with the members of an elected body which is represented by a lawyer in a matter if the purpose of the communication is to request that the matter be placed on the public meeting agenda of the elected body and a copy of the written communication is given to the attorney for the elected body.

RPC 219. A lawyer may communicate with a custodian of public records, pursuant to the North Carolina Public Records Act, for the purpose of making a request to examine public records related to the representation although the custodian is an adverse party whose lawyer does not consent to the communication.

RPC 224. Employer's lawyer may not engage in direct communications with the treating physician for an employee with a workers' compensation claim.

RPC 233. A deputy attorney general attorney who represents the state on the appeal of a death sentence should send to the defense lawyer a copy of a letter the deputy attorney general received from the defendant.

RPC 249. A lawyer may not communicate with a child who is represented by a guardian ad litem and an attorney advocate unless the lawyer obtains the consent of the attorney advocate.

97 FEO 2. A lawyer may interview an unrepresented former employee of an adverse represented organization about the subject of the representation unless the former employee participated substantially in the legal representation of the organization in the matter.

97 FEO 10. A prosecutor may instruct a law enforcement officer to send an undercover officer into the prison cell of a represented criminal defendant to observe the defendant's communications with other inmates in the cell.

99 FEO 10. Opinion rules that a government lawyer working on a fraud investigation may instruct an investigator to interview employees of the target organization provided the investigator does not interview an employee who participates in the legal representation of the organization or an officer or manager of the organization who has the authority to speak for and bind the organization.(See also comment [9] to Rule 4.2)

2002 FEO 8. Opinion rules that a lawyer who is appointed the guardian ad litem for a minor plaintiff in a tort action and is represented in this capacity by legal counsel, must be treated by opposing counsel as a represented party and, therefore, direct contact with the guardian ad litem, without consent of counsel, is prohibited.

2004 FEO 4 - Opinion rules that a lawyer may ask questions of a deponent that were recommended by another lawyer, although the deponent is the defendant in the other lawyer's case, provided notice of the deposition is given to the deponent's lawyer.

CASE NOTES

This rule does not prevent a person in custody from making inculpatory statements upon waiver of the right to counsel. State v. Romero , 56 N.C. App. 48, 286 S.E.2d 903, disc. rev. denied , 306 N.C. 391, 294 S.E.2d 218 (1982).

Interview of Plaintiff 's Physician by Defense Attorneys. - Defense attorneys may not interview a plaintiff 's treating physician privately without the plaintiff 's express consent. Defendant must use the statutorily recognized methods of discovery set out in § 1A-1, Rule 26 of the Rules of Civil Procedure. Crist v. Moffatt , 326 N.C. 326, 389 S.E.2d 41 (1990).

Applied in State v. Thompson , 332 N.C. 204, 420 S.E.2d 395 (1992).

Quoted in McCallum v. CSX Transp ., Inc., 149 F.R.D. 104 (M.D.N.C. 1993

NORTH DAKOTA

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

1. 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.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the lawyer-client relationship, and the uncounseled disclosure of information relating to the representation.

[2] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[3] 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. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. 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.

[4] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[5] This Rule also applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by counsel concerning the matter to which the communication relates.

[6] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or who 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. 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 3.4(f). The prohibition of this Rule does not apply to contact with an unrepresented former constituent of the represented organization (although Rule 4.3 does then apply); however, the lawyer making the contact must take care not to seek to induce the former constituent to reveal information that may be protected by the privilege attached to lawyer-client communications to the extent of the person's contacts, while a constituent, with her or his former employer's counsel.

[7] The prohibition on communications with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(g). Thus, a lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[8] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Reference: Minutes of the Professional Conduct Subcommittee of the Attorney Standards Committee on 09/20/85 and 10/18/85; Minutes of the Joint Committee on Attorney Standards Meeting of 12/12/97, 06/08/04, 04/08/05, 06/14/05.

OHIO

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

1. 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.

Comment

[1] This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation.

[2] This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

[4] This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See Rule 8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[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. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this rule in addition to honoring the constitutional rights of the accused. 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.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this rule, for example, where

communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this rule 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. Consent of the organization's lawyer is not required for communication with a former constituent. 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. 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.

[8] The prohibition on communications with a represented person applies only in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(g). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Comparison to former Ohio Code of Professional Responsibility

Rule 4.2 is analogous to DR 7-104(A)(1), with the addition of language that allows an otherwise prohibited communication with a represented person to be made pursuant to court order. Also see Advisory Opinions 96-1 and 2005-3 from the Board of Commissioners on Grievances and Discipline.

Comparison to ABA Model Rules of Professional Conduct

Rule 4.2 is identical to Model Rule 4.2.

OKLAHOMA

RULE 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 to do so.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract or negotiation or transaction, who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, party or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with non-lawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a).Also, 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. and a Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

[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. Communications authorized by law may also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. , when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. 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.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of an represented organization, this Rule 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 by a lawyer for another person or entity concerning the matter in representation with persons having managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with the that matter may be imputed to the organization for purposes of civil or criminal liability, or whose statement may constitute an admission on the part of the organization. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent an agent or employee 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 3.4(f). 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.

[8]The prohibition on of communications with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the a lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). See Terminology. Thus, the a lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

RULE 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.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with non-lawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[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. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. 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.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule 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. Consent of the organization's lawyer is not required for communication with a former constituent. 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 3.4(f). 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.
[8]The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.
[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

OREGON

DR 7104. Communicating with a Person Represented by Counsel

(A) During the course of the lawyer's representation of a client, a lawyer shall not:

(1) communicate or cause another to communicate on the subject of the representation, or on directly related subjects with a person the lawyer knows to be represented by a lawyer on that subject, or on directly related subjects, unless:

(a) the lawyer has the prior consent of a lawyer representing such other person;

(b) the lawyer is authorized by law to do so; or

(c) a written agreement requires a written notice or demand to be sent to such other person, in which case a copy of such notice or demand shall also be sent to such other person's lawyer. This prohibition includes a lawyer representing the lawyer's own interests.

(B) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client.

PENNSYLVANIA

Rule 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.

Comment:

(1) This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

(2) This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

(3) The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

(4) This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

(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. Communications authorized by law may also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. 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.

(6) A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where

communication with a person represented by counsel is necessary to avoid reasonably certain injury.

(7) In the case of a represented organization, this Rule 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. Consent of the organization's lawyer is not required for communication with a former constituent. 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 3.4(f). 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.

(8) The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

(9) In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

PUERTO RICO

Rule 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 party 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 by law to do so.

RHODE ISLAND

Rule 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 party 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 by law to do so.

SOUTH CAROLINA

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

1. 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.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though to represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter without consent from or notice to the original lawyer. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so including giving a second professional opinion without consent from or notice to the original lawyer.

[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. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. 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.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule 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. Consent of the organization's lawyer is not required for communication with a former constituent. 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 3.4(f). 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, Comment [2].

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(g). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

SOUTH DAKOTA

Rule 4.2. Communication with Person Represented by Counsel.

1. 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.

COMMENT:

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[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. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. 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.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to

authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule 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. Consent of the organization's lawyer is not required for communication with a former constituent. 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 3.4(f). 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.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

TENNESSEE

Rule 4.2. COMMUNICATION WITH A 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 by law to do so.

1. COMMENTS

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by counsel concerning the matter to which the communication relates. The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the communication is not permitted by this Rule.

[3] In the case of a represented organization, this Rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with a member of the governing board, an officer or managerial agent or employee, or an agent or employee who supervises or directs the organization's lawyer concerning the matter, has authority to contractually obligate the organization with respect to the matter, or otherwise participates substantially in the determination of the organization's position in the matter.

[4] If an agent or employee of an organization is represented in the matter by his or her own counsel, consent by that counsel will be sufficient for purposes of this Rule. Consent of the organization's lawyer is not required for communication with a former agent or employee. See Rule 4.4 regarding the lawyer's duty not to violate the organization's legal rights by inquiring about information protected by the organization's attorney-client privilege or as work-product of the organization's lawyer. In communicating with a current or former agent or employee of an organization, a lawyer shall not solicit or assist in the breach of any duty of confidentiality owed by the agent to the organization. See RPC 4.4.

[5] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the subject matter of the representation. For example, the existence of a controversy between a government agency and a private party, or between two private parties, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter, such as additional or different unlawful conduct not within the subject matter of the representation. Nor does this Rule preclude a lawyer from communicating with a person who seeks a second opinion about a matter in which

the person is represented by another lawyer. Also, parties to a matter may communicate directly with each other.

[6] Communications with represented persons may be authorized by specific constitutional or statutory provisions, by rules governing the conduct of proceedings, by applicable judicial precedent, or by court order. Communications authorized by law, for example, may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with a governmental official having the power to redress the client's grievances.

[7] By virtue of its exemption of communications authorized by law, this Rule permits a prosecutor or a government lawyer engaged in a criminal or civil law enforcement investigation to communicate with or direct investigative agents to communicate with a represented person prior to the represented person being arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding against the represented person. A civil law enforcement investigation is one conducted under the government's police or regulatory power to enforce the law. Once a represented person has been arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding, however, prosecutors and government lawyers must comply with this Rule. A represented person's waiver of the constitutional right to counsel does not exempt the prosecutor from the duty to comply with this Rule.

[8] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

4.02 Communication with One Represented by Counsel

(a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(c) For the purpose of this rule, organization or entity of government includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

(d) When a person, organization, or entity of government that is represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited by paragraph (a) from giving such advice without notifying or seeking consent of the first lawyer.

Comment:

1. Paragraph (a) of this Rule is directed at efforts to circumvent the lawyer-client relationship existing between other persons, organizations or entities of government and their respective counsel. It prohibits communications that in form are between a lawyers client and another person, organization or entity of government represented by counsel where, because of the lawyers involvement in devising and controlling their content, such communications in substance are between the lawyer and the represented person, organization or entity of government.

2. Paragraph (a) does not, however, prohibit communication between a lawyers client and persons, organizations, or entities of government represented by counsel, as long as the lawyer does not cause or encourage the communication without the consent of the lawyer for the other party. Consent may be implied as well as expressed, as, for example, where the communication occurs in the form of a private placement memorandum or similar document that obviously is intended for multiple recipients and that normally is furnished directly to persons, even if known to be represented by counsel. Similarly, that paragraph does not impose a duty on a lawyer to affirmatively discourage communication between the lawyers client and other represented persons, organizations or entities of government. Furthermore, it does not prohibit client communications concerning matters outside the

subject of the representation with any such person, organization, or entity of government. Finally, it does not prohibit a lawyer from furnishing a second opinion in a matter to one requesting such opinion, nor from discussing employment in the matter if requested to do so. But see Rule 7.02.

3. Paragraph (b) of this Rule provides that unless authorized by law, experts employed or retained by a lawyer for a particular matter should not be contacted by opposing counsel regarding that matter without the consent of the lawyer who retained them. However, certain governmental agents or employees such as police may be contacted due to their obligations to the public at large.

4. In the case of an organization or entity of government, this Rule prohibits communications by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject of the representation and with those persons presently employed by such organization or entity whose act or omission may make the organization or entity vicariously liable for the matter at issue, without the consent of the lawyer for the organization or entity of government involved. This Rule is based on the presumption that such persons are so closely identified with the interests of the organization or entity of government that its lawyers will represent them as well. If, however, such an agent or employee is represented in the matter by his or her own counsel that presumption is inapplicable. In such cases, the consent by that counsel to communicate will be sufficient for purposes of this Rule. Compare Rule 3.04(f). Moreover, this Rule does not prohibit a lawyer from contacting a former employee of a represented organization or entity of a government, nor from contacting a person presently employed by such an organization or entity whose conduct is not a matter at issue but who might possess knowledge concerning the matter at issue.

UTAH

Rule 4.2. Communication with Persons Represented by Counsel.

1. (a) General 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 the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client if authorized to do so by any law, rule, or court order, in which event the communication shall be strictly restricted to that allowed by the law, rule or court order, or as authorized by paragraphs (b), ©, (d) or (e) of this Rule.

(b) Rules Relating to Unbundling of Legal Services. A lawyer may consider a person whose representation by counsel in a matter does not encompass all aspects of the matter to be unrepresented for purposes of this Rule and Rule 4.3, unless that person's counsel has provided written notice to the lawyer of those aspects of the matter or the time limitation for which the person is represented. Only as to such aspects and time is the person considered to be represented by counsel.

© Rules Relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement. A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction in the matter, may communicate with a person known to be represented by a lawyer if:

(c)(1) the communication is in the course of, and limited to, an investigation of a different matter unrelated to the representation or any ongoing, unlawful conduct; or

(c)(2) the communication is made to protect against an imminent risk of death or serious bodily harm or substantial property damage that the government lawyer reasonably believes may occur and the communication is limited to those matters necessary to protect against the imminent risk; or

(c)(3) the communication is made at the time of the arrest of the represented person and after that person is advised of the right to remain silent and the right to counsel and voluntarily and knowingly waives these rights; or

(c)(4) the communication is initiated by the represented person, directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel, including the right to have substitute counsel, for that communication.

(d) Organizations as Represented Persons.

(d)(1) When the represented person is an organization, an individual is represented by counsel for the organization if the individual is not separately represented with respect to the subject matter of the communication, and

(d)(1)(A) with respect to a communication by a government lawyer in a civil or criminal law enforcement matter, is known by the government lawyer to be a current member of the control group of the represented organization; or

(d)(1)(B) with respect to a communication by a lawyer in any other matter, is known by the lawyer to be

(d)(1)(B)(I) a current member of the control group of the represented organization; or

(d)(1)(B)(ii) a representative of the organization whose acts or omissions in the matter may be imputed to the organization under applicable law; or

(d)(1)(B)(iii) a representative of the organization whose statements under applicable rules of evidence would have the effect of binding the organization with respect to proof of the matter.

(d)(2) The term " control group" means the following persons: (A) the chief executive officer, chief operating officer, chief financial officer, and the chief legal officer of the organization; and (B) to the extent not encompassed by Subsection (A), the chair of the organization's governing body, president, treasurer, secretary and a vice-president or vice-chair who is in charge of a principal business unit, division or function (such as sales, administration or finance) or performs a major policy-making function for the organization; and © any other current employee or official who is known to be participating as a principal decision maker in the determination of the organization' s legal position in the matter.

(d)(3) This Rule does not apply to communications with government parties, employees or officials unless litigation about the subject of the representation is pending or imminent. Communications with elected officials on policy matters are permissible when litigation is pending or imminent after disclosure of the representation to the official.

(e) Limitations on Communications. When communicating with a represented person pursuant to this Rule, no lawyer may

(e)(1) inquire about privileged communications between the person and counsel or about information regarding litigation strategy or legal arguments of counsel or seek to induce the person to forgo representation or disregard the advice of the person' s counsel; or

(e)(2) engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement or other disposition of actual or potential criminal charges or civil enforcement claims or sentences or penalties with respect to the matter in which the person is represented by counsel unless such negotiations are permitted by law, rule or court order.

Comment

[1] Rule 4.2 of the Utah Rules of Professional Conduct deviates substantially from ABA Model Rule 4.2 by the addition of paragraphs (b), ©, (d) and (e). Paragraphs ©, (d) and (e) are substantially the same as the former Utah Rules 4.2(b), © and (d), adopted in 1999, as are most of the corresponding comments that address these three paragraphs of this Rule. There is also a variation from the Model Rule in paragraph (a), where the body of judicially created rules are added as a source to which the lawyer may look for general exceptions to the prohibition of communication with persons represented by counsel. (Because of these major differences, the comments to this Rule do not correspond numerically to the comments in ABA Model Rule 4.2.

[2] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[3] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[4] This Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[5] This Rule does not prohibit communication with a represented person or an employee or agent of such a person where the subject of the communication is outside the scope of the representation. For example, the existence of a controversy between a government agency and a privateparty, between two organizations, between individuals or between an organization and an individual does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does the Rule prohibit government lawyers from communicating with a represented person about a matter that does not pertain to the subject matter of the representation but is related to the investigation, undercover or overt, of ongoing unlawful conduct. Moreover, this Rule does not prohibit a lawyer from communicating with a person to determine if the person in fact is represented by counsel concerning the subject matter that the lawyer wishes to discuss with that person.

[6] This Rule does not preclude communication with a represented person who is seeking a second opinion from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). 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.

[7] A lawyer may communicate with a person who is known to be represented by counsel in the matter to which the communication relates only if the communicating lawyer obtains the consent of the represented person's lawyer, or if the communication is otherwise permitted by paragraphs (a), (b) or ©. Paragraph (a) permits a lawyer to communicate with a person known to be represented by counsel in a matter without first securing the consent of the represented person' s lawyer if the communicating lawyer is authorized to do so by law, rule or court order. Paragraph (b) recognizes that the scope of representation of a person by counsel may, under Rule 1.2, be limited by mutual agreement. Because a lawyer for another party cannot know which of Rule 4.2 or 4.3 applies under these circumstances, the lawyer who has undertaken a limited representation must assume the responsibility for informing another party's lawyer of the limitations. This ensures that such a limited representation will not improperly or unfairly induce an adversary's lawyer to avoid contacting the person on those aspects of a matter for which the person is not represented by counsel. Note that this responsibility on the lawyer undertaking limited-scope representation also relates to the ability of another party's lawyer to make certain *ex parte* contacts without violating Rule 4.3. Utah Rule of Professional Conduct 4.2(b) and related sections of this Comment are part of the additions to the

jury tampering, murder, assault, or intimidation of witnesses, bail jumping, or unlawful flight to avoid prosecution. Also, permitted are undercover activities directed at ongoing criminal activity, even if it is related to past criminal activity for which the person is represented by counsel.

[14] Under subparagraph (c)(2), a government lawyer may engage in limited communications to protect against an imminent risk of serious bodily harm or substantial property damage. The imminence and gravity of the risk will be determined from the totality of the circumstances. Generally, a risk would be imminent if it is likely to occur before the government lawyer could obtain court approval or take other reasonable measures. An imminent risk of substantial property damage might exist if there is a bomb threat directed at a public building. The Rule also makes clear that a government attorney may communicate directly with a represented party " at the time of arrest of the represented party" without the consent of the party' s counsel, provided that the represented party has been fully informed of his or her constitutional rights at that time and has waived them. A government lawyer must be very careful to follow Rule 4.2(d) and would have a significant burden to establish that the waiver of right to counsel was knowing and voluntary. The better practice would include a written or recorded waiver. Nothing in this Rule, however, prevents law enforcement officers, even if acting under the general supervision of a government lawyer, from questioning a represented person. The actions of the officers will not be imputed to the government lawyer unless the conversation has been " scripted" by the government lawyer.

[15] If government lawyers have any concerns about the applicability of any of the provisions of paragraph © or are confronted with other situations in which communications with represented persons may be warranted, they may seek court approval for the *ex parte* communication.

[16] Any lawyer desiring to engage in a communication with a represented person that is not otherwise permitted under this Rule must apply in good faith to a court of competent jurisdiction, either *ex parte* or upon notice, for an order authorizing the communication. This means, depending on the context: (1) a district judge or magistrate judge of a United States District Court; (2) a judge or commissioner of a court of general jurisdiction of a state having jurisdiction over the matter to which the communication relates; or (3) a military judge.

[17] In determining whether a communication is appropriate a lawyer may want to consider factors such as: (1) whether the communication with the represented person is intended to gain information that is relevant to the matter for which the communication is sought; (2) whether the communication is unreasonable or oppressive; (3) whether the purpose of the communication is not primarily to harass the represented person; and (4) whether good cause exists for not requesting the consent of the person's counsel prior to the communication. The lawyer should consider requesting the court to make a written record of the application, including the grounds for the application, the scope of the authorized communications, and the action of the judicial officer, absent exigent circumstances.

[18] Organizational clients are entitled to the protections of this Rule. Paragraph (d) specifies which individuals will be deemed for purposes of this Rule to be represented by the lawyer who is representing the organization in a matter. Included within the control group of an organizational client, for example, would be the designated high level officials identified in subparagraph(d)(2). Whether an officer performs a major policy function is to be determined by reference to the organization's business as a whole. Therefore, a vice-president who has policy making functions in connection with only a unit or division would not be a major policy maker for that reason alone,

ABA Model Rules clarifying that a lawyer may undertake limited representation of a client under the provisions of Rule 1.2. Paragraph © specifies the circumstances in which government lawyers engaged in criminal and civil law enforcement matters may communicate with persons known to be represented by a lawyer in such matters without first securing consent of that lawyer.

[8] A communication with a represented person is authorized by paragraph (a) if permitted by law, rule or court order. This recognizes constitutional and statutory authority as well as the well-established role of the state judiciary in regulating the practice of the legal profession. Direct communications are also permitted if they are made pursuant to discovery procedures or judicial or administrative process in accordance with the orders or rules of the court or other tribunal before which a matter is pending.

[9] A communication is authorized under paragraph (a) if the lawyer is assisting the client to exercise a constitutional right to petition the government for redress of grievances in a policy dispute with the government and if the lawyer notifies the government's lawyer in advance of the intended communication. This would include, for example, a communication by a lawyer with a governmental official with authority to take or recommend action in the matter, provided that the sole purpose of the lawyer' s communication is to address a policy issue, including the possibility of resolving a disagreement about a policy position taken by the government. If, on the other hand, the matter does not relate solely to a policy issue, the communicating lawyer must comply with this Rule.

[10] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communication is subject to Rule 4.3.

[11] Paragraph © of this Rule makes clear that this Rule does not prohibit all communications with represented persons by state or federal government lawyers (including law enforcement agents and cooperating witnesses acting at their direction) when the communications occur during the course of civil or criminal law enforcement. The exemptions for government lawyers contained in paragraph © of this Rule recognize the unique responsibilities of government lawyers to enforce public law. Nevertheless, where the lawyer is representing the government in any other role or litigation (such as a contract or tort claim, for example) the same rules apply to government lawyers as are applicable to lawyers for private parties.

[12] A "civil law enforcement proceeding" means a civil action or proceeding before any court or other tribunal brought by the governmental agency that seeks to engage in the communication under relevant statutory or regulatory provisions, or under the government's police or regulatory powers to enforce the law. Civil law enforcement proceedings do not include proceedings related to the enforcement of an administrative subpoena or summons or a civil investigative demand; nor do they include enforcement actions brought by an agency other than the one that seeks to make the communication.

[13] Under paragraph © of this Rule, communications are permitted in a number of circumstances. For instance, subparagraph (c)(1) permits the investigation of a different matter unrelated to the representation or any ongoing unlawful conduct. (Unlawful conduct involves criminal activity and conduct subject to a civil law enforcement proceeding.) Such violations include, but are not limited to, conduct that is intended to evade the administration of justice including in the proceeding in which the represented person is a defendant, such as obstruction of justice, subornation of perjury,

unless that unit or division represents a substantial part of the organization's total business. A staff member who gives advice on policy but does not have authority, alone or in combination with others, to make policy does not perform a major policy making function.

[19] Also included in the control group are other current employees known to be "participating as principal decision makers" in the determination of the organization' s legal position in the proceeding or investigation of the matter. In this context, "employee" could also encompass former employees who return to the company's payroll or are specifically retained for compensation by the organization to participate as principal decision makers for a particular matter. In general, however, a lawyer may, consistent with this Rule, interview a former employee of an organization without consent of the organization's lawyer.

[20] In a criminal or civil law enforcement matter involving a represented organization, government lawyers may, without consent of the organization' s lawyer, communicate with any officer, employee, or director of the organization who is not a member of the control group. In all other matters involving organizational clients, however, the protection of this Rule is extended to two additional groups of individuals: individuals whose acts might be imputed to the organization for the purpose of subjecting the organization to civil or criminal liability and individuals whose statements might be binding upon the organization. A lawyer permitted by this Rule to communicate with an officer, employee, or director of an organization must abide by the limitations set forth in paragraph (e).

[21] This Rule does prohibit communications with any person who is known by the lawyer making the communication to be represented by counsel in the matter to which the communication relates. A person is "known" to be represented when the lawyer has actual knowledge of the representation. Knowledge is a question of fact to be resolved by reference to the totality of the circumstances, including reference to any written notice of the representation. See Rule 1.0(f) Written notice to a lawyer is relevant, but not conclusive, on the issue of knowledge. Lawyers should ensure that written notice of representation is distributed to all attorneys working on a matter.

[22] Paragraph (e) is intended to regulate a lawyer's communications with a represented person, which might otherwise be permitted under the Rule, by prohibiting any lawyer from taking unfair advantage of the absence of the represented person' s counsel. The prohibition contained in paragraph (e) is limited to inquiries concerning privileged communications and lawful defense strategies. The Rule does not prohibit inquiry into unlawful litigation strategies or communications involving, for example, perjury or obstruction of justice.

[23] The prohibition of paragraph (e) against the communicating lawyer' s negotiating with the represented person with respect to certain issues does not apply if negotiations are authorized by law, rule or court order. For example, a court of competent jurisdiction could authorize a lawyer to engage in direct negotiations with a represented person. Government lawyers may engage in such negotiations if a represented person who has been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding initiates communications with the government lawyer and the communication is otherwise consistent with requirement of subparagraph (c)(4).

VERMONT

Rule 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 by law to do so.

Virginia

RULE 4.2 Communication With Persons 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 by law to do so.

Comment

[1-2] *ABA Model Rule* Comments not adopted.
[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule. A lawyer is permitted to communicate with a person represented by counsel without obtaining the consent of the lawyer currently representing that person, if that person is seeking a "second opinion" or replacement counsel.
[4] This Rule does not prohibit communication with a represented person, or an employee or agent of a represented person, concerning matters outside the representation. For example, the existence of a controversy between an organization and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification or legal authorization for communicating with the other party is permitted to do so.
[5] In circumstances where applicable judicial precedent has approved investigative contacts in pre-indictment, noncustodial circumstances, and they are not prohibited by any provision of the United States Constitution or the Virginia Constitution, they should be considered to be authorized by law within the meaning of the Rule. Similarly, communications in civil matters may be considered authorized by law if they have been approved by judicial precedent.
[6] *ABA Model Rule* Comment not adopted.
[7] In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in *Upjohn v. United States,* 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits *ex parte* communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate *ex parte* with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.
[8] This Rule covers any person, whether or not a party to a formal proceeding, who is

represented by counsel concerning the matter in question. Neither the need to protect uncounselled persons against being taken advantage of by opposing counsel nor the importance of preserving the client-attorney relationship is limited to those circumstances where the represented person is a party to an adjudicative or other formal proceeding. The interests sought to be protected by the Rule may equally well be involved when litigation is merely under consideration, even though it has not actually been instituted, and the persons who are potentially parties to the litigation have retained counsel with respect to the matter in dispute.
[9] Concerns regarding the need to protect uncounselled persons against the wiles of opposing counsel and preserving the attorney-client relationship may also be involved where a person is a target of a criminal investigation, knows this, and has retained counsel to receive advice with respect to the investigation. The same concerns may be involved where a "third-party" witness furnishes testimony in an investigation or proceeding, and although not a formal party, has decided to retain counsel to receive advice with respect thereto. Such concerns are equally applicable in a non-adjudicatory context, such as a commercial transaction involving a sale, a lease or some other form of contract.

Virginia Code Comparison

This Rule is substantially the same as DR 7-103(A)(1), except for the change of "party" to "person" to emphasize that the prohibition on certain communications with a represented person applies outside the litigation context.

Committee Commentary

The Committee believed that substituting "person" for "party" more accurately reflected the intent of the Rule, as shown in the last sentence of the Comment, and was preferable to the apparent limitation of DR 7-103(A)(1) which referred to "[c]ommunicat[ion] on the subject of the representation with a party . . . ." The following revision to Comment [3] was made to include the language of Comment [3] from the ABA rule regarding the prohibition against communicating with a represented party even when the represented person or the lawyer initiates the contact.

The amendments effective April 13, 2007, added Comment [3].

WASHINGTON

RPC RULE 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.

Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[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. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. 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.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] [Washington revision] In the case of a represented organization, this Rule 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. Consent of the organization's lawyer is not required for communication with a former constituent. 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. 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.

[8] The prohibition on communication with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3. Additional Washington Comments (10 - 11)

[10] Comment [7] to Model Rule 4.2 was revised to conform to Washington law. The phrase "or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability" and the reference to Model Rule 3.4(f) was deleted. Whether and how lawyers may communicate with employees of an adverse party is governed by Wright v. Group Health Hospital, 103 Wn.2d 192, 691 P.2d 564 (1984). See also Washington Comment [5] to Rule 3.4.

[11] An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation. (The provisions of this Comment were taken from former Washington RPC 4.2(b)).

[Amended effective September 1, 2006.]

WEST VIRGINIA

Rule 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 party 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 by law to do so.

Wisconsin

SCR 20:4.2 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.

ABA Comment

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.
[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.
[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.
[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.
[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. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. 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.
[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule 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. Consent of the organization's lawyer is not required for communication with a former constituent. 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 3.4(f). 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.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

WYOMING

Rule 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 or entity 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.

1. Comment. -

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person, who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. Regardless of who commences the communication, a lawyer must immediately terminate communication with a person if the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). 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. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[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. Communications authorized by law may also include constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. See also, Rule 4.4 (Respect for the Rights of Third Persons).

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule 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 that the matter may be imputed to the organization for purposes of civil or criminal liability. 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 3.4(f). 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, Comment [2].

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(g). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

222 F.3d 1133, 2000 Daily Journal D.A.R. 9365, 00 Cal. Daily Op. Serv. 7080, 6 Wage & Hour Cas.2d (BNA) 502
(Cite as: 222 F.3d 1133)

H
Briefs and Other Related Documents

United States Court of Appeals,Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellant,
Robin L. Harris, Appellant,
v.
Virgilio TALAO, Defendant-Appellee.
United States of America, Petitioner,
v.
United States District Court for the Northern District of California; Respondent,
Virgilio Talao; San Luis Gonzaga Construction Co.; Gerardina Talao; Maria Talao, Real Parties in Interest.
Nos. 99-10351, 99-70974.

Argued and Submitted March 15, 2000
Filed Aug. 23, 2000

Assistant United States Attorney (AUSA), who represented government in matter in which criminal charges were brought against corporation and its principals, appealed from order of the United States District Court for the Northern District of California, Vaughn R. Walker, J., which stated that she had violated California Rules of Professional Conduct by engaging in communications with corporation's bookkeeper, who was represented by corporation's attorney. Separately, government petitioned for writ of mandamus to prevent use of jury instruction intended to remedy ethical violation by AUSA. The Court of Appeals, Politz, Circuit Judge, sitting by designation, held that: (1) order constituted a sanction of AUSA, and thus was appealable, and (2) AUSA's communications during investigation with bookkeeper, who initiated contact and asserted that corporation and its attorney were attempting to prevent her from testifying truthfully, did not violate ethical rules.

Reversed, and petition for writ of mandamus dismissed as moot.

West Headnotes

[1] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases

Criminal Law 110 ⇐1023(1)

110 Criminal Law
110XXIV Review
110XXIV(C) Decisions Reviewable
110k1021 Decisions Reviewable
110k1023 Appealable Judgments and Orders
110k1023(1) k. In General. Most Cited Cases
District court order stating that Assistant United States Attorney (AUSA) had made an improper ex parte contact with a represented party, in violation of California Rules of Professional Conduct, per se constituted a sanction, and thus was appealable. Cal.Prof.Conduct Rule 2-100.

[2] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
Provision of California Rules of Professional Conduct prohibiting ex parte contacts with represented parties exists in order to preserve the attorney-client relationship and the proper

functioning of the administration of justice. Cal.Prof.Conduct Rule 2-100.

[3] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
Provision of California Rules of Professional Conduct prohibiting ex parte contacts with represented parties is a rule governing attorney conduct and the duties of attorneys, and does not create a right in a party not to be contacted by opposing counsel. Cal.Prof.Conduct Rule 2-100.

[4] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
Objective of provision of California Rules of Professional Conduct prohibiting ex parte contacts with represented parties is to establish ethical standards that foster the internal integrity of and public confidence in the judicial system. Cal.Prof.Conduct Rule 2-100.

[5] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
Applicability of provision of California Rules of Professional Conduct prohibiting ex parte contacts with represented parties to pre-indictment, non-custodial communications by federal prosecutors and investigators with represented parties is determined through case-by-case adjudication; this allows courts to police clear misconduct, while keeping in mind that prosecutors are authorized by law to employ legitimate investigative techniques in conducting or supervising criminal investigations. Cal.Prof.Conduct Rule 2-100.

[6] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
Assistant United States Attorney (AUSA), who was involved in criminal investigation of corporation and its principals, did not violate provision of California Rules of Professional Conduct prohibiting ex parte contacts with represented parties when she engaged in discussions with corporation's bookkeeper, who had been subpoenaed to testify before grand jury, and was represented by corporation's attorney, after bookkeeper told AUSA that she did not wish to be represented by corporation's attorney, because she could not speak truthfully in his presence, and that principals of corporation were pressuring her to testify untruthfully. Cal.Prof.Conduct Rule 2-100.

[7] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
When an employee/party of a defendant corporation initiates communications with an attorney for the government for the purpose of disclosing that

corporate officers are attempting to suborn perjury and obstruct justice, provision of California Rules of Professional Conduct prohibiting ex parte contacts with represented parties does not bar discussions between the employee and the attorney. Cal.Prof.Conduct Rule 2-100.

[8] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
Assuring the proper functioning of the attorney-client relationship is an important rationale behind provision of California Rules of Professional Conduct prohibiting ex parte contacts with represented parties. Cal.Prof.Conduct Rule 2-100.

[9] Witnesses 410 ⇐198(1)

410 Witnesses
410II Competency
410II(D) Confidential Relations and Privileged Communications
410k197 Communications to or Advice by Attorney or Counsel
410k198 In General
410k198(1) k. In General. Most Cited Cases
Attorney-client privilege is at the expense of full and free discovery of the truth, and for that reason applies only where necessary to achieve its purpose.

[10] Attorney and Client 45 ⇐32(1)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(1) k. In General. Most Cited Cases
A witness's assertion that she is afraid of testifying in an attorney's presence does not, without more, suggest that the attorney has engaged in any ethical or legal violation.

[11] District and Prosecuting Attorneys 131 ⇐8

131 District and Prosecuting Attorneys
131k8 k. Powers and Proceedings in General. Most Cited Cases
When a person who has been represented by institutional counsel perceives a conflict in that representation and approaches a prosecutor or investigator, the prosecutor or investigator should advise the person of his right to obtain substitute counsel.

*1135 James M. Wagstaffe and Pamela Urueta, Kerr & Wagstaffe LLP, San Francisco, California, for the appellant.
Mary McNamara, Swanson and McNamara, San Francisco, California, for the defendant-appellee.
J. Douglas Wilson, United States Attorney's Office, San Francisco, California, for the petitioner.
John T. Philipsborn, San Francisco, California, for real party in interest.
Louis S. Katz, San Francisco, California, for real party in interest.

Appeals from the United States District Court for the Northern District of California and Petition for Writ of Mandamus; Vaughn R. Walker, District Judge, Presiding. D.C. No. CR-97-00217-VRW.

Before: POLITZ,[FN1] REINHARDT, and HAWKINS, Circuit Judges.

FN1. Honorable Henry A. Politz, Senior United States Circuit Judge for the Fifth Circuit Court of Appeals, sitting by designation.

POLITZ, Circuit Judge:
AUSA Robin Harris appeals the decision of the United States District Court for the Northern District of California that she violated Rule 2-100 of the California Rules of Professional Conduct. The United States petitions this court for a writ of mandamus to prevent the district court from giving

a jury instruction intended to remedy what the trial court viewed as Harris' Rule 2-100 violation. For the reasons assigned, we hold that Harris did not commit an ethical violation. Accordingly, there is no longer any basis for a remedial jury instruction and the petition for mandamus is moot.

BACKGROUND

San Luis Gonzaga Construction, Inc. (SLGC) is a corporation wholly-owned by Virgilio Talao. In February 1996, several SLGC employees filed a complaint with the United States Department of Labor, Wage and Hour Division alleging that SLGC did not pay the prevailing wage, required them to kickback a portion of their wages, and made false statements to the government regarding the wages earned and hours worked by the employees. A similar complaint was filed with the Laborers' Contract Administration Trust Fund Board of Adjustment.

On June 27, 1996, the Asian Law Caucus initiated a qui tam action against SLGC, Virgilio Talao, and Gerardina Talao,[FN2] based on the same facts as alleged in the employees' complaints.[FN3] On October 14, 1996, the criminal division of the United States Attorney's office, acting on a referral from the civil division, initiated a criminal investigation of SLGC and the Talaos relating to these charges. SLGC and the Talaos were represented in all of these matters by attorney Christopher Brose.

FN2. Gerardina Talao is the secretary/treasurer of SLGC and the wife of Virgilio Talao.

FN3. The United States eventually intervened in the qui tam action on August 29, 1997.

The prosecutor assigned to the criminal action was Assistant United States Attorney Robin Harris. In early 1997, Brose initiated discussions with government attorneys, including AUSA Harris, regarding the possibility of settling the pending civil and criminal investigations of SLGC and the Talaos.

On April 21, 1997, Department of Labor Special Agent Alfredo Nodal served a subpoena on SLGC's bookkeeper, Lita Ferrer, directing her to testify before the grand jury on April 30, 1997. When Virgilio Talao learned of the subpoena he instructed Brose to be present for Ferrer's testimony. On April 29, 1997, Brose telephoned Ferrer and arranged to meet with her the next day, prior to her grand jury appearance.

Later that same day, however, Ferrer repaired to the federal building and asked to see Harris. Because Harris was not available, Ferrer spoke to her immediate *1136 supervisor, AUSA Sandra Teters. Ferrer asked to have the date of her grand jury appearance changed because she did not want Brose to be present before or during her grand jury testimony. She explained that she would feel pressured to give false testimony if Brose were present. She said she had received a telephone call from Talao in which he told her to "stick with the story" she had told while testifying in one of the related administrative actions. Teters told Ferrer that she would have to testify the following day, but informed her that Brose would not be present during her testimony as attorneys are not permitted to accompany witnesses before a grand jury.

On April 30, Ferrer met with Brose as scheduled to discuss her impending grand jury appearance. They made plans to continue their discussion at the federal building immediately prior thereto. Before Brose arrived at the federal building later that day, however, Ferrer encountered AUSA Harris and SA Nodal in the hallway outside the grand jury courtroom. Nodal introduced Ferrer to Harris. Ferrer then told Harris and Nodal that she did not wish to be represented by Brose. Ferrer agreed to discuss the matter further, and Harris and Nodal took her to a witness room.

Ferrer told Harris and Nodal that she was not and did not want to be represented by Brose. Harris then informed Ferrer of her right to be represented by an attorney, but Ferrer declined representation. When asked why she did not want Brose to act as her attorney, Ferrer stated that she wished to tell the

truth and that she did not believe she could do so if she had to testify in his presence. She also said that the Talaos had been pressuring her to testify untruthfully. Ferrer gave Harris and Nodal information about the rates paid by SLGC, her preparation of corporate payroll records, and the possible destruction of corporate documents. During the interview, Brose knocked on the door and demanded to speak with Ferrer. Ferrer was informed of Brose's presence and desire to speak with her, but she said she did not wish to speak with him.

Uncertain whether she should continue the interview, Harris sought guidance from her superiors. The chief of the criminal division, AUSA Joel Levin, opined that Brose was wrongfully tampering with a witness and instructed Harris to continue the interview outside Brose's presence. During the remainder of the interview, Ferrer gave further instances of wrongdoing by her employers and explained how they concealed the truth from investigators and Brose. She stated that Virgilio Talao had told her to tell untruths to the grand jury and that she believed Brose had been directed there by Talao to intimidate her and to keep her from telling the truth. A few minutes later she recounted these facts in her grand jury testimony.

On July 16, 1997, the grand jury returned a 20-count indictment against the Talaos and SLGC. In February 1998, the Talaos and SLGC filed a Joint Motion to Dismiss the indictment asserting that the contact between Harris and Ferrer had violated California's ethical rule against *ex parte* contacts with represented parties [FN4] and SLGC's constitutional rights. The court denied the motion, but found a violation of Rule 2-100 and stated that it would refer AUSA Harris' conduct to the State Bar of California. The court also declared that if the case went to trial it would inform the jury of Harris' misconduct and instruct them to take it into account in assessing Ferrer's credibility. Later, the court concluded that Harris had acted in good faith and determined not to refer the matter to the state bar.

FN4. Rule 2-100 provides:
[w]hile representing a client, a member shall not communicate directly or indirectly about the subject matter of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.
Notwithstanding this provision, however, " communications otherwise authorized by law" are permitted. Rule 2-100(C)(3).

*1137 Harris appeals the finding that she acted unethically and violated Rule 2-100. The government filed a petition for a writ of mandamus to prevent the district court from giving its proposed remedial instruction at trial. The two matters were consolidated for consideration.

ANALYSIS

Jurisdiction Over Harris' Appeal

SLGC and the Talaos insist that the district court's finding that Harris violated Rule 2-100 does not constitute a sanction against her and therefore does not provide a basis for appeal. In making this assertion, they rely on the decision in *Weissman v. Quail Lodge, Inc.*,[FN5] substantially employing the reasoning in *Williams v. United States*.[FN6]

FN5. 179 F.3d 1194 (9th Cir.1999).

FN6. 156 F.3d 86 (1st Cir.1998).

In *Williams*, a bankruptcy judge levied monetary sanctions against the government and two attorneys. In his published findings of fact supporting the sanctions, the judge characterized the attorneys' conduct as obstructionist and unjustified, referring to the testimony of one as "pure baloney," and ranked the other's "performance and credibility at about the same level." [FN7] The bankruptcy judge later vacated the sanction against one attorney and the sanction against the other was annulled on appeal to the district court. Neither court,

however, rescinded or vacated the factual findings or the harsh language used to describe the conduct of the two attorneys.

FN7. *Id.* at 88.

The attorneys contended on appeal that the bankruptcy court's findings of fact "besmirch[ed] their professional reputations to such an extent that they operate[d] as a de facto sanction." [FN8] The *Williams* court disagreed, noting that "not every criticism by a judge that offends a lawyer's sensibilities is a sanction." [FN9] The court declined to draw a line between routine judicial commentary and commentary that is inordinately injurious to a lawyer's reputation, holding that words alone may constitute a sanction only if expressly identified as such. The court recognized that this formalistic approach might exact a considerable price from some attorneys without affording them a means of redress, but chose to follow it in order to avoid line-drawing which it believed might prove exceedingly difficult and apt to chill judicial candor.

FN8. *Id.* at 90.

FN9. *Id.*

In *Weissman,* the district court sanctioned an attorney for what it considered to be "a serious lack of professionalism and good judgment." [FN10] The attorney had intervened in a class action without information to substantiate that his client was a class member, and then failed to appear at a hearing at which his objections were addressed. The district judge found counsel's objections " groundless, contrived, and misplaced" and also noted that he had demonstrated a pattern of such behavior in other cases.[FN11] The court issued an order restricting counsel's ability to file objections to proposed class action settlement agreements in ADA cases in that district.

FN10. *Weissman,* 179 F.3d at 1196.

FN11. *Id.*

The attorney appealed both the district court's order and the disparaging remarks therein. This court reversed the order insofar as it restricted counsel's ability to file objections for failure of notice and an opportunity to be heard, but concluded that we did not have jurisdiction to hear the appeal of the trial court's criticism. We adopted the reasoning in *Williams* and held that "words alone will constitute a sanction only 'if they are expressly identified as a reprimand.' " [FN12]

FN12. *Id.* at 1200.

[1] *Weissman* and *Williams,* however, do not determine our jurisdiction in this case. Those cases addressed only instances in which mere judicial criticism constitutes*1138 an appealable sanction. The district court in the present case, however, did more than use "words alone" or render "routine judicial commentary." Rather, the district court made a finding and reached a legal conclusion that Harris knowingly and wilfully violated a specific rule of ethical conduct. Such a finding, *per se,* constitutes a sanction.[FN13] The district court's disposition bears a greater resemblance to a reprimand than to a comment merely critical of inappropriate attorney behavior. A reprimand generally carries with it a degree of formality.[FN14] The requisite formality in this case is apparent from the fact that the trial court found a violation of a particular ethical rule, as opposed to generally expressing its disapproval of a lawyer's behavior. Further, the district court's conclusion that Harris violated Rule 2-100 carries consequences similar to the consequences of a reprimand. If the court's formal finding is permitted to stand, it is likely to stigmatize Harris among her colleagues and potentially could have a serious detrimental effect on her career. In addition, she might be subjected to further disciplinary action by the California Bar. We have no reluctance in concluding that the district court's finding of an ethical violation by Harris is an appealable sanction.

FN13. Gregory P. Joseph, Sanctions: The Federal Law of Litigation AbuseBUSE 260 (3rd Ed.2000) (recognizing that "

> [a]mong the most lenient sanctions that a court may impose is ... to make a formal finding of a violation not coupled with any additional sanction").
>
> FN14. *Federal Labor Union 23393 v. American Can Co.*, 28 N.J.Super. 306, 100 A.2d 693, 695 (1953) ("Reprimand ... means to reprove severely; ... to censure formally" (citations omitted)). Indeed, the *Weissman* and *Williams* courts required express identification of reprimands in order to signify when mere words carried the requisite formality.

Our conclusion on the issue of jurisdiction in this case does not implicate the difficulties that *Weissman* and *Williams* sought to avoid. We do not invite appellate review of every unwelcome word uttered or written by the district courts. Indeed, a formal finding of a violation eliminates the need for difficult line drawing in much the same way as a court's explicit pronouncement that its words are intended as a sanction. In addition, we have no reason to believe that our finding of jurisdiction herein will come at the expense of judicial candor. As the *Williams* court noted, uncertainty over the verbiage that would constitute sanctions might cause judges to temper their criticisms in a way that could interfere with their ability to administer their courtrooms appropriately. We think it is unlikely, however, that judges will be similarly unsure about the meaning and effect of formal findings like the one against Harris.

Rule 2-100 Violation

[2][3][4] In determining the applicability of Rule 2-100, we must be mindful of the fundamental reasons behind the venerable rule in legal ethics prohibiting *ex parte* contacts with represented parties. The rule exists in order to " 'preserv[e] ... the attorney-client relationship and the proper functioning of the administration of justice.' " FN15 It is a rule governing attorney conduct and the duties of attorneys, and does not create a right in a party not to be contacted by opposing counsel.FN16 Its objective is to establish ethical standards that foster the internal integrity of and public confidence in the judicial system.FN17

> FN15. *Mills Land and Water Co. v. Golden West Refining Co.*, 186 Cal.App.3d 116, 230 Cal.Rptr. 461, 468 (1986), quoting *Mitton v. State Bar*, 71 Cal.2d 525, 78 Cal.Rptr. 649, 654, 455 P.2d 753 (1969).
>
> FN16. *United States v. Lopez*, 4 F.3d 1455, 1462 (9th Cir.1993) (holding that criminal defendant did not have a right not to be contacted, and consequently could not waive application of § 2-100).
>
> FN17. *Jeffry v. Pounds*, 67 Cal.App.3d 6, 136 Cal.Rptr. 373, 376 (1977); *Millsberg v. State Bar*, 6 Cal.3d 65, 98 Cal.Rptr. 223, 490 P.2d 543, 549 (1971).

Preliminarily, we should point out that the parties dispute the applicability of Rule 2-100 to pre-indictment, non-custodial communications by federal prosecutors and investigators with represented parties.*1139 While it is true that this court has found Rule 2-100 not applicable to such communications in particular cases,FN18 we have declined to announce a categorical rule excusing all such communications from ethical inquiry. FN19 In *United States v. Lopez*, we held that "beginning *at the latest* upon the moment of indictment, a prosecuting attorney has a duty under ethical rules like Rule 2-100 to refrain from communicating with represented defendants." FN20 We also observed that "courts have been divided over whether the rule applies even in a pre-indictment setting" FN21 and cited, among other cases, the Second Circuit's decision in *United States v. Hammad*.FN22

> FN18. *United States v. Powe*, 9 F.3d 68, 69-70 (9th Cir.1993) (undercover investigative contacts); *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir.1981) (phone call recorded by government informant).

FN19. *Powe*, 9 F.3d at 69-70 ("We need not decide the reach of *Kenny* ...."); *Kenny*, 645 F.2d at 1339 ("While the present case provides no opportunity for us to say just when the ethical line might be crossed, we do not believe it has been crossed here.") (citation omitted).

FN20. 4 F.3d 1455, 1461 (9th Cir.1993) (emphasis added).

FN21. *Id.* at 1460 n. 2.

FN22. 858 F.2d 834 (2d Cir.1988). *Lopez*, 4 F.3d at 1460 n. 2.

In *Hammad* the court rejected the argument that an ethical rule analogous to Rule 2-100 was " coextensive with the sixth amendment" and therefore remained "inoperative until the onset of adversarial proceedings," *i.e.*, indictment.[FN23] Observing that the timing of indictment "lies substantially within the control of the prosecutor," the court explained that under an ethical rule that was dependent on indictment, "a government attorney could manipulate grand jury proceedings to avoid its encumbrances." [FN24] Rather than announcing a bright-line rule, the court preferred to apply the ethical rule through "case-by-case adjudication," [FN25] policing clear misconduct while keeping in mind that prosecutors are " authorized by law" to employ legitimate investigative techniques in conducting or supervising criminal investigations.[FN26]

FN23. 858 F.2d at 838.

FN24. *Id.* at 839.

FN25. *Id.* at 840.

FN26. *Id.* at 839.

[5] The district court relied on *Hammad* in concluding that ethical concerns were raised by the communications between Ferrer and the government here. While we disagree with the district judge's ultimate conclusion as to whether a violation occurred, his reliance on *Hammad* was well-founded. We find the Second Circuit's approach to be the proper one. Here, although at the time of the communications no indictments had yet been issued, the government and SLGC had clearly taken adversarial positions. The Department of Labor was conducting its civil investigation of SLGC's wage practices. The Asian Law Caucus had filed its qui tam action. On behalf of SLGC, attorney Brose had initiated settlement talks with the government regarding both its civil and criminal investigations. Under these circumstances, involving fully defined adversarial roles, impending grand jury proceedings, and awareness on the part of the responsible government actors of SLGC's ongoing legal representation, Rule 2-100 governed AUSA Harris's pre-indictment, non-custodial communications with Ferrer.

At this point a brief historical reference appears in order. During the early part of the decade of the 1990's, intense discussions were had between state judicial authorities and the Department of Justice over a position taken by the DOJ in a written communication popularly referred to as the " Thornburgh Memorandum." In essence, that memorandum created serious problems by excusing federal attorneys from compliance with state ethics rules. The conflict that developed was dissipated *1140 when the Congress adopted what is now 28 U.S.C. § 530B, and made state ethics rules applicable to government attorneys. [FN27]

FN27. 28 U.S.C. § 530B(a) now provides in pertinent part that "[a]n attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."

[6][7] Under the circumstances of this case, we conclude that Rule 2-100 did not prohibit Harris's conduct. Despite the apparent conundrum created by Ferrer's dual role as employee/party and witness, [FN28] the interests in the internal integrity of and

public confidence in the judicial system weigh heavily in favor of the conclusion that Harris' conduct was at all times ethical. We deem manifest that when an employee/party of a defendant corporation initiates communications with an attorney for the government for the purpose of disclosing that corporate officers are attempting to suborn perjury and obstruct justice, Rule 2-100 does not bar discussions between the employee and the attorney. Indeed, under these circumstances, an automatic, uncritical application of Rule 2-100 would effectively defeat its goal of protecting the administration of justice. It decidedly would not add meaningfully to the protection of the attorney-client relationship if subornation of perjury, or the attempt thereof, is imminent or probable.

FN28. *Mills Land,* 230 Cal.Rptr. at 466 (describing the problem as an "insoluble dilemma").

Few, if any, unethical acts by counsel are more heinous than subornation of perjury. It would be an anomaly to allow the subornation of perjury to be cloaked by an ethical rule, particularly one manifestly concerned with the administration of justice. As commentators have noted with regard to the crime-fraud exception to the attorney-client privilege, "[s]ince the policy of the privilege is that of promoting the administration of justice, it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out the illegal or fraudulent scheme." [FN29] In a similar vein, it would be a perversion of the rule against *ex parte* contacts to extend it to protect corporate officers who would suborn perjury by their employees.

FN29. McCormick on Evidence § 95, 350 (Strong, ed.1992).

[8][9] Appellees maintain that application of Rule 2-100 is necessary here in order to protect the attorney-client relationship between the corporation and its counsel. We are keenly aware that assuring the proper functioning of the attorney-client relationship is an important rationale behind the rule. Again, however, like the attorney-client privilege, the prohibition against *ex parte* contacts protects that relationship at the expense of "the full and free discovery of the truth." [FN30] For that reason, the attorney-client privilege "applies only where necessary to achieve its purpose." [FN31] When a corporate employee/witness comes forward to disclose attempts by the corporation's officers to coerce her to give false testimony, the prohibition against *ex parte* contacts does little to support an appropriate attorney-client relationship. Once the employee makes known her desire to give truthful information about potential criminal activity she has witnessed, a clear conflict of interest exists between the employee and the corporation.[FN32] Under these circumstances,*1141 corporate counsel cannot continue to represent both the employee and the corporation. Indeed, Brose made clear in his testimony at the evidentiary hearing before the district court that if Ferrer had approached him with information adverse to the interests of the corporation he would have advised her that she should retain her own lawyer. Under these circumstances, because the corporation and the employee cannot share an attorney, *ex parte* contacts with the employee cannot be deemed to, in any way, affect the attorney-client relationship between the corporation and its counsel. In this setting, the corporation's interest, therefore, clearly does not provide the basis for application of the rule. The trial court erred in otherwise concluding.

FN30. *Weil v. Investment/Indicators, Research & Management, Inc.,* 647 F.2d 18, 24 (9th Cir.1981).

FN31. *Fisher v. United States,* 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976).

FN32. California Rules of Professional Conduct 3-310; *Wood v. Georgia,* 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981) ("[i]t is inherently wrong [for an attorney] to represent both the employer and the employee if the employee's interest may, and the public interest will, be

> advanced by the employee's disclosure of his employer's criminal conduct.") (quoting *In re Abrams*, 56 N.J. 271, 276, 266 A.2d 275 (1970)); *United States v. RMI Company*, 467 F.Supp. 915, 922 (W.D.Pa.1979) ("the representation of a defendant in a criminal case and of a government witness who is also the defendant's employee could give [the appearance of impropriety] and is sufficient in itself to disqualify counsel from further representation of the witnesses ").

[10] The fact that we approve AUSA Harris's conduct does not mean that we suggest that attorney Brose in fact committed any act of subornation of perjury. Ferrer felt pressured when Virgilio Talao told her by phone to "stick to her story," and she believed that she would feel pressured to give false testimony if Talao's attorney were present. Harris acted appropriately on the basis of the representations volunteered to her office by Ferrer. We strongly emphasize, however, that a witness's assertion that she is afraid of testifying in an attorney's presence does not, without more, suggest that the attorney has engaged in any ethical or legal violation. Indeed, it is not unknown for corporate employees involved in alleged wrongdoing to attempt to gain favor with U.S. Attorneys by claiming that corporate officials or corporate counsel directed them to act unlawfully. Clients are sometimes willing to throw lawyers to the wolves when they believe that doing so will let them avoid prosecution or a longer prison sentence. Claims of lawyer misconduct made under such circumstances should be viewed with a most critical eye.

[11] We should note that the U.S. Attorney here did the right thing in advising Ferrer that she had a right to be represented by an attorney and giving her the opportunity to contact substitute counsel. When a person who has been represented by institutional counsel perceives a conflict in that representation and approaches a prosecutor or investigator, the prosecutor or investigator should do as Harris did here: advise the person of his right to obtain substitute counsel. Furthermore, we do not mean to suggest that government officials have a license to approach an employee and initiate communications whenever there is a possible conflict of interest between the employee and the corporation for whom the employee works. In this case, Ferrer initiated the communications with the U.S. Attorney's office, and Harris responded properly by clarifying her ethical duties and advising Ferrer of her right to counsel. It is these circumstances and acts that make the district court's finding of an ethical violation improper in this case.

CONCLUSION

Concluding that Harris committed no ethical violation, it follows that no remedial instruction is necessary or proper. For this reason, the government's mandamus petition is moot and need not be considered. The sanction against Harris is REVERSED, and the government's petition for writ of mandamus is DISMISSED AS MOOT.

C.A.9 (Cal.),2000.
U.S. v. Talao
222 F.3d 1133, 2000 Daily Journal D.A.R. 9365, 00 Cal. Daily Op. Serv. 7080, 6 Wage & Hour Cas.2d (BNA) 502

Briefs and Other Related Documents (Back to top)

- 1999 WL 33617640 (Appellate Brief) Appellant Robin L. Harris' Reply Brief (Dec. 15, 1999) Original Image of this Document (PDF)
- 1999 WL 33626057 (Appellate Brief) Reply Brief for Petitioner (Dec. 15, 1999) Original Image of this Document (PDF)
- 1999 WL 33608532 (Appellate Brief) Answering Brief of Defendant-Appellees/Real Parties in Interest (Dec. 10, 1999) Original Image of this Document (PDF)
- 1999 WL 33612239 (Appellate Brief) Appellant Robin L. Harris Opening Brief (Nov. 01, 1999) Original Image of this Document (PDF)
- 99-10351 (Docket) (Aug. 05, 1999)

END OF DOCUMENT

858 F.2d 834
(Cite as: 858 F.2d 834)

Briefs and Other Related Documents

United States Court of Appeals,Second Circuit.
UNITED STATES of America, Appellant,
v.
Eid HAMMAD, a/k/a Eddie Hammad, and Taiseer Hammad, Defendants-Appellees.
No. 882, Docket 87-1513.

Argued March 24, 1988.
Decided May 12, 1988.
Revised Sept. 23, 1988.
As Amended Nov. 29, 1988.

Defendant charged with Medicaid and mail fraud and obstruction of justice moved to suppress evidence. The United States District Court for the Eastern District of New York, Israel Leo Glasser, J., granted motion to suppress, 678 F.Supp. 397, and appeal was taken. The Court of Appeals reversed, 846 F.2d 854. In revised opinion, the Court of Appeals, Irving R. Kaufman, Circuit Judge, held that: (1) prosecutor violated disciplinary rule prohibiting lawyer from communicating with party he knows to be represented by counsel, but (2) suppression of recordings and videotapes of conversations between defendant and government informant was inappropriate.

Reversed.

West Headnotes

[1] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
Disciplinary rule prohibiting lawyer from communicating with party represented by counsel applies to criminal prosecutions. ABA Code of Prof.Resp., DR 7-104(A)(1).

[2] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
Disciplinary rule prohibiting lawyer from communicating with party represented by counsel applies to investigatory stages of criminal prosecution prior to attachment of Sixth Amendment protections. ABA Code of Prof.Resp., DR 7-104(A)(1); U.S.C.A. Const.Amend. 6.

[3] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
Under disciplinary rule prohibiting lawyer from communicating with party represented by counsel, prosecutor is "authorized by law" to employ legitimate investigative techniques in conducting or supervising criminal investigations, and use of informants to gather evidence against suspect will frequently fall within ambit of such authorization. ABA Code of Prof.Resp., DR 7-104(A)(1).

[4] Attorney and Client 45 ⇐32(12)

45 Attorney and Client

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(Cite as: 858 F.2d 834)

45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
Prosecutor violated disciplinary rule prohibiting lawyer from communicating with party represented by counsel when he, during arson investigation, caused informant to approach defendant to elicit incriminating statements and to show defendant counterfeit grand jury subpoena bearing purported seal of district court and false signature of clerk. ABA Code of Prof.Resp., DR 7-104(A)(1).

[5] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
Use of informants by government prosecutors in preindictment and noncustodial situation, absent egregious misconduct, will generally fall within " authorized by law" exception to disciplinary rule prohibiting lawyer from communicating with party represented by counsel and will not be subject to sanctions. ABA Code of Prof.Resp., DR 7-104(A)(1).

[6] Criminal Law 110 ⇐394.1(2)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k394 Evidence Wrongfully Obtained
110k394.1 In General
110k394.1(2) k. Wrongful Mode of Procurement. Most Cited Cases
In light of underlying purposes of Code of Professional Responsibility and exclusionary rule, suppression may be ordered in district court's discretion when prosecutor violates disciplinary rule prohibiting lawyer from communicating with party he knows to be represented by counsel. ABA Code of Prof.Resp., DR 7-104(A)(1).

[7] Criminal Law 110 ⇐394.1(2)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k394 Evidence Wrongfully Obtained
110k394.1 In General
110k394.1(2) k. Wrongful Mode of Procurement. Most Cited Cases
Suppression of videotapes and conversations between defendant and government informant was inappropriate, although prosecutor violated disciplinary rule prohibiting lawyer from communicating with party he knows to be represented by counsel when he caused informant to approach defendant, given prior uncertainty regarding applicability of rule to criminal cases. ABA Code of Prof.Resp., DR 7-104(A)(1).

*835 Sean F. O'Shea, Asst. U.S. Atty., E.D.N.Y. (Andrew J. Maloney, U.S. Atty., John Gleeson, Asst. U.S. Atty., Brooklyn, N.Y., of counsel), for appellant U.S.
Richard A. Greenberg, New York City (Robert Hill Schwartz, New York City, of counsel), for defendant-appellee Taiseer Hammad.
Harvey L. Greenberg, New York City (Washor, Greenberg & Washor, New York City, of counsel), for defendant-appellee Eid Hammad.

Before KAUFMAN, CARDAMONE and PIERCE, Circuit Judges.
The opinion filed May 12, 1988 at 846 F.2d 854 (2nd Cir.) is revised as follows.

IRVING R. KAUFMAN, Circuit Judge:
On November 30, 1985, the Hammad Department Store in Brooklyn, New York, caught fire under circumstances suggesting arson. The Bureau of Alcohol, Tobacco and Firearms was assigned to investigate in conjunction with the United States Attorney for the Eastern District of New York.

During the course of his investigation, an Assistant

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United States Attorney ("AUSA") discovered that the store's owners, Taiseer and Eid Hammad, had been audited by the New York State Department of Social Services for Medicaid fraud. The audit revealed that the Hammad brothers had bilked Medicaid out of $400,000; they claimed reimbursement for special orthopedic footwear but supplied customers with ordinary, non-therapeutic shoes. Consequently, the Department revoked the Hammads' eligibility for Medicaid reimbursement and demanded return of the $400,000 overpayment. The Hammads challenged the Department's determination and submitted invoices purporting to document their sales of orthopedic shoes. The invoices were received from Wallace Goldstein of the Crystal Shoe Company, a supplier to the Hammads' store.

On September 22, 1986, however, Goldstein informed the AUSA that he had provided the Hammads with false invoices. Government investigators, therefore, suspected the fire had been intended to destroy actual sales records, thereby concealing the fraudulent Medicaid claims. Goldstein agreed to cooperate with the government's investigation. Accordingly, the prosecutor directed Goldstein to arrange and record a meeting with the Hammads.

Some three weeks later, on October 9, Goldstein telephoned the Hammads. He spoke briefly with Eid, who referred him to *836 Taiseer. Goldstein falsely told Taiseer he had been subpoenaed to appear before the grand jury investigating the Hammads' Medicaid fraud. He added that the grand jury had requested records of Crystal's sales to the Hammad Department Store to compare them with the invoices the Hammads had submitted. Taiseer did not deny defrauding Medicaid, but instead urged Goldstein to conceal the fraud by lying to the grand jury and by refusing to produce Crystal's true sales records. He also questioned Goldstein regarding the contents of his subpoena, which did not actually exist. Goldstein responded that he did not have the subpoena in his possession. He agreed to inquire further. One hour later, presumably after speaking with the AUSA, Goldstein telephoned Taiseer again and described the fictitious subpoena.

Goldstein and Hammad saw each other five days later. The meeting was recorded and videotaped. Goldstein showed Hammad a sham subpoena supplied by the prosecutor. The subpoena instructed Goldstein to appear before the grand jury and to provide any records reflecting shoe sales from Crystal to the Hammad Department Store. Hammad apparently accepted the subpoena as genuine because he spent much of the remainder of the meeting devising strategies for Goldstein to avoid compliance. The two held no further meetings.

On April 15, 1987, after considering the recordings, videotapes and other evidence, the grand jury returned a forty-five count indictment against the Hammad brothers, including thirty-eight counts of mail fraud for filing false Medicaid invoices. Eid was also indicted for arson and for fraudulently attempting to collect fire insurance. Taiseer faced the additional charge of obstructing justice for attempting to influence Goldstein's grand jury testimony. The case was assigned to Judge Glasser of the Eastern District of New York.

Before trial, Taiseer Hammad moved to suppress the recordings and videotapes, alleging the prosecutor had violated DR 7-104(A)(1) of the American Bar Association's Code of Professional Responsibility. The rule prohibits a lawyer from communicating with a "party" he knows to be represented by counsel regarding the subject matter of that representation. In short, Taiseer alleged that the prosecutor-through his "alter ego" Goldstein-had violated ethical obligations by communicating directly with him after learning that he had retained counsel.

A hearing was convened on September 17, 1987, to consider the suppression motion and, specifically, to ascertain whether the prosecutor knew, at the time, that Taiseer had counsel. In support of his motion, Hammad submitted affidavits from his attorney, Richard Greenberg, and his prior counsel, George Weinbaum. Weinbaum also testified at the hearing.

In essence, Weinbaum testified that, from August 1985 to June 1987, he represented Taiseer Hammad

in all aspects of his Medicaid dispute. Specifically, Weinbaum recounted telephoning the AUSA in July 1986 and informing him that he "represented Taiseer Hammad and the Hammad department store. " He did not comply with a request for written confirmation of his relationship with Taiseer, but did not suggest any change in his status as Hammad's attorney.

The government vigorously disputed Hammad's assertion that the prosecutor had violated ethical standards by authorizing Goldstein to approach the defendant. It argued that DR 7-104(A)(1) was irrelevant to criminal investigations. Alternatively, it claimed the rule did not apply to investigations prior to the commencement of adversarial proceedings against a defendant. In addition, the government denied that, at the time he directed Goldstein to approach Taiseer, the prosecutor knew Taiseer was represented by counsel. The government argued that the AUSA reasonably believed Weinbaum ceased representing Taiseer on September 15, 1986. Thus, the argument proceeds, Taiseer had no attorney when he met with Goldstein. The *837 government, however, failed to present any evidence to support its factual contentions or to rebut Weinbaum's assertion that he continued to represent Taiseer. It rested on its legal contention that DR 7-104(A)(1) did not apply.

In an order dated September 21, 1987, Judge Glasser granted Taiseer's motion to suppress the recordings and videotapes. 678 F.Supp. 397 (E.D.N.Y.1987). The government, he found, "was clearly aware, by at least as early as September 9, 1986, that [Taiseer] had retained counsel in connection with this case." 678 F.Supp. at 399. He also determined that Goldstein was the prosecutor's "alter ego" during his discussions with Hammad. Accordingly, the court held that the prosecutor had violated DR 7-104(A)(1) and suppressed the recordings and videotapes secured as a result of the violation.

The government moved for reconsideration on September 28, 1987, and belatedly proffered the AUSA's affidavit responding to Taiseer's factual assertions. The district court denied reconsideration without considering the affidavit. This appeal ensued, pursuant to 18 U.S.C. § 3731.

The government challenges Judge Glasser's application of this ethical precept in suppressing the recordings and videotapes of Taiseer Hammad's conversations with Wallace Goldstein. The government repeats the arguments it presented at the suppression hearing. Specifically, it argues that the Assistant United States Attorney could not have violated DR 7-104(A)(1) because the provision is inapplicable to criminal investigations under any circumstances, or, alternatively, that DR 7-104(A)(1) becomes operative only after sixth amendment rights have attached. The government also contests the district court's finding that the prosecutor knew Weinbaum represented Hammad when he dispatched Goldstein and that Goldstein was his "alter ego." Finally, the government urges that suppression is not available to remedy an ethical violation.

We decline to hold, as the government suggests, either that DR 7-104(A)(1) is limited in application to civil disputes or that it is coextensive with the sixth amendment. Nor has the government provided an adequate basis for reversing the able district judge's determination, after the suppression hearing, that the prosecutor knew Hammad had legal representation or that Goldstein was his "alter ego." We are mindful, however, that suppression of evidence is an extreme remedy that may impede legitimate investigatory activities. Accordingly, we find, in this case, that suppression of the recordings and videotapes constituted an abuse of the district court's discretion.

Rule DR 7-104(A)(1) of the American Bar Association's Model Code of Professional Responsibility governs relations between attorneys and adverse parties they know are represented by counsel. It provides:

A. During the course of his representation of a client a lawyer shall not:

1. Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

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Model Code of Professional Responsibility DR 7-104(A)(1). Accordingly, lawyers are constrained to communicate indirectly with adverse parties through opposing counsel.

This restriction is not statutorily mandated. The federal courts enforce professional responsibility standards pursuant to their general supervisory authority over members of the bar. *In Re Snyder,* 472 U.S. 634, 645 n. 6, 105 S.Ct. 2874, 2881 n. 6, 86 L.Ed.2d 504 (1985). In addition, the Eastern District of New York, where this action arose, has adopted the Code of Professional Responsibility through Local Rule 2 of its General Rules.

[1] This circuit conclusively established the applicability of DR 7-104(A)(1) to criminal prosecutions in *838*United States v. Jamil,* 707 F.2d 638 (2d Cir.1983). In *Jamil,* we held that " DR 7-104(A)(1) may be found to apply in criminal cases, ... to government attorneys ... [and] to non-attorney government law enforcement officers when they act as the alter ego of government prosecutors." 707 F.2d at 645 (citations omitted). Even those courts restricting the rule's ambit have suggested that, in appropriate circumstances, DR 7-104(A)(1) would apply to criminal prosecutions. *See, e.g., United States v. Kenny,* 645 F.2d 1323, 1339 (9th Cir.), *cert. denied,* 452 U.S. 920, 101 S.Ct. 3059, 69 L.Ed.2d 425 (1981); *United States v. Lemonakis,* 485 F.2d 941, 954-56 (D.C.Cir.1973) , *cert. denied,* 415 U.S. 989, 94 S.Ct. 1586, 39 L.Ed.2d 885 (1984); *United States v. Massiah,* 307 F.2d 62, 65-66 (2d Cir.1962), *rev'd on other grounds,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Thus, the government's contention that DR 7-104(A)(1) is "inapplicable to criminal investigations" is mistaken.

[2] The applicability of DR 7-104(A)(1) to the investigatory stages of a criminal prosecution presents a closer question. The government asserts the rule is coextensive with the sixth amendment, and hence, that it remains inoperative until the onset of adversarial proceedings. The appellee responds that several courts have enforced DR 7-104(A)(1) prior to attachment of sixth amendment protections. We find no principled basis in the rule to constrain its reach as the government proposes; indeed, even a recent district court decision *declining* to apply DR 7-104(A)(1) to the investigatory stages of a prosecution conceded, "Those courts that have found DR 7-104(A)(1) inapplicable to the investigatory stage of a criminal prosecution have not clearly stated the bases for those decisions." *United States v. Guerrerio,* 675 F.Supp. 1430, 1436 (S.D.N.Y.1987). Nonetheless, we urge restraint in applying the rule to criminal investigations to avoid handcuffing law enforcement officers in their efforts to develop evidence.

The government relies substantially on dicta from *United States v. Vasquez,* 675 F.2d 16, 17 (2d Cir.1982) (*per curiam*), where we suggested that DR 7-104(A)(1)'s applicability to a criminal investigation "is doubtful." More recently, however, in *Jamil,* we observed that the question remained open "whether DR 7-104(A)(1) would have been violated in this context...." 707 F.2d at 646. And we have intimated that similar practices, such as prearraignment interviews outside the presence of defense counsel, may contravene DR 7-104(A)(1) although they pass constitutional muster. *United States v. Foley,* 735 F.2d 45, 48 (2d Cir.1984), *cert. denied,* 469 U.S. 1161, 105 S.Ct. 915, 83 L.Ed.2d 928 (1985).

In addition, contrary to the government's assertions, at least two district courts in this circuit have concluded that the rule applies irrespective of the sixth amendment. In *United States v. Sam Goody, Inc.,* 506 F.Supp. 380, 393-94 (E.D.N.Y.1981), the court initially rejected defendant's sixth amendment claims but, in subsequent proceedings, *United States v. Sam Goody, Inc.,* 518 F.Supp. 1223, 1224-25 n. 3 (E.D.N.Y.1981), *appeal dismissed,* 675 F.2d 17 (2d Cir.1982), found it "unethical for the government to 'wire' an informant and send him to one of the defendants' offices in an attempt to elicit incriminating statements *after* that defendant's attorney had presented himself to the prosecutor and told him to deal with his client only through him (the attorney)." (emphasis in original). Thus, the trial judge expressly extended the rule beyond the confines of the sixth amendment.

Thereafter, in the lower court's *Jamil* decision, Judge Weinstein of the Eastern District of New

York exhaustively considered the government's contention that DR 7-104(A)(1) is coextensive with the sixth amendment. He noted that several courts have hinted at this "unity" and treated the Disciplinary Rule as little more than an appendage to the constitutional provision, without independent import in this context. *United States v. Jamil*, 546 F.Supp. 646, 655-58 (E.D.N.Y.1982), *rev'd* *839 *on other grounds*, 707 F.2d 638 (2d Cir.1983). *See, e.g., Kenny*, 645 F.2d at 1339; *Lemonakis*, 485 F.2d at 954-56. Such treatment, however, makes the rule superfluous, and "is neither apparent nor compelling." 546 F.Supp. at 657. The sixth amendment and the disciplinary rule serve separate, albeit congruent purposes.

The Constitution defines only the "minimal historic safeguards" which defendants must receive rather than the outer bounds of those we may afford them. *McNabb v. United States*, 318 U.S. 332, 340, 63 S.Ct. 608, 612, 87 L.Ed. 819 (1943). In other words, the Constitution prescribes a floor below which protections may not fall, rather than a ceiling beyond which they may not rise. The Model Code of Professional Responsibility, on the other hand, encompasses the attorney's duty "to maintain the highest standards of ethical conduct." Preamble, Model Code of Professional Responsibility (1981). The Code is designed to safeguard the integrity of the profession and preserve public confidence in our system of justice. It not only delineates an attorney's duties to the court, but defines his relationship with his client and adverse parties. Hence, the Code secures protections not contemplated by the Constitution.

Moreover, we resist binding the Code's applicability to the moment of indictment. The timing of an indictment's return lies substantially within the control of the prosecutor. Therefore, were we to construe the rule as dependent upon indictment, a government attorney could manipulate grand jury proceedings to avoid its encumbrances.

The government contends that a broad reading of DR 7-104(A)(1) would impede legitimate investigatory practices. In particular, the government fears career criminals with permanent " house counsel" could immunize themselves from infiltration by informants. *See United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir.), *cert. denied*, 464 U.S. 852, 104 S.Ct. 165, 78 L.Ed.2d 150 (1983); *Vasquez*, 675 F.2d at 17; *Guerrerio*, 675 F.Supp. at 1436. We share this concern and would not interpret the disciplinary rule as precluding undercover investigations. Our task, accordingly, is imposing adequate safeguards without crippling law enforcement.

The principal question presented to us herein is: to what extent does DR 7-104(A)(1) restrict the use of informants by government prosecutors prior to indictment, but after a suspect has retained counsel in connection with the subject matter of a criminal investigation? In an attempt to avoid hampering legitimate criminal investigations by government prosecutors, Judge Glasser resolved this dilemma by limiting the rule's applicability "to instances in which a suspect has retained counsel specifically for representation in conjunction with the criminal matter in which he is held suspect, and the government has knowledge of that fact." *Hammad*, 678 F.Supp. at 401. Thus, he reasoned, the rule exempts the vast majority of cases where suspects are unaware they are being investigated.

[3] While it may be true that this limitation will not unduly hamper the government's ability to conduct effective criminal investigations in a majority of instances, we nevertheless believe that it *is* unduly restrictive in that small but persistent number of cases where a career criminal has retained "house counsel" to represent him in connection with an ongoing fraud or criminal enterprise. This Court has recognized that prosecutors have a responsibility to perform investigative as well as courtroom-related duties in criminal matters, *see, e.g., Barbera v. Smith*, 836 F.2d 96, 99 (2d Cir.1987). As we see it, under DR 7-104(A)(1), a prosecutor is "authorized by law" to employ legitimate investigative techniques in conducting or supervising criminal investigations, and the use of informants to gather evidence against a suspect will frequently fall within the ambit of such authorization.

[4] Notwithstanding this holding, however, we recognize that in some instances a government

prosecutor may overstep the already broad powers of his office, and in so doing, violate the ethical precepts of DR 7-104(A)(1). In the present case, the prosecutor issued a subpoena for the informant, not to secure his attendance before the grand jury, but to create a pretense that might help the informant elicit admissions from a represented suspect. Though we have no occasion to consider the use of this technique in relation to unrepresented suspects, *see United States v. Martino,* 825 F.2d 754 (3d Cir. 1987), we believe that use of the technique under the circumstances of this case contributed to the informant's becoming that alter ego of the prosecutor. Consequently, the informant was engaging in communications proscribed by DR 7-104(A)(1).[FN1] *See Massiah,* 307 F.2d 62, 66 (2d Cir.1962), *rev'd on other grounds,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Therefore, we agree with Judge Glasser that the prosecution violated the disciplinary rule in this case.

> FN1. *See also* ABA Standards Relating to the Administration of Criminal Justice, Standard 3-3.1(d) ("It is unprofessional conduct for a prosecutor to secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena or similar judicial process unless the prosecutor is authorized by law to do so.").

[5] Notwithstanding requests for a bright-line rule, we decline to list all possible situations that may violate DR 7-104(A)(1). This delineation is best accomplished by case-by-case adjudication, particularly when ethical standards are involved. As our holding above makes clear, however, the use of informants by government prosecutors in a preindictment, non-custodial situation, absent the type of misconduct that occurred in this case, will generally fall within the "authorized by law" exception to DR 7-104(A)(1) and therefore will not be subject to sanctions.

[6] On appeal, the government also claims that even if there was a violation of the disciplinary rule, exclusion is inappropriate to remedy an ethical breach. We have not heretofore decided whether suppression is warranted for a DR 7-104(A)(1) violation. *See, e.g., Jamil,* 707 F.2d at 646. We now hold that, in light of the underlying purposes of the Professional Responsibility Code and the exclusionary rule, suppression may be ordered in the district court's discretion.

The exclusionary rule mandates suppression of evidence garnered in contravention of a defendant's constitutional rights and protections. *See Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The rule is thus intended to: deter improper conduct by law enforcement officials, *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984); *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Elkins v. United States,* 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960); preserve judicial integrity by insulating the courts from tainted evidence, *United States v. Payner,* 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980); *Elkins,* 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669; *Olmstead v. United States,* 277 U.S. 438, 469, 48 S.Ct. 564, 569, 72 L.Ed. 944 (1928) (Holmes, J., dissenting); and maintain popular trust in the integrity of the judicial process, *United States v. Calandra,* 414 U.S. 338, 357, 94 S.Ct. 613, 624, 38 L.Ed.2d 561 (1974) (Brennan, J., dissenting). Anything short of exclusion, the Supreme Court reasoned, would be "worthless and futile" in securing the rule's goals. *Mapp,* 367 U.S. at 652, 81 S.Ct. at 1690.

These same needs arise outside the context of constitutional violations. "The principles governing the admissibility of evidence in federal criminal trials have not been restricted ... to those derived solely from the Constitution." *McNabb v. United States,* 318 U.S. at 341, 63 S.Ct. at 613. Hence, the exclusionary rule has application to governmental misconduct which *841 falls short of a constitutional transgression.

Some statutes require exclusion by their own terms. For example, the government is precluded from introducing into evidence any wire or oral communication intercepted contrary to authorized

procedures. 18 U.S.C. § 2515. Other statutes have been interpreted to permit exclusion when contravention of the statute interferes with a substantial right, such as prompt execution of a warrant. *See Commonwealth v. Cromer,* 365 Mass. 519, 313 N.E.2d 557 (1974); W. LaFave and J. Israel, Criminal Procedure, § 3.1, p. 146. Indeed, suppression may even be ordered for violations of administrative regulations. *See United States v. Caceres,* 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979). In the instant case, we consider the exclusionary rule's applicability to yet another category of non-constitutional transgressions-breaches of ethical precepts enforced pursuant to the federal courts' supervisory authority.

For half a century, the Supreme Court has recognized that "civilized conduct of criminal trials" demands federal courts be imbued with sufficient discretion to ensure fair proceedings. *Nardone v. United States,* 308 U.S. 338, 342, 60 S.Ct. 266, 268, 84 L.Ed.2d 307 (1939). Thus, as Justice Frankfurter observed, "[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *McNabb,* 318 U.S. at 340, 63 S.Ct. at 612. Such standards constitute an exercise of the courts' supervisory authority. *McNabb,* 318 U.S. at 341, 63 S.Ct. at 613.

Specifically, the Supreme Court has expressly authorized federal courts to exercise their " supervisory power in some circumstances to exclude evidence taken from the *defendant* by ' willful disobedience of law,' " *Payner,* 447 U.S. at 735 n. 7, 100 S.Ct. at 2446 n. 7, quoting *McNabb,* 318 U.S. at 345, 63 S.Ct. at 615 (emphasis in original), or "when the defendant asserts a violation of his own rights," *Payner,* 447 U.S. at 734-35, 100 S.Ct. at 2445-46. Other circuits have expressly included suppression among the panoply of remedies available to district judges for violations of DR 7-104(A)(1). *United States v. Killian,* 639 F.2d 206 (5th Cir.), *cert. denied,* 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981); *United States v. Durham,* 475 F.2d 208 (7th Cir.1973); *United States v. Thomas,* 474 F.2d 110 (10th Cir.), *cert. denied,* 412 U.S. 932, 93 S.Ct. 2758, 37 L.Ed.2d 160 (1973).

In *Thomas,* the Tenth Circuit excluded a defendant's written statement obtained by a state law enforcement agent without the knowledge or consent of defense counsel. Specifically, the court held that "once a criminal defendant has either retained an attorney or had an attorney appointed for him by the court, any statement obtained by interview from such defendant *may not be offered in evidence for any purpose* unless the accused's attorney was notified of the interview...." *Thomas,* 474 F.2d at 112 (emphasis added). Thus, the Tenth Circuit not only permitted, but actually required suppression of evidence violative of the ethical canon.

Shortly thereafter, in *Durham,* the Seventh Circuit reached a similar conclusion, citing "ethical questions" concerning statements taken "in the absence of retained counsel known to be representing the defendant on this criminal charge." 475 F.2d at 211. And more recently, in *Killian,* the Fifth Circuit opined that "[s]uppression of the statements would probably have been the appropriate sanction in this case, were it not for the refusal of the government to use those statements." 639 F.2d at 210.

Moreover, at least one district court in this circuit has relied upon this line of analysis, expressing willingness to exclude evidence garnered in contravention of the Rule. *United States v. Howard,* 426 F.Supp. 1067 (W.D.N.Y.1977). Thus, after finding a constitutional basis to suppress the defendant's statements, the court alternatively refused to "allow this contested evidence to be admitted at trial ... because the government failed to advise defendant's counsel of the continued interrogation *842 and refused to heed counsel's directive that interrogation should not proceed in his absence." *Howard,* 426 F.Supp. at 1072.

The government argues that other circuits have refused to suppress evidence for disciplinary rule violations. *See, e.g., United States v. Sutton,* 801 F.2d 1346 (D.C.Cir.1986); *United States v. Dobbs,* 711 F.2d 84 (8th Cir.1983); *Lemonakis,* 485 F.2d 941 (D.C.Cir.1973). These cases, however, are

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inapposite because the courts never resolved the exclusion issue. Rather, they held DR 7-104(A)(1) was not violated, and, thus, the remedy question never arose.

Accordingly, we reject the government's effort to remove suppression from the arsenal of remedies available to district judges confronted with ethical violations. We have confidence that district courts will exercise their discretion cautiously and with clear cognizance that suppression imposes a barrier between the finder of fact and the discovery of truth. *See Elkins,* 364 U.S. at 216,, 80 S.Ct. at 1443-44.

[7] Judge Glasser apparently assumed, as the *Thomas* court implied, that suppression is a necessary consequence of a DR 7-104(A)(1) violation. Exclusion, however, is not required in every case. Here, the government should not have its case prejudiced by suppression of its evidence when the law was previously unsettled in this area. Therefore, in light of the prior uncertainty regarding the reach of DR 7-104(A)(1), an exclusionary remedy is inappropriate in this case.

Accordingly, we find the district court abused its discretion in suppressing the recordings and videotapes, and its decision is reversed.

C.A.2 (N.Y.),1988.
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Briefs and Other Related Documents (Back to top)

• 1987 WL 888124 (Appellate Brief) Brief for the Appellant (Jan. 27, 1987) Original Image of this Document (PDF)

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876 F.Supp. 265
(Cite as: 876 F.Supp. 265)

C

United States District Court,M.D. Florida,
Orlando Division..
In re DISCIPLINARY PROCEEDINGS Governed by Rule 2.04(d), M.D.Fla.Rules, REGARDING John DOE, an Assistant United States Attorney.
No. 92-122 MISC-J-16.

Feb. 26, 1993.

Disciplinary proceedings were commenced. A three-judge panel of the District Court held that local rule of professional conduct governing communication with person represented by counsel does not apply to noncustodial communications with corporate employees during criminal investigations, including grand jury investigations, that have not become formal proceedings initiated by making of arrest, filing of complaint, or return of indictment.

Disciplinary report rejected.

West Headnotes

[1] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
For local rule of professional conduct governing communication with person represented by counsel to apply to communications with corporate employee, it must be known that corporate employee involved is managerial person or there must be significant likelihood that lawyer initiating communication may seek to use employee's statement against corporation in subsequent proceedings. West's F.S.A. Bar Rule 4-4.2; U.S.Dist.Ct.Rules M.D.Fla., Rule 2.04(c).

[2] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
Local rule of professional conduct governing communication with person represented by counsel does not apply to noncustodial communications with corporate employees during criminal investigations (including grand jury investigations) that have not become formal proceedings initiated by making of arrest, filing of complaint, or return of indictment, even though prosecutor knows that corporate counsel is acting in matter for corporation and employee to be interviewed may have information that could be used against corporation. West's F.S.A. Bar Rule 4-4.2; U.S.Dist.Ct.Rules M.D.Fla., Rule 2.04(c).

[3] Attorney and Client 45 ⇐32(2)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(2) k. Standards, Canons, or Codes of Conduct. Most Cited Cases
Local rule of professional conduct borrowing and adopting Florida Rules of Professional Conduct is not adoption also of opinions of Ethics Committee of Florida Bar or even the decisions of the Supreme Court of Florida interpreting those rules; while those opinions are highly persuasive, district court must retain right to interpret and apply rules in federal setting, which responsibility and authority

may not be abdicated to state system. U.S.Dist.Ct.Rules M.D.Fla., Rule 2.04(c).

Before MOORE, Chief Judge, and HODGES and SCHLESINGER, District Judges.

OPINION

Under Rule 2.04(d)(2) of the rules of this court, whenever a grievance committee of the court reports that there is a probable cause to believe that a member of the bar has been guilty of unprofessional or unethical conduct, the Chief Judge is obliged to constitute a three judge court to hear and determine the matter. This is such a case and we sit as a three-judge court. We have decided, however, on the basis of the committee report alone, [FN1] that no further proceedings are warranted. Yet, because the issue presented is one that is likely to recur in this district as it has elsewhere, we write to explain our decision for the benefit and future guidance of the Middle District bar.

FN1. The rule contemplates that, ordinarily, when the grievance committee makes a finding and report of probable cause, an order to show cause is entered and a confidential evidentiary hearing is conducted after the accused member of the bar is given an opportunity to respond to that order.

Rule 2.04(c), M.D.Fla.Rules, provides that "the professional conduct of all members of the bar of this court ... shall be governed by the Model Rules of Professional Conduct of the American Bar Association as modified and adopted by the Supreme Court of Florida to govern the professional behavior of the members of The Florida Bar." The ABA Model Rule involved in this case is Rule 4.2, modified and adopted in Florida as Rule 4-4.2. See *Rules Regulating The Florida Bar*, 494 So.2d 977, 1065 (Fla.1986). The Florida rule provides:

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 [party] 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 by law to do so].

*267 The bracketed language appears in the ABA Model Rules but not in the Florida rules. Thus, in Florida, "party" was changed to "person," and the phrase "or is authorized by law to do so" was deleted.

The issue presented is whether Rule 4-4.2 is violated by an Assistant United States Attorney who (a) interviews or causes an agent to interview the employees of a corporation which is (b) the subject of an on-going grand jury investigation and is (c) represented by counsel concerning the subject of that investigation but (d) such counsel is not given notice and has not consented to the interview of the corporate employees.

The facts, as reported by the grievance committee, are these. During the course of a grand jury investigation of the activities of a corporation, [FN2] an Assistant United States Attorney directed federal law enforcement agents to interview a secretary employed by that corporation. The corporation was then represented by counsel employed with respect to the subject of the investigation and this fact was known to the Assistant United States Attorney. The corporation's lawyer was not notified of the impending interview and did not consent to it. When telephoned by the agents, the secretary agreed to the interview and invited the agents to her home. On arrival the agents asked the secretary whether or not she had an attorney. When she responded in the negative, the agents informed her that she had a right to have an attorney present, including the attorney for her corporate employer if she so desired. She declined and proceeded to answer the agents' questions (which related to certain computer codes used in her work). The interview was completed in about ten minutes.

FN2. The anonymity of all persons will be preserved given the nature of the proceeding and the explicit provision for

confidentiality contained in Rule 2.04(d), M.D.Fla.Rules.

Later, a bookkeeper employed by the corporation was also approached by the agents under direction of the Assistant United States Attorney, again without the knowledge or consent of corporate counsel. When questioned by the agents the bookkeeper informed them that she did not wish to be interviewed and that was the end of the conversation.

The comment following Florida Rule 4-4.2 contains, in pertinent part, the following passage (494 So.2d at 1065-1066):
In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee 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). This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

[1] Here, one of the defenses urged before the grievance committee by the Assistant United States Attorney was that the subjects of the interviews-the secretary and the bookkeeper-were not managerial employees nor were their statements likely to be imputed to the corporation or to constitute an admission on the part of the corporation. The grievance committee concluded, however, and we think rightly so, that the ultimate legal effect or admissibility of statements taken from employees is not the appropriate standard by which to measure the propriety of a prosecutor's contact with corporate employees. To predicate application of Rule 4-4.2 on what a court ultimately rules on these issues-a ruling which may well depend in part on other facts not known at the time of the communication in question-would create an unworkable standard by which attorneys would be required to govern their conduct. We think instead, in keeping with the comment following Rule 4-4.2, that the rule should apply when it is known that the corporate employee involved is a managerial person or there is any significant likelihood that the lawyer initiating the communication*268 may seek to use the employee's statement against the corporation in subsequent proceedings.

[2] That brings us, then, to the broader question of whether Rule 4-4.2 has any application at all to government lawyers conducting (or directing) non-custodial interviews of corporate employees during the investigative process before the initiation of criminal proceedings but at a time when the prosecutor knows that corporate counsel is acting in the matter for the corporation and the employee to be interviewed may have information that could be used against the corporation.[FN3]

FN3. The grievance committee concluded in this instance that because the employees were approached for information relating to their work, any statements by them arguably could be admissible in evidence against the corporation under Rule 801(d)(2)(D), F.R.E., citing *Wilkinson v. Carnival Cruise Line, Inc.*, 920 F.2d 1560, 1564-67 (11th Cir.1991). Following the standard previously discussed, therefore, the committee concluded that Rule 4-4.2 applied regardless of the *results* of the communication, i.e., whether any statements were actually obtained which could have been used against the corporation. We take the same approach.

While that issue is new both to this court and to the Eleventh Circuit, it has been decided elsewhere on several occasions.[FN4] The most recent opinion at the circuit level is the Tenth Circuit decision in *United States v. Ryans*, 903 F.2d 731 (10th Cir.1990), *cert. denied*, 498 U.S. 855, 111 S.Ct. 152, 112 L.Ed.2d 118 (1990). The court in *Ryans* recognized that at least three circuits-the D. C.

Circuit in *United States v. Lemonakis*, 485 F.2d 941, 955 (D.C.Cir.1973), *cert. denied*, 415 U.S. 989, 94 S.Ct. 1586, 39 L.Ed.2d 885 (1974) and *United States v. Sutton*, 801 F.2d 1346, 1366 (D.C.Cir.1986); the Eighth Circuit in *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir.1983), *cert. denied*, 464 U.S. 852, 104 S.Ct. 165, 78 L.Ed.2d 150 (1983); and the Ninth Circuit in *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir.1981), *cert. denied*, 452 U.S. 920, 101 S.Ct. 3059, 69 L.Ed.2d 425 (1981)-have all held that the so-called anti-contact rule simply does not apply in the case of a non-custodial interrogation which occurs in a criminal investigation that has not then ripened into formal criminal proceedings such as the making of an arrest, the filing of a complaint or the return of an indictment. Id. at 735-736. The *Ryans* court further noted that three other circuits-the Fifth, the Seventh and the Tenth-have all held that the rule either does or may apply to a *custodial*, pre-indictment interview of a defendant in the absence of and without the consent of counsel (*United States v. Killian*, 639 F.2d 206, 210 (5th Cir.1981), *cert. denied* 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981); *United States v. Durham*, 475 F.2d 208, 211 (7th Cir.1973), and *United States v. Thomas*, 474 F.2d 110, 112 (10th Cir.1973), *cert. denied*, 412 U.S. 932, 93 S.Ct. 2758, 37 L.Ed.2d 160, (1973)); and only the Second Circuit has purported to apply the rule in a non-custodial, pre-indictment setting. *United States v. Hammad*, 858 F.2d 834 (2d Cir.1988), *cert. denied*, 498 U.S. 871, 111 S.Ct. 192, 112 L.Ed.2d 154 (1990). *Id.* at 736. The *Ryans* court then held (903 F.2d at 739):

> FN4. Most of the decisions involve the predecessor of Rule 4.2 of the ABA Model Rules of Professional Conduct (1983), namely the corresponding provisions of DR 7-104(A)(1) of the ABA Model Code of Professional Responsibility (1970).

We must disagree with the *Hammad* opinion's interpretation of the rule. We are not convinced that the language of the rule calls for its application to the investigative phase of law enforcement. In contrast to DR 7-104(A)(2), which prohibits a lawyer representing a client from giving advice to a "person" who is not represented by counsel, DR 7-104(A)(1) prohibits communications with a " party." Black's Law Dictionary defines party as "a litigant, or a person directly interested in the subject matter of a case." Moreover, the rule concerns a lawyer's conduct "[d]uring the course of his representation of a client," and is limited to communication "on the subject matter of the representation" with a party represented by counsel "in that matter." Although the Code does not define these terms, the rule appears to contemplate an adversarial relationship between litigants, whether in a criminal or a civil setting. This interpretation is consistent with the policies underlying the disciplinary rule and the ethical canon from *269 which it derives. We agree, for example, with the District of Columbia Circuit's conclusion that the contours of the "subject matter of the representation" are uncertain during the investigative stage of the case, and therefore less susceptible to the damage of "artful" legal questions which the disciplinary rule is designed in part to avoid. *See Lemonakis*, 485 F.2d at 956.

We choose to follow the Tenth Circuit's decision in *Ryans*, as well as the other circuits that have reached the same result, and we hold that Rule 4-4.2 does not apply to non-custodial communications with corporate employees during criminal investigations (including grand jury investigations) that have not become formal proceedings initiated by the making of an arrest, the filing of a complaint or the return of an indictment. In so holding we recognize, as pointed out earlier, that the Florida formulation of the ethical rule is broader than the ABA Model Rule 4.2 in that "person" was substituted for "party," and that the qualifying phrase "or is authorized by law to do so" was deleted. Nevertheless, we believe that the other references in the rule to "representing a client" in relation to communications concerning "the subject of the representation" and made "in the matter," all contemplate, as the court held in *Ryans*, an adversarial relationship between litigants, not a mere investigation. As one state court has said:
The weightiest of all arguments against the appellant's position [that Model Rule 4.2 applies in an investigative setting] is the one based upon

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(Cite as: 876 F.Supp. 265)

simple common sense. If the law were as the appellant urges it upon us, there could be little effective investigation of any sophisticated and organized criminal enterprise. A successful case, for instance against insider trading on Wall Street may depend upon hundreds of confidential interviews of employees, many of whom will insist upon anonymity. It would be difficult to maintain anonymity if the boss's lawyer were present at the interview.

In re Criminal Investigation No. 13, 82 Md.App. 609, 573 A.2d 51, 55 (1990).

[3] We are also mindful of the fact that the Committee on Professional Ethics of The Florida Bar has issued an opinion to the effect that Rule 4-4.2 is applicable to federal prosecutors (a conclusion with which we agree), but other portions of that opinion might be read as being inconsistent with the result we reach here. See, Florida Bar Ethics Opinion 90-4, July 15, 1990 (1990 WL 446959). Specifically, that opinion states:

The Committee acknowledges the potential problems raised [by the Government], but believes that Rule 4-4.2 can be applied in a manner that minimizes or eliminates those concerns. In covert investigation situations, for example, applying the rule according to its express terms should not impede most covert investigations. A Justice Department attorney's knowledge that a person is represented in connection with a particular matter is required before the rule is triggered. In the case of an undercover investigation, it seems unlikely that the typical suspect will be represented with respect to that particular matter because at that time he or she usually will not be aware that there is a "matter."

The memorandum also raises the concern that career criminals will retain "house counsel" in an effort to use Rule 4-4.2 to frustrate investigations. The Committee believes that a relatively small number of criminals have "house counsel" on permanent retainer; with respect to those few who do, it can be argued that the rule would not be triggered until the suspect referred the particular matter in question to his or her "house counsel."

That the rule should not impede "most" covert investigations, or the fact that "a relatively small number of criminals have 'house counsel' ", is to us an unsatisfactory interpretation and result. Government lawyers, and the courts and other lawyers for that matter, need and are entitled to have a bright line in this area separating ethical from unethical behavior. Thus, to the extent our holding today is inconsistent with Florida Bar Ethics Opinion 90-4, we choose not to follow that opinion.[FN5]

FN5. We do not regard the provisions of our Rule 2.04(c), M.D.Fla.Rules, borrowing and adopting the Florida Rules of Professional Conduct, as an adoption also of the opinions of the Ethics Committee of The Florida Bar or even the decisions of the Supreme Court of Florida interpreting those rules. While the opinions of the Committee and of the Supreme Court of the state are highly persuasive, this court must retain the right to interpret and apply the rules in the federal setting. That responsibility and authority may not be abdicated to the state system. C.f. *In re Wilkes,* 494 F.2d 472, 474-75 (5th Cir.1974).

*270 The report of the grievance committee in this instance is rejected and no further action will be taken by the court in this proceeding.

DONE and ORDERED.

M.D.Fla.,1993.
In re Disciplinary Proceedings Regarding Doe
876 F.Supp. 265

END OF DOCUMENT

Westlaw.

895 F.Supp. 1000
(Cite as: 895 F.Supp. 1000)

H
Briefs and Other Related Documents

United States District Court,N.D. Illinois,Eastern Division.
UNITED STATES of America,
v.
Barney WARD, George Lindemann, and Marion Hulick.
No. 94 CR 483.

Aug. 8, 1995.

Defendant moved to suppress certain tapes and statements on the ground that the government obtained them in violation of the local rule of professional conduct prohibiting lawyers from communicating with represented parties. The District Court, Marovich, J., held that: (1) assuming without deciding that the anticontact rule applies to preindictment, noncustodial communications, government's undercover taping of defendant in meetings with another suspect fell within "authorized by law" exception to the rule; (2) assuming without deciding that the anticontact rule applies to preindictment, noncustodial communications, meeting between Assistant United States Attorney, who knew that defendant was represented by counsel, and defendant to discuss defendant's cooperation options with the government violated the rule; and (3) assuming that the Assistant United States Attorney's meeting with defendant violated the anticontact rule, suppression was not the proper remedy.

Motion denied.

West Headnotes

[1] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
Local rule of professional conduct and its predecessor prohibiting contact with represented parties apply only to attorneys. U.S.Dist.Ct.Rules N.D.Ill., Professional Conduct Rule 4.2; Code of Prof.Resp., DR 7-104(A)(1).

[2] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
Broad application of local rule of professional conduct prohibiting attorneys from communicating with represented parties would have potentially drastic impact on legitimate and necessary tactics involved in the investigation of crime. U.S.Dist.Ct.Rules N.D.Ill., Professional Conduct Rule 4.2.

[3] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
Assuming without deciding that the local rule of professional conduct prohibiting attorneys from contacting represented parties applied to preindictment, noncustodial communication, government's undercover taping of defendant in

meetings with another suspect was legitimate investigatory tactic that fell within the "authorized by law" exception to the anti-contact rule. U.S.Dist.Ct.Rules N.D.Ill., Professional Conduct Rule 4.2.

[4] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
Assuming without deciding that the local rule of professional conduct prohibiting attorneys from contacting represented parties applied to preindictment, noncustodial communication, meeting between Assistant United States Attorney, who knew that defendant was represented by counsel, and defendant for the purpose of confronting defendant with the evidence against him and discussing his cooperation options violated the anti-contact rule. U.S.Dist.Ct.Rules N.D.Ill., Professional Conduct Rule 4.2.

[5] Criminal Law 110 ⇐394.1(2)

110 Criminal Law
110XVII Evidence
110XVII(I) Competency in General
110k394 Evidence Wrongfully Obtained
110k394.1 In General
110k394.1(2) k. Wrongful Mode of Procurement. Most Cited Cases
Assuming that preindictment, noncustodial meeting between Assistant United States Attorney and defendant violated the local rule of professional conduct prohibiting attorneys from contacting represented parties, suppression of the evidence against defendant was not the appropriate remedy in light of the unsettled nature of the law in this area and the fact that defendant voluntarily chose to continue to speak with the attorney and the FBI agent who accompanied him. U.S.Dist.Ct.Rules N.D.Ill., Professional Conduct Rule 4.2.

[6] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
It is best to maintain narrow reading and cautious approach to local rule of professional conduct prohibiting attorneys from contacting represented parties. U.S.Dist.Ct.Rules N.D.Ill., Professional Conduct Rule 4.2.

[7] Attorney and Client 45 ⇐32(12)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k32 Regulation of Professional Conduct, in General
45k32(12) k. Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent. Most Cited Cases
Local anti-contact rule or substantially similar provision is widely accepted ethical limitation on communications with represented parties found in almost all jurisdictions. U.S.Dist.Ct.Rules N.D.Ill., Professional Conduct Rule 4.2.

*1001 James B. Burns, United States Attorney, Steven A. Miller, Susan Cox, Assistant United States Attorneys, Chicago, IL, for U.S.
Victor J. Rocco, Gordon Altman Butowsky Weitzen Shalov & Wein, New York City, Gregory C. Jones, Carolyn McNiven, Grippo & Elden, Chicago, IL, for Barney Ward.

MEMORANDUM OPINION AND ORDER
MAROVICH, District Judge.
In this opinion, the Court addresses one of the remaining motions filed by Defendants in this case. Defendant Barney Ward has moved to suppress what the Court will label the 1992 Tapes and the 1994 Statements. Ward's motion is not premised on a violation of the Constitution. Instead, Ward

seeks suppression on the novel ground that the Government obtained the 1992 Tapes and the 1994 Statements in violation of Rule 4.2 of the Rules of Professional Conduct for the Northern District of Illinois. Rule 4.2 provides:

During the course of representing a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by another lawyer in that matter unless the first lawyer has obtained the prior consent of the lawyer representing such other party or as may otherwise be authorized by law.

Ward's contention that Assistant United States Attorney Steven Miller violated Rule 4.2 raises issues not yet addressed by the Seventh Circuit or any other court in the Circuit. For the reasons set forth below, the Court will deny the motion to suppress and finds no basis to hold an evidentiary hearing.

BACKGROUND

For purposes of this motion, the Court has considered the various affidavits tendered by the parties concerning the contacts between the Government, Ward and counsel for Ward prior to his indictment. The following represents a summary of the facts contained within those affidavits. Notably, the Government argues that, even assuming the truth of the facts asserted by Ward, the Government has not violated Rule 4.2 and suppression is not warranted.

On March 4, 1992, FBI Special Agent Peter Cullen telephoned Barney Ward at his home in Brewster, New York. According to *1002 Ward, Cullen informed him that the United States Attorney's Office for the Northern District of Illinois was investigating an alleged scheme involving the deliberate killing of horses to defraud insurance companies. Cullen told Ward that an individual named Thomas Burns had been arrested in February 1991 for the killing of a horse named Streetwise. Cullen asked questions about Burns, also known as Tim Ray in the indictment. Ward answered those questions. Ward states that Cullen told him that he was not a target of the investigation. Cullen also asserts that at this time Ward was not viewed as a suspect or target of the investigation. Agent Cullen asked Ward if he would speak to agents in person. Ward told Cullen that he would get back to him. Ward states that he intended to consult with his attorney before agreeing to an in-person interview.

Ward asserts that he then consulted with his attorney, Victor J. Rocco. Rocco agreed to contact Agent Cullen. Agent Cullen indicates that he received a call on March 4, 1992, from Andrew Heine who indicated that he represented Ward. Beyond this communication, Cullen has no record of Heine ever contacting him again.

On March 9, 1992, Rocco phoned Agent Cullen and informed Cullen that he represented Ward. After describing the nature of the investigation and noting that AUSA Steven Miller was supervising it, Agent Cullen told Rocco that Ward was not a target of the investigation. According to Rocco, Cullen stated that the Government's interest in interviewing Ward was to obtain corroboration of certain facts about Thomas Burns. Rocco concluded the conversation by indicating that he would talk to Ward and get back to Cullen.

According to Rocco, he contacted Agent Cullen again on March 10, 1992. Agent Cullen does not indicate in his affidavit any phone call from Rocco on March 10, 1992. As asserted by Rocco, he told Cullen that Ward had apparently already answered the pertinent questions. He also told Agent Cullen that he was unwilling to allow Ward to be interviewed directly by other government agents. Rocco suggested that the government would need a subpoena to speak with Ward. Rocco further states that he told Agent Cullen that the Government was not to communicate with Ward and that any communications regarding the investigation should be handled through him.

According to Agent Cullen, he never informed AUSA Miller about his contact with Rocco or Heine. Further, Cullen states that he first received information indicating Ward's alleged involvement in the crimes under investigation in June 1992.[FN1] At this time, Paul Valliere, a target of the

investigation, revealed in an interview that Ward had arranged for him to hire Burns to kill his horse. In addition to Valliere and Agent Cullen, AUSA Miller and Anton Valukas, counsel for Valliere, were also present at this interview. By the time of Valliere's revelation, Agent Cullen indicates that he had forgotten about his contact with Victor Rocco due to the massive nature of the investigation. Prior to Valliere's statements implicating Ward, the Government contends that its investigation did not focus on Ward because their principal cooperating witness, Burns, had steadfastly denied that Ward had any involvement in the matters under investigation.

FN1. In a supplemental submission to the Court, Defendant produced an Illinois State Police investigative report dated January 28, 1991. That report notes that a confidential source suspected the possibility of Ward's involvement in a horse killing for George Lindemann in December 1990. Defendant argued that this report, produced by the Government in discovery, indicates that Ward was a target long before June 1992. Defendant Ward, however, failed to indicate when this report came into the Government's hands. In response to the supplemental submission, the Government has tendered the affidavit of Agent Cullen who says that he has never read this report and that it was produced to the FBI in January 1995. The Court finds no basis to conclude that this investigative report has any bearing on the motion to suppress.

The 1992 Tapes

As part of Valliere's agreement to cooperate in the investigation, he agreed to surreptitiously record conversations with Ward. On June 8, 1992, Valliere recorded a telephone conversation with Ward. Valliere also recorded two more conversations with Ward *1003 on October 5, 1992, and November 20, 1992. Rocco maintains that he was never contacted by any representative of the Government to seek his permission to communicate with Ward. These three taped conversations are the 1992 Tapes Ward seeks to suppress.

The 1994 Statements

On February 16, 1994, AUSA Miller, and Special Agent Cullen, accompanied by four other FBI agents, showed up at a trailer camp in Wellington, Florida, where Ward was staying while competing in a horse show in the area. According to Ward, AUSA Miller informed him that he was a target of the investigation and told him that the Government planned to indict him in the immediate future. Ward asserts that AUSA Miller told him that the Government's case was overwhelming and that the purpose of the meeting was for him to consider his cooperation options. Ward states that he told AUSA Miller that he was represented by counsel that his counsel had spoken to Agent Cullen on his behalf. Ward asserts that Cullen denied speaking to his attorney.

Cullen states that until Ward mentioned the name, he had forgotten about Victor Rocco. Cullen does not indicate whether he told AUSA Miller about his recollection. Agent Cullen states that after Ward mentioned Rocco's name, Ward was asked whether he wished to continue to speak with AUSA Miller and Cullen. Ward stated that he would talk to them and the interview continued. On July 26, 1994, the grand jury indicted Barney Ward on charges of conspiracy, wire fraud, mail fraud and obstruction of justice.

DISCUSSION

The Supreme Court has recognized, albeit in a different context, that "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160, 108 S.Ct. 1692, 1697-98, 100 L.Ed.2d 140 (1988) (granting district courts substantial latitude in resolving potential conflicts of interest due to multiple representation of

defendants in criminal proceedings). Defendant Ward argues that AUSA Miller orchestrated a clandestine campaign to obtain admissions from Ward despite knowing that Ward was represented by counsel. Ward contends that the 1992 Tapes and the 1994 Statements must be suppressed as a sanction for AUSA Miller's violation of Rule 4.2. The Government has taken the position that (1) the bulk of authority does not support application of Rule 4.2 to pre-indictment investigations, (2) even if Rule 4.2 applies, AUSA Miller did not violate it, and (3) even if AUSA Miller did violate Rule 4.2, suppression of the evidence is not the proper remedy. The precise issues before this Court are (1) whether Rule 4.2 applies to federal prosecutors prior to indictment in the context of non-custodial contacts with represented persons and, if so, (2) whether AUSA Miller violated the Rule in this case such that suppression is the proper remedy.

Before we address these issues, a brief comment on the history and purpose of Rule 4.2 is necessary. Rule 4.2 and its predecessors have existed since 1908 but only recently have defense attorneys urged that the anti-contact rule should apply in criminal proceedings to bar certain contacts by prosecutors. *Grievance Committee for the Southern District of New York v. Simels*, 48 F.3d 640, 647 (2d Cir.1995) (considering application of Rule 4.2 to defense attorney's contact with represented co-defendant). Among the many justifications for such rules is the need to protect "a defendant from the danger of being tricked into giving his case away by opposing counsel's artfully crafted questions." *United States v. Jamil*, 707 F.2d 638, 646 (2d Cir.1983). Notwithstanding this significant policy goal, the *Simels* court concluded that the origin and scope of the anti-contact provision reveal that it is primarily a rule of professional courtesy. In *Simels*, the Second Circuit preceded its careful review of the history of DR 7-104(A)(1) with the following wise admonition: "The conceded power of the federal district courts to supervise the conduct of attorneys should not be used as a means to substantially alter federal criminal law practice." *Simels*, 48 F.3d at 644. With this in mind, we proceed to analyze Ward's arguments.

*1004 [1] Defendant Ward places tremendous reliance on an earlier Second Circuit case, *United States v. Hammad*, 858 F.2d 834 (2d Cir.1988), *cert. denied*, 498 U.S. 871, 111 S.Ct. 192, 112 L.Ed.2d 154 (1990). As far as this Court's research discloses, *Hammad* represents one of the only opinions finding that a prosecutor had violated DR 7-104(A)(1), predecessor of Rule 4.2. *See also Simels*, 48 F.3d at 649 ("It is significant that since *Hammad*, neither this Court nor any reported district court decision considering an alleged violation of DR 7-104(A)(1) has found that the Rule had been violated.") Even in the *Hammad* opinion upon which Ward relies, the Second Circuit refused to suppress the evidence obtained through that violation.

Since *Hammad* appears to be the only major opinion finding a violation, a brief review of the Second Circuit's holding in that case is in order. In *Hammad*, the prosecutor issued a subpoena to an informant, "not to secure his attendance before the grand jury, but to create a pretense that might help the informant elicit admissions from a represented suspect." 858 F.2d at 840. Although both Rule 4.2 and its predecessor DR 7-104(A)(1) apply only to attorneys, the Second Circuit reasoned that the prosecutor's use of a sham subpoena rendered the informant the prosecutor's alter ego. *Id.* As a result, the Second Circuit found the communications prohibited under the Rule.

Before reaching this conclusion, however, the *Hammad* court considered the close question of whether and to what extent DR 7-104(A)(1) applies in the investigatory stages of a criminal prosecution. The Government argued, as it does here, that the anti-contact rule is coextensive with the Sixth Amendment and thus is not effective until initiation of formal adversary proceedings-preliminary hearing, indictment, information or arraignment. Several courts before and after *Hammad* have adopted this view. *See, e.g., United States v. Powe*, 9 F.3d 68, 69 (9th Cir.1993); *United States v. Ryans*, 903 F.2d 731, 740 (10th Cir.), *cert. denied*, 498 U.S. 855, 111 S.Ct. 152, 112 L.Ed.2d 118 (1990); *United States v. Sutton*, 801 F.2d 1346, 1366 (D.C.Cir.1986); *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir.), *cert. denied*, 464 U.S. 852, 104 S.Ct. 165, 78 L.Ed.2d 150 (1983); *United*

States v. Kenny, 645 F.2d 1323, 1339 (9th Cir.), *cert. denied*, 452 U.S. 920, 101 S.Ct. 3059, 69 L.Ed.2d 425 (1981); *United States v. Infelise*, 773 F.Supp. 93, 94-95 (N.D.Ill.1991) (Williams, J.).[FN2]

FN2. The Seventh Circuit, however, has not taken a position on the application of Rule 4.2 or its predecessor to pre-indictment, non-custodial settings. In custodial settings, the Seventh Circuit has suggested that a pre-indictment interview of a suspect in the absence of retained counsel "raise[s] ethical questions" under DR 7-104(A)(1). *United States v. Durham*, 475 F.2d 208, 211 (7th Cir.1973).

[2] These courts typically base their holdings on two major themes. First, the courts quite correctly foresee the potentially drastic impact of a broad application of Rule 4.2 on legitimate and necessary tactics involved in the investigation of crime. *See, e.g., Ryans*, 903 F.2d at 739. Second, the courts often interpret the use of the term "party" in DR 7-104(A)(1) to require formal adversary proceedings before the rule applies.[FN3] *Id.*

FN3. DR 7-104(A)(1) provides that:
(A) During the course of his representation of a client a lawyer shall not:
(1) Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized to do so.

In keeping with these restrictive interpretations of DR 7-104(A)(1), the commentary to ABA Model Rule 4.2 explains that:
[C]ommunications with represented criminal suspects prior to initiation of formal judicial proceedings as part of a noncustodial investigation by government agents or with informants generally are not considered subject to the anticontact rule. The rationale is usually that the rule is coextensive with the accused's Sixth Amendment right to counsel, and that the contact is within the " authorized by law" exception.

Annotated Model Rules of Professional Conduct Rule 4.2 cmt. (1992). Several commentators also have concluded that the anti-contact*1005 rule was not intended to apply to the investigatory activities of prosecutors and law enforcement officials. *See* L. Ray Patterson & Thomas B. Metzloff, *Legal Ethics: The Law of Professional Responsibility* 709 (3d ed. 1989) ("Almost surely drafters of the Rule [DR 7-104(A)(1)] did not contemplate its application to prosecutors."); Bruce A. Green, *A Prosecutor's Communications with Defendants: What are the Limits?*, 24 Crim.L.Bull. 283 (1988) (same); Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 Colum.L.Rev. 1137, 1176-83 (1987) (arguing that the anti-contact rule was designed for civil-litigation and its adversarial setting).

A host of questions plagues any attempt to apply Rule 4.2 or its predecessor to prosecutors in the pre-indictment, non-custodial setting present in this case. Who is the prosecutor's client? Is the prosecutor acting as an advocate or merely a supervising investigator? What is the subject of the representation at this stage of a criminal investigation? When does a person become a " party" under the Rule? Is it proper for a court to apply Rule 4.2 when the courts have struggled to craft a delicate balance between the needs of law enforcement and the constitutional protections afforded by the Fifth and Sixth Amendments? What does "authorized by law" mean? No court has offered an extensive analysis of these difficult questions. As will become apparent, this Court need not provide all the answers to resolve Defendant's motion.[FN4]

FN4. If there is be national uniformity in this area, this Court believes it can only come through the Supreme Court's exercise of its rule-making power to craft a uniform rule for federal criminal prosecutions. Of course, as the Second Circuit pointed out in *Simels*, such a rule

> would be subject to Congressional veto under the Rules Enabling Act. *See Simels,* 48 F.3d at 644 n. 6; 28 U.S.C. § 2074. As this Court well knows, the rule-making process in the area of criminal procedure is a long and difficult one.

In its attempt to address a few of these difficult questions, the *Hammad* court reasoned that the " Constitution defines only the 'minimal historic safeguards' which defendants must receive rather than the outer bounds of those we may afford them." *Hammad,* 858 F.2d at 839 (quoting *McNabb v. United States,* 318 U.S. 332, 340, 63 S.Ct. 608, 612-13, 87 L.Ed. 819 (1943)). While acknowledging the potential impact on investigations of crime, the Second Circuit found nothing on the face of the Rule that constrained its reach to that of the Sixth Amendment right to counsel. *Id.* at 838. The court noted that the Model Code of Professional Responsibility " encompasses the attorney's duty to 'maintain the highest standards of ethical conduct.' " *Id* at 839. The Second Circuit thus found that the Code " secures protections not contemplated by the Constitution." *Id.* Of course, the dilemma then became to balance these protections with the unique and well-established role of federal prosecutors in the investigation of crime.

In its resolution of this dilemma, the *Hammad* court expressed several limitations on the use of the disciplinary rule. The Second Circuit expressly noted that it "would not interpret the disciplinary rule as precluding undercover investigations." *Hammad,* 858 F.2d at 839. Furthermore, the Second Circuit explained that under DR 7-104(A)(1), "a prosecutor is 'authorized by law' to employ legitimate investigative techniques in conducting or supervising criminal investigations, and the use of informants to gather evidence against a suspect will frequently fall within the ambit of such authorization." *Id.*

The *Hammad* court's holding that DR 7-104(A)(1) applies to pre-indictment, non-custodial contacts with represented persons has not resulted in any further findings of a violation of the rule. Even in the Second Circuit, the courts have generally concluded that the contact was authorized by law as a legitimate investigative technique. *See Simels,* 48 F.3d at 649 (citing cases). In practice, then, the broad exceptions to the rule noted in *Hammad* may operate to swallow the Rule itself except in perhaps the most egregious instances of misconduct. Consequently, the results in the Second Circuit do not differ in practical terms from the result reached in those circuits where the courts have concluded that the "no contact" rule simply was not meant to apply to prosecutors *1006 in the pre-indictment, non-custodial stage of criminal investigations.

This Court finds itself in substantial agreement with those courts finding that the anti-contact rule was not meant to apply to pre-indictment non-custodial contacts with a represented party. While substantial authority supports this view, we will proceed to analyze Ward's arguments assuming that the Rule does apply. If, operating under this assumption, the Court concludes that suppression is an inappropriate remedy for any asserted violation then we need not answer the more difficult questions presented in by the ambiguous language of Rule 4.2.

Rule 4.2 is not entirely identical to DR 7-104(A)(1) and one can argue that at least one of these differences supports a broader interpretation of Rule 4.2. In that regard, we note that the commentary to Rule 4.2 indicates that the "[t]his rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." One could read this statement as undermining some aspects of the logic underlying the numerous court holdings finding that the rule does not apply to pre-indictment contacts. As stated above, these decisions have reasoned that formal proceedings must be initiated in order for the predecessor to Rule 4.2 to come into play. This comment calls that assumption into question when Rule 4.2 applies. In addition, this comment weakens the argument that prior to the initiation of formal proceedings, the criminal suspect is not a "party" within the meaning of the Rule. This ambiguity, among others, informs and supports our decision to proceed on the assumption that Rule 4.2 applies.

[3] Assuming that Rule 4.2 applies in the pre-Indictment, non-custodial setting presented in this case, we must now analyze first whether the facts indicate AUSA Miller's awareness of Ward's represented status and whether the contact at issue falls within the "authorized by law" exception to Rule 4.2. As to the first question, the record does not clearly indicate that AUSA Miller knew Ward had retained counsel in conjunction with the fraud investigation at the time the 1992 Tapes were made.

Assuming that Miller did know that Ward was represented by counsel at the time of the 1992 Tapes, the Government argues that the undercover taping of Ward in meetings with Valliere falls within the "authorized by law" exception to Rule 4.2 . This Court agrees. In reaching this conclusion, this Court finds itself in accord with the cases recognizing that undercover taping of suspects during the investigatory stage of criminal proceedings is precisely the kind of legitimate investigatory tactic that even the *Hammad* court found permissible. *Hammad*, 858 F.2d at 839; *see also United States v. DeVillio*, 983 F.2d 1185, 1192 (2d Cir.1993). While we need not rule out the possibility that a prosecutor could abuse this tactic in an attempt to interfere with a suspect's relationship with counsel, we do not find any showing of such an attempt in this case with respect to the 1992 Tapes. [FN5]

> FN5. Upon request of the Court, the Government tendered preliminary transcripts of the challenged taped conversations. Having reviewed those transcripts, the Court finds no suggestion that the Government abused its authority to investigate the matters charged in the indictment.

[4] Next, we consider the 1994 Statements made by Ward upon AUSA Miller's visit to his trailer a few months before Ward's indictment. The Court finds this incident far more troublesome. Rule 4.2 would appear to prohibit AUSA Miller from proceeding with any communication with Ward after he stated that he had an attorney. Given that the stated purpose of this meeting was to confront Ward with the allegedly overwhelming nature of the evidence against him and to discuss his cooperation options, the danger for Ward of uncounseled communication with the Government is readily apparent. Couple this danger with the power of the prosecutor to control the timing of the indictment and the triggering of constitutional protections which would prohibit such contact and the potential for prejudice and abuse of power increases. In contrast to the covert use of informants, the Court finds the balance of competing interests weighs in favor of prohibiting overt contacts with represented parties for the purpose of discussing cooperation with the Government. Assuming *1007 Rule 4.2 applies, the Court would consider AUSA Miller's contact with Ward in violation of the Rule.

[5] Having deemed the contact a violation of the Rule, the Court must consider whether suppression is the proper remedy. The *Hammad* court considered suppression a proper remedy, but left its use to the discretion of the district court. At the time AUSA Miller confronted Ward and to this day, a substantial body of law exists which leads to the conclusion that his conduct was proper. At the very least, no court in this circuit, and few, if any, courts in other jurisdictions had affirmatively ruled that similar conduct violated any ethical prohibition. Considering the unsettled state of law in this area and that Ward voluntarily chose to continue to speak with AUSA Miller and Agent Cullen, the Court finds suppression inappropriate in this case.

[6] In reaching this conclusion, we have attempted to evaluate and account for the numerous competing policies that Rule 4.2 seeks to balance. We are also mindful of recent holdings in other areas of the law that suggest that a "federal judge cannot [and should not] punish the prosecutor at the expense of the law-abiding public." *United States v. Van Engel*, 15 F.3d 623, 632 (7th Cir.1993), *cert. denied*, 511 U.S. 1142, 114 S.Ct. 2163, 128 L.Ed.2d 886 (1994). In keeping with this view and the admonition of the *Simels* court, we find it best to maintain a narrow reading and cautious approach to Rule 4.2.

[7] Rule 4.2, or a substantially similar provision, is a widely accepted ethical limitation on

communications with represented parties found in almost all jurisdictions. Nonetheless, its impact on federal prosecutors remains unclear. If the Rule is to operate with any force and if it is to offer any guidance to federal prosecutors, a uniform standard is necessary. Notwithstanding this need, this Court cannot rewrite the Rule to provide the clarity and uniformity that is currently absent.

While on the subject of uniformity, the Court notes that the Department of Justice has promulgated a regulation covering the subject of communication with represented parties. *See* 28 C.F.R. pt. 77; 59 Fed.Reg. 39,910 (1994). While this regulation represents a moderation of the views expressed by then Attorney General Thornburgh in his infamous memorandum, it still contains broad statements regarding the power of the Justice Department to set ethical standards for its attorneys and to exempt them from application of contrary standards. The regulation also indicates that the Department generally will serve as the disciplinary body and gives notice of the Department's intent to displace state and federal rules of ethical conduct. The regulation does not apply to the conduct in this case because it had not yet taken effect, but we do find a few points noteworthy.[FN6]

> FN6. For more recent discussion of the conflicts inherent in the anti-contact rule and divergent opinions of courts and commentators, see Amy R. Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts,* 8 Geo. J. Legal Ethics 473 (1995); Neals-Erik William Delker, *Ethics and the Federal Prosecutor: The Continuing Conflict over the Application of Model Rule 4.2 to Federal Attorneys,* 44 Am.U.L.Rev. 855 (1995); Roger C. Cramton & Kisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules,* 53 U.Pitt.L.Rev. 291 (1992).

Setting aside the debate about the impact of this regulation and the authority of the Justice Department to enact it, this regulation would appear to prohibit AUSA Miller from communicating with Ward as he did in this case. Specifically, the commentary to the final rule notes that the Department has settled on a general policy (embodied in changes to the United States Attorneys' Manual) of prohibiting overt contacts with represented targets of criminal investigations. *See* 59 Fed.Reg. 39927-28. The regulation itself states that:

An attorney for the government may not initiate or engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement, or other disposition of actual or potential criminal charges ..., or sentences or penalties with a represented person ... who the attorney for the government knows is represented *1008 by an attorney without the consent of the attorney representing such person....

28 C.F.R. § 77.8. While one can engage in word-play to argue that a discussion of cooperation options does not fit precisely within this provision, it is apparent to the Court that the policies underlying Rule 4.2 and this new regulation would counsel against AUSA Miller's contact with Ward as it occurred in this case.

In the absence of Seventh Circuit authority on this issue, this Court is confronted with an impressive number of opinions persuasively reasoning that Rule 4.2's substantially identical predecessor does not and should not apply to pre-indictment, non-custodial contacts by prosecutors or undercover informants. As we have noted, those opinions are not entirely satisfactory but we cannot ignore them. In light of this substantial body of authority, the limited authority supporting Defendant's position is insufficient to cause the Court to hold affirmatively that Rule 4.2 does apply to such contacts. In any event, assuming the Rule does apply in this case, the Court would not find suppression warranted. Accordingly, Defendant's motion to suppress the 1992 Tapes and the 1994 Statements is denied.

CONCLUSION

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For the reasons set forth above, the Court denies Defendant Ward's motion to suppress.

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Briefs and Other Related Documents (Back to top)

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C

Supreme Court of New Mexico.
In the Matter of G. Paul HOWES, Esq., An Attorney Admitted to Practice Before the Courts of the State of New Mexico.
No. 23414.

May 21, 1997.

Attorney discipline proceeding was brought. The Supreme Court held that: (1) duty of Assistant United States Attorney (AUSA) to refrain from communicating with a represented criminal defendant was not subject to argument, and thus finding of violation of disciplinary rule was not precluded on basis of advice AUSA received from chief and deputy chief of felony section; (2) AUSA " communicated" with represented defendant by listening to him after defendant called; (3) communications were not authorized by law; (4) Supremacy Clause did not preclude discipline; and (5) appropriate sanction was public censure.

Censured.

West Headnotes

[1] Attorney and Client 45 ⇐37.1

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k37.1 k. In General. Most Cited Cases
Disciplinary rule providing that subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty must be read in connection with rule which directs that a lawyer is bound by the Rules notwithstanding that the lawyer acted at the direction of another person, and rule is not meant to immunize attorneys from accountability for their misconduct. SCRA 1986, Rules 16-502, subds. A, B.

[2] Attorney and Client 45 ⇐38

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k38 k. Character and Conduct. Most Cited Cases
Duty of Assistant United States Attorney (AUSA) to refrain from communicating with a represented criminal defendant was not subject to argument, and thus finding of violation of disciplinary rule was not precluded on basis of advice AUSA received from chief and deputy chief of felony section, and, in any event such advice did not provide excuse where AUSA was not seeking advice as to his ethical obligations to defendant and to the public defender, and any passing consideration of these duties which may have arisen was secondary to the primary question of how to obtain admissible evidence from a defendant. SCRA 1986, Rules 16-402, 16-502, subd. B.

[3] Attorney and Client 45 ⇐37.1

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k37.1 k. In General. Most Cited Cases
Within rule stating that subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty, attorney's employer, even though that employer may be an attorney or an arm of the United States government, cannot create an "arguable question of professional duty" by the simple mechanism of unilaterally declaring that a

particular rule of conduct is burdensome and should not apply to its employees. SCRA 1986, Rule 16-502, subd. B.

[4] Attorney and Client 45 ⇐38

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k38 k. Character and Conduct. Most Cited Cases

Within rule providing that lawyer shall not communicate with represented party without other lawyer's consent, lawyer "communicates" with a represented party when he willingly listens to what that person has to say, and thus Assistant United States Attorney (AUSA) violated rule when, after criminal defendant initiated telephone calls to him and detective, AUSA did not contact defendant's attorney and encouraged defendant to talk to him and detective without advice of defendant's attorney. SCRA 1986, Rule 16-402.

[5] Attorney and Client 45 ⇐38

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k38 k. Character and Conduct. Most Cited Cases

Even where a government attorney's actions do not violate constitutional standards so as to require suppression of evidence in criminal case, they may still be in violation of disciplinary rules, such as rule prohibiting communication with represented party. SCRA 1986, Rule 16-402.

[6] Attorney and Client 45 ⇐37.1

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k37.1 k. In General. Most Cited Cases

Conduct of attorney could not be excused, for disciplinary purposes, by rule of jurisdiction in which he acted, where rule was not adopted until after the conduct in question. SCRA 1986, Rule 16-805.

[7] Attorney and Client 45 ⇐38

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k38 k. Character and Conduct. Most Cited Cases

Communications by Assistant United States Attorney (AUSA) with represented party were not " authorized by law" so as to be permissible under disciplinary rule on ground that Congress has authorized the Attorney General to direct and supervise the conduct of Department of Justice (DOJ) prosecutors and that AUSA acted in compliance with DOJ policies; general enabling statutes do not authorize the DOJ to issue policies or regulations that absolve its attorneys from the responsibility to comply with ethical regulations promulgated by the courts granting them their licenses and responsible for their conduct as officers of the court. 28 U.S.C.A. §§ 515(a), 516, 533, 547; SCRA 1986, Rule 16-402.

[8] Attorney and Client 45 ⇐38

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k37 Grounds for Discipline
45k38 k. Character and Conduct. Most Cited Cases

States 360 ⇐18.67

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.67 k. Professions. Most Cited Cases

Supremacy Clause of United States Constitution did not preclude New Mexico Supreme Court from enforcing New Mexico's Rules of Professional Conduct concerning communication with represented party against Assistant United States

Attorney (AUSA) acting within his official duty, as no federal law required him to carry out his duties in an unprofessional manner. U.S.C.A. Const. Art. 6, cl. 2; SCRA 1986, Rule 16-402.

[9] Attorney and Client 45 ⇐59.8(1)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.8 Public Reprimand; Public Censure; Public Admonition
45k59.8(1) k. In General. Most Cited Cases
(Formerly 45k58)
Public censure was warranted for conduct of Assistant United States Attorney (AUSA) in improperly communicating with represented defendant, though defendant initiated contact and despite contention that AUSA was simply caught in a dispute between the federal government and the state bar associations, where contacts occurred on several occasions, some of them after defendant's attorney had objected, and AUSA refused to accept or recognize the wrongful nature of his conduct, and had substantial experience in the practice of law. SCRA 1986, Rules 16-402, 16-804, subd. A.

**161 *313 Virginia L. Ferrara, Chief Disciplinary Counsel, Albuquerque, Ray Twohig, Special Assistant Bar Counsel, Albuquerque, for Disciplinary Board.
Department of Justice, Eric H. Holder, Jr., Charles F. Flynn, W. Mark Nebeker, Washington, DC, Robert J. Gorence, Albuquerque, for Respondent.

OPINION

PER CURIAM:
This matter came before the Court following disciplinary proceedings conducted pursuant to the Rules Governing Discipline, 17-101 to 17-316 NMRA. Pursuant to Rule 17-316, G. Paul Howes requested that we review the recommendation of the disciplinary board that he be publicly censured for several violations of the Rules of Professional Conduct, 16-101 to 16-805 NMRA. Because of the significant questions of law involved and the existence of an issue of substantial public interest, we requested briefs from the parties. After a thorough review of the record of these proceedings and the arguments and briefs submitted, we adopt the recommendation of the disciplinary board.

FACTS

In early August 1988, Billy Wilson (Wilson) was shot and killed in an apartment house in Washington, D.C. On August 23, 1988, Darryl Smith (defendant) was arrested for this murder and subsequently gave a lengthy videotaped statement to police, in which he admitted being at the scene of the murder but claimed that the murder had actually been committed by a Larry Epps.

Public Defender Jaime S. Gardner was appointed to represent defendant, and respondent, who was at all material times an attorney licensed by this Court, represented the United States. At the time of the events giving rise to the charges in this case (November 1988,) respondent practiced law as an Assistant United States Attorney (AUSA) in the Superior Court of the District of Columbia pursuant to the authorization of the United States Attorney General under 28 USC § 517.[FN1]

FN1. 28 USC § 517 directs that "the Solicitor General, or any other officer of the Department of Justice, may be sent to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

On August 24, 1988, defendant appeared for presentment in the Superior Court of the District of Columbia and was ordered held without bond until a preliminary hearing could be held. On September 6, 1988, respondent moved the court to release defendant on his own recognizance pending further investigation of the case. Prior to defendant's release, respondent indicated to the public defender that he would like to speak with defendant about the case; however, she refused

permission unless respondent was willing to offer her client complete immunity, which he was not willing to offer.

Between September 26 and October 5, 1988, defendant contacted District of Columbia Metropolitan Police Detective Donald R. Gossage (detective) on several occasions and made statements to him about the Wilson murder and two other murders. The detective told respondent about these statements. Respondent had no personal experience with a defendant who contacted police to discuss his own case, but office policy permitted him to deal with witnesses who were represented by counsel in other cases without notifying their attorneys. Respondent discussed the situation with the chief of the felony section, who told him to advise the detective that if **162 *314 defendant were to initiate further contact with the detective, the detective could listen but that he was not to initiate contact with defendant. There was no discussion about whether to notify the public defender. Respondent relayed the message to the detective and told him as well to make notes of anything defendant might say, so that any inconsistent statements could be used for impeachment purposes.

The public defender first learned of these contacts with her client through testimony presented at his preliminary hearing on October 5, 1988. Probable cause was found to charge defendant with the murder of Wilson, and he was remanded to custody and ordered held without bond. Defendant's attorney complained in open court about the contacts with her client made without her knowledge and asked the court to issue a directive that there be no further contacts with defendant. Respondent stated that he expected no further contacts with defendant but added that "if he wants to call us, we will take his call." The court issued no directive but observed on the record that the public defender would undoubtedly instruct her client that such contacts were not in his best interest.

Between October 5 and November 1, 1988, however, defendant continued his efforts to contact the detective from the jail. He left messages for the detective on his beeper and even spoke with him on several occasions regarding the Wilson murder and the other two cases (wherein he was not charged and, therefore, not represented by counsel.) Respondent was aware that defendant was talking about the Wilson murder to the detective but did not notify the public defender or obtain her permission for the detective to discuss the case with her client.

On November 18, 1988, the detective was in respondent's office working with him on the Wilson murder case when respondent himself received a call from defendant on his private line. Respondent had never given his private number to defendant, although he had given it to the detective. At respondent's request, the detective listened in on an extension. Although defendant was advised that he did not have to speak with defendant and the detective and that his lawyer would not be happy, he proceeded to talk about the Wilson case for approximately six minutes while respondent and the detective listened and took notes. Defendant called back about ten minutes later and spoke with respondent and the detective for another fifteen minutes, although he was again reminded that the public defender would be unhappy with him. At the conclusion of this call, the detective agreed to visit defendant at the jail. Although respondent's notes indicate that defendant now was focusing almost exclusively on the Wilson murder, the public defender was advised neither of the calls nor of the impending visit with her client.

The detective had been advised by respondent that because defendant was initiating the calls, the constitutionality and the voluntariness of the statements were established and that he should "let Darryl talk" but refrain from posing questions of his own. After the call to his own office and the appointment for the detective to visit personally with defendant, respondent consulted with the chief and deputy chief of the felony section, who advised him that the detective should take a partner with him to the jail and give defendant his Miranda warnings before proceeding with the interview.

While the deputy chief recalled that there may have been some discussion of the ethical proprieties of communicating directly with defendant, the chief of the felony section acknowledged in his testimony

that his primary concern in advising respondent was whether the evidence would be constitutionally admissible. The deputy chief did not recollect that respondent advised either himself or the chief that he had personally spoken with defendant. It is also clear from the record that the chief's advice as to any ethical considerations was more directed at the contacts the detective was having with defendant rather than to any calls respondent might be receiving. The chief acknowledged that his understanding of the rules regarding professional responsibility would probably not have affected his advice, because he "didn't think the D.C. bar rules had much to say about how the police behaved."

On November 21, 1988, the detective and a partner visited with defendant at the jail and **163 *315 gave Miranda warnings, but defendant refused to sign the form because, he said, it would make his lawyer angry. The meeting was terminated.

On November 25 or 26, 1988, respondent received four more collect calls from defendant from the jail, all of which he accepted. He reminded defendant that his attorney had already complained to the court about his contacts with representatives of the government but permitted defendant to continue to speak with him nonetheless. Respondent asked no questions but listened to everything defendant had to say. While his notes again indicate that defendant was now speaking only of the Wilson murder, respondent did not advise defendant's attorney of these calls.

Defendant was indicted for the murder of Wilson on December 8, 1988. The public defender subsequently sought to have defendant's statements to respondent and the detective suppressed and/or the indictment dismissed on the basis of prosecutorial misconduct. The motion was denied by written order dated July 10, 1989, but the judge referred the matter of respondent's possible violation of DR 7-104 of the Code of Professional Responsibility [FN2] to the District of Columbia Board of Professional Responsibility.

FN2. At all relevant times, Rule 7-104(A)(1) of the Code of Professional Responsibility in the District of Columbia read as follows:
"During the course of his representation of a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing the other party or is authorized by law to do so."
At all relevant times, Rule 16-402 of the Rules of Professional Conduct in New Mexico read as follows:
"In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so ..."
The prohibitions contained in the Rules are essentially identical.

The Board of Professional Responsibility for the District of Columbia at that time had disciplinary jurisdiction over any attorney who engaged in the practice of law in the District of Columbia on a *pro hac vice* basis, but in 1988 the relevant rule did not apply to an AUSA practicing pursuant to 28 USC § 517. For this reason, the case was referred to the office of New Mexico's disciplinary counsel in May 1990.

Rule 16-805, NMRA subjects a lawyer admitted to practice in New Mexico to the disciplinary authority of this Court, even though he or she may be engaged in practice elsewhere. Both respondent and his employer, the United States Department of Justice (DOJ), filed federal suits challenging this Court's jurisdiction to conduct this disciplinary proceeding. Both suits were resolved in favor of this court's jurisdiction. *See In re Doe,* 801 F.Supp. 478 (D.C.N.M.1992) and *United States v. Ferrara,* 847 F.Supp. 964 (D.C.D.C.1993), *aff'd* 54 F.3d 825 (App.D.C.1995). These opinions have discussed some, but not all, of the legal principles we now address.

The hearing committee and the disciplinary board

concluded that respondent had violated Rule 16-402 by directly communicating about the subject of the representation with a party he knew to be represented by another lawyer in the matter without the consent of the other lawyer and without authorization of law to do so. The committee and the board panel also concluded that respondent had violated Rule 16-804(A) by knowingly communicating with defendant through the detective and by knowingly assisting and inducing the detective to communicate with defendant.

The issues raised by respondent in his appeal are (a) whether he was entitled to rely on the advice of his supervisor and thus should be excused for any violation of Rule 16-402 under the provisions of Rule 16-502(B); (b) whether he "communicated" with defendant within the meaning of Rule 16-402; (c) whether any communication that occurred was " authorized by law;" (d) whether his actions were authorized under federal Constitutional principles that override New Mexico's Rules of Professional Conduct; and (e) whether, even if a violation occurred, disciplinary action should be taken against him.

**164 *316 DISCUSSION

I. The applicability of Rule 16-502(B) to respondent's actions.

[1][2] Respondent first argues that New Mexico's Rule 16-502(B) should control the resolution of this case. This rule states that "a subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." It is respondent's contention that he was a "subordinate lawyer" within the meaning of this rule and that, as such, he was not only entitled but also obligated to rely upon the advice given to him by the chief and deputy chief of the felony section with respect to the calls generated by defendant. Consequently, he asserts, his actions must be excused. Respondent's position fails for several reasons.

First of all, Rule 16-502(B) must be read in connection with Rule 16-502(A), which directs that "a lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person." The ABA Comment to Model Rule 5.2 makes it clear that the rule, taken as a whole, is not meant to immunize attorneys from accountability for their misconduct. FN3

FN3. The ABA Comment begins with the admonition that "although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules."

Respondent has cited no cases, and we are aware of none, which hold for the proposition that an attorney may be exonerated from the consequences of his or her misconduct simply on the basis that the unethical acts were committed upon another's instructions or authorization. The few reported cases on this topic uphold the theory that an attorney is always answerable for his or her own actions. As one court has noted:
When others are involved in misconduct with counsel, degrees of culpability may vary, but ultimate responsibility does not. Counsel simply cannot delegate to others their own duty to act responsibly ... [in] the end, each member of the bar is an officer of the court. His or her first duty is not to the client or the senior partner, but to the administration of justice.

Roberts v. Lyons, 131 F.R.D. 75, 84 (E.D.Pa.1990) citing *Coburn Optical Indus., Inc. v. Cilco*, 610 F.Supp. 656, 661 (M.D.N.C.1985); *see also McCurdy v. Kansas Dep't of Transp.*, 21 Kan.App.2d 262, 898 P.2d 650, 652 (1995) ("[A] lawyer is not relieved of his or her responsibility for a violation of the rules of professional conduct just because he or she acted at the direction of a supervisor," citing the Comment to Rule 5.2).

[3] Even more compelling, however, is that in this

instance there was no "arguable question of professional duty" needing resolution. Respondent has argued that various memoranda generated in-house at the Department of Justice prior to his actions took the position that federal prosecutors are not bound by state disciplinary rules prohibiting communication with represented persons and has submitted these documents as exhibits to the record. We are not persuaded that an attorney's employer, even though that employer may be an attorney or an arm of the United States government, can create an " arguable question of professional duty" within the meaning of Rule 16-502(B) by the simple mechanism of unilaterally declaring that a particular rule of conduct is burdensome and should not apply to its employees.

In further support of his position that such an arguable question exists, respondent has cited numerous articles on the subject of whether or not federal prosecutors should be bound by state ethical rules. While we recognize that a debate currently rages regarding the applicability of ABA Model Rule 4.2 to federal prosecutors, all of the articles cited by respondent were published between 1990 and 1996 and were no doubt occasioned in part by former Attorney General Richard Thornburgh's *Memorandum* of June 8, 1989, which discussed the applicability of Rule 4.2 to federal prosecutors and which itself was issued after respondent's acts of misconduct. Respondent's duty to refrain from communicating with a represented criminal defendant is not subject to argument. According to the ABA Comment to Model Rule 5.2, if a question **165 *317 of ethical duty can be answered in only one way, " the duty of both lawyers is clear and they are equally responsible for fulfilling it."

Even if one were to accept the premise that an arguable question of professional duty with respect to Rule 16-402 existed in November 1988, it is apparent from the record of these proceedings that the discussions respondent had with the chief of the felony section regarding defendant's calls bore only a tangential relationship to respondent's ethical duties. The chief testified under oath that his " primary concern as a supervisor was whether the evidence was constitutionally admissible" and that he "would have focused on the constitutional issues involved in contacts between a defendant and a law enforcement representative; that is, I would have been focusing on his Fifth Amendment right to be silent, his Sixth Amendment right to counsel." Additionally, it is not clear from the testimony of the chief and deputy chief that they were even aware that respondent himself was communicating with defendant. Clearly respondent was not seeking advice as to his ethical obligations to defendant and to the public defender; any passing consideration of these duties which may have arisen was secondary to the primary question of how to obtain admissible evidence from defendant.

Rule 16-502 cannot and does not excuse respondent's conduct.

II. Whether respondent "communicated" with defendant within the meaning of Rule 16-402.

[4] Respondent next disputes the hearing committee's conclusion that a lawyer "communicates " with a represented party when he willingly listens to what that person has to say. He argues that he did not violate Rule 16-402 because the evidence in the case shows that he simply listened to defendant. Since there was no questioning of defendant, he reasons, he did not "communicate" with defendant. We disagree.

While certainly one purpose of Rule 16-402 is to prevent attorneys from utilizing their legal skills to gain an advantage over an unsophisticated lay person, an equally important purpose is to protect a person represented by counsel "not only from the approaches of his adversary's lawyer, but from the folly of his own well-meaning initiatives and the generally unfortunate consequences of his ignorance. " *People v. Green,* 405 Mich. 273, 274 N.W.2d 448, 459 (1979) (quoting Justice Levin's dissent).

The law and Rule 16-402 also recognize that once an attorney has been retained or appointed to represent a litigant, that attorney's responsibility is to act on behalf of the client and to protect the client from compromising his or her case by inadvertently waiving a viable defense or from disclosing privileged information. The attorney cannot fulfill

this responsibility when opposing counsel freely comes into contact with the client without the attorney's knowledge.

By not contacting defendant's attorney and by encouraging defendant to talk to him and to the detective without her advice, respondent violated Rule 16-402 and the principles behind it.
The principle is not so much, important as that is, to preserve the civilized decencies, but to protect the individual, often ignorant and uneducated, and always in fear, when faced with the coercive police power of the State. The right to the continued advice of a lawyer, already retained or assigned, is his real protection against an abuse of power by the organized State. It is more important than the preinterrogation warnings given to defendants in custody. These warnings often provide only a feeble opportunity to obtain a lawyer, because the suspect or accused is required to determine his need, unadvised by anyone who has his interests at heart. The danger is not only the risk of unwise waivers of the privilege against self-incrimination and of the right to counsel, but the more significant risk of inaccurate, sometimes false, and inevitably incomplete descriptions of the events described.

People v. Hobson, 39 N.Y.2d 479, 485, 384 N.Y.S.2d 419, 423, 348 N.E.2d 894, 899 (1976).

To argue that one does not violate Rule 16-402 if one does not ask questions or impart**166 *318 information borders on sophistry. People do not compromise their positions or waive their defenses by listening to an attorney; they do so by talking while the attorney listens.

"Communication" and "interrogation" are not synonymous, and it is "communication" that is prohibited by Rule 16-402. One can communicate interest and concern simply by indicating a willingness to listen. Since criminal defendants who are in custody often attempt to seek out and explain themselves to persons in authority under the generally misguided notion that they can extricate themselves from an unfortunate situation, the apparent willingness of a detective and a prosecutor to consider a defendant's version of the facts can be a particularly compelling message. "The influence of the prosecutor's presence is immeasurable." *People v. Green*, 405 Mich. 273, 274 N.W.2d 448, 456 (quoting Justice Moody, concurring in part and dissenting in part). Respondent and the detective were well aware that defendant was attempting to discuss the evidence in his own case in order to help himself and they used his false hope to their advantage. Even if they asked no questions of defendant, by granting him an audience they tacitly encouraged him to keep talking.

While a lack of overreaching by a prosecutor in this situation may be a mitigating factor, it does not excuse compliance with the standard prescribed by Rule 16-402. In *People v. Green*, the prosecutor merely listened to and took notes on the statement of a murder suspect (at the suspect's request) and, at the end of the statement, simply asked the man whether he had been telling the whole truth. Although the statement was found to be voluntary, the attorney's violation of Rule 7-104(A)(1) was recognized by the court. A similar violation of the rule occurred in *Suarez v. State*, 481 So.2d 1201 (Fla.1985), where the prosecuting attorney "did little except listen to what the defendant had to say and take notes." *Id.* at 1206 (quoting *Green*, 274 N.W.2d at 454-455).

We therefore reject respondent's argument that an attorney does not violate Rule 16-104 unless he or she is an active participant in a conversation with a represented opponent regarding the subject matter of the representation.

III. Whether respondent communications were " authorized by law" within the meaning of Rule 16-402.

Respondent next contends that even if he is found to have "communicated" with defendant, there is no violation of Rule 16-402 because any communication he might have had was "authorized by law." In support of this position, he asserts that his conduct would have been authorized under case law, under other states' interpretations of their disciplinary rules, and/or under statutes delegating to the Attorney General the responsibility for conducting criminal investigations and prosecutions

(and the interpretations the DOJ has placed on these statutes.)

The cases cited by respondent in support of his first theory do little to bolster his position, as the cases concern the issue of whether statements made to a prosecutor by a represented defendant should be suppressed rather than the issue of whether the prosecutor violated the ethical prohibition against contact with a represented party. As an example, respondent places great reliance on the decision of the District of Columbia Court of Appeals in *United States v. Rorie,* 518 A.2d 409 (D.C.App.1986), a case in which the chief of the felony section had personally participated. In *Rorie,* the appellate court overturned the trial court's exclusion of unsolicited statements made to a detective by a represented criminal defendant. The decision is based upon a Sixth Amendment analysis of the facts and makes no mention whatsoever of rules governing attorney ethical conduct.

Additionally, many of the suppression decisions relied upon by respondent involve non-custodial, pre-charging contacts with represented criminal defendants. Respondent cites *United States v. Ryans,* 903 F.2d 731 (10th Cir.), *cert. denied,* 498 U.S. 855, 111 S.Ct. 152, 112 L.Ed.2d 118 (1990), for the proposition that federal courts have declined to hold that otherwise legitimate law enforcement communications with represented persons violate ethical obligations. In *Ryans,* however, the Tenth Circuit noted that the **167 *319 rule against unauthorized contact would apply when one has been "charged, arrested or indicted or otherwise ' faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.' " 903 F.2d at 740 (quoting *Kirby v. Illinois,* 406 U.S. 682, 689, 92 S.Ct. 1877, 1882, 32 L.Ed.2d 411 [1972]). The Court explained that "when the government's role shifts from investigation to accusation, however, then the balance of the interests at stake shifts. Clearly, if adversary proceedings had begun here, this would be a different case." *Id.* In the present case, at the time of respondent's communications with defendant, defendant had been arrested, a preliminary hearing had been held, probable cause had been found, and defendant was in custody being held without bond.

Respondent's reliance upon the holdings in suppression decisions as justification for his conduct is misplaced, as these cases generally do not define an attorney's ethical responsibilities. If they mention disciplinary rules at all, it is primarily to make clear that the rules are not ordinarily available to a criminal defendant in fashioning a personal remedy for himself or herself. As recently noted by the Ninth Circuit Court of Appeals in reversing a lower court's dismissal of an indictment because of a prosecutor's unauthorized contact with a represented defendant:

We are sensitive to the district court's concerns that none of the alternative sanctions available to it are as certain to impress the government with our resoluteness in holding prosecutors to the ethical standards which regulate the profession as a whole. At the same time, we are confident that, when there is no showing of substantial prejudice to the defendant, lesser sanctions, such as holding the prosecutor in contempt or referral to the state bar for disciplinary proceedings, can be adequate to discipline and punish government attorneys who attempt to circumvent the standards of their profession.

United States v. Lopez, 4 F.3d 1455, 1464 (9th Cir.1993) (citations omitted).

[5] Respondent has chosen to ignore the body of case law which has held that even where an attorney's actions do not violate constitutional standards, they may still be in violation of Rule 7-104(A) and/or Rule 16-402. The exclusionary rule is available to courts when a defendant's constitutional rights have been trampled, but many courts have recognized that the public would be ill-served if the misconduct of an individual attorney permitted an otherwise guilty person to go free. A reversal of a defendant's conviction for a prosecutor's violation of Rule 7-104(A)(1) "would constitute reprehensible 'overkill,' " and "bar disciplinary action directed against the offending attorney would be a more appropriate response and would serve as a more effective deterrent than the indirect sanction of the exclusionary rule." *People v. Green,* 405 Mich. 273, 274 N.W.2d 448,

454-455; *see also United States v. Partin*, 601 F.2d 1000 (9th Cir.1979); *United States v. Dennis*, 843 F.2d 652 (2d Cir.1988).

[6] We disagree with respondent's argument that his communications with the defendant should be deemed authorized pursuant to comments to disciplinary rules in other jurisdictions, most of which were not even in effect at the time of his misconduct. We particularly reject the suggestion that his actions should be viewed in light of a Comment to the District of Columbia's Rule 7-104 adopted in 1991 (three years *after* his misconduct,) given the fact that early in these proceedings he objected strenuously to disciplinary counsel's having charged him with a violation of that rule as well as ours and successfully argued to the hearing committee that the Board and this Court had no authority to enforce District of Columbia's rules and that those particular allegations against him should be dismissed. He now claims to have acted in accordance with the District of Columbia's rule and the 1991 Comment thereto.

Had the Comment to the District of Columbia's rule been in effect in 1988, respondent's argument might have some merit under our Rule 16-805. This rule states that a New Mexico attorney is subject to this Court's disciplinary authority even though engaged in practice elsewhere but recognizes that "if the rules of professional conduct in the two jurisdictions differ, principles of conflict**168 *320 of laws may apply." Since even respondent admits in his brief that the District of Columbia's rule and New Mexico's rule were " identical in all pertinent respects" in 1988, however, we need not address this argument.

[7] Respondent's third purported justification for the position that his communications were "authorized by law" is that Congress has authorized the Attorney General to direct and supervise the conduct of DOJ prosecutors and that he acted in compliance with DOJ policies. We question whether 28 USC §§ 516, 515(a), 533 and 547 empower the Attorney General and/or the DOJ to adopt policies that are inconsistent with an attorney's ethical responsibilities. Consequently, we are not persuaded that those policies rise to the level of "law" within the meaning of Rule 16-402.

For regulations issued by an agency to have the force of law, they must be promulgated pursuant to statutory authority. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, 99 S.Ct. 1705, 1717-1718, 60 L.Ed.2d 208 (1979). While the grant of authority need not be specific, a reviewing court must " reasonably be able to conclude that the grant of authority contemplates the regulations issued." *Id.* at 308, 99 S.Ct. at 1721. We cannot reasonably conclude that the general enabling statutes cited by respondent authorize the DOJ to issue policies or regulations that absolve its attorneys from the responsibility to comply with ethical regulations promulgated by the courts granting them their licenses and responsible for their conduct as officers of the court.

As noted by one court:
The Department of Justice Appropriation Authorization Act ("DOJ Act") requires all attorneys in the Department of Justice to "be duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia." *See* Pub.L. No. 96-132, 93 Stat. 1040, 1044 (1979) (appropriations for fiscal year 1980); *see also* Pub.L. No. 102-395, 106 Stat. 1828, 1838, § 102(a) (1992) (appropriations for fiscal year 1993, reenacting provisions of Pub.L. 96-132). To be "duly licensed and authorized to practice as an attorney," a member of a state bar must of necessity comply with that state's code of professional responsibility. Congress therefore clearly contemplated compliance with state bar ethical standards by attorneys practicing in the Department of Justice.

United States v. Ferrara, 847 F.Supp. 964, 969 (D.C.D.C.1993), *aff'd* 54 F.3d 825 (App.D.C.1995); *see also United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 961 F.Supp. 1288, 1293-1294 (E.D.Mo.1997) (general enabling statutes do not authorize DOJ to issue regulations exempting its attorneys from requirements of state ethical rules) and *U.S. v. Lopez*, 4 F.3d 1455, 1461 (9th Cir.1993) (enabling statutes neither expressly nor impliedly authorize contacts with represented individuals.)

Under none of the theories advanced by respondent can it be said that his communications with defendant fell within the "authorized by law" exception to Rule 16-402.

IV. Whether the Supremacy Clause of the United States Constitution precludes our enforcement of New Mexico's Rules of Professional Conduct in this instance.

[8] Respondent next raises as a defense the same Supremacy Clause argument that has been decided adversely to him and his employer (DOJ) by two other courts of competent jurisdiction. *See In re Doe* and *U.S. v. Ferrara.* While we recognize that these decisions are not binding on this Court, in view of our holding that respondent was not authorized by any federal law to undertake the actions which he did, we choose to follow the reasoning of Judges Burciaga and Johnson in those cases and reject as well the argument that the Supremacy Clause bars us from regulating respondent's conduct.

At the outset of his argument, respondent claims that as a federal official he "cannot be punished for actions within his official duty." We remind respondent that our purpose in disciplining attorneys for violating our Rules of Professional Conduct is not the punishment of the attorney but " the protection of the public, the profession, and the administration of justice." *Preface,* Rules Governing **169 *321 Discipline, NMRA 17-101 to 17-316 NMRA. Our duty to ensure that the safety of the public, the reputation of the profession, and the orderly administration of justice are not undermined by the actions of an attorney licensed by this Court should in no way interfere with respondent's duty to see that the laws of the United States are "faithfully executed." As noted by Judge Burciaga:

Certainly, if permitted to act unethically any attorney could gain advantage over his or her adversary. But to prevail in litigation by unfair means not only rewards the unscrupulous but relegates justice to a hollow victory. This is exactly what the codes of ethics is designed to prevent ... "the United States wins its case whenever justice is done one of its citizens in the courts."

In re Doe, 801 F.Supp. at 488-489 (quoting from an inscription on the rotunda wall in Washington, D.C.).

The conflict between our ethical rules and respondent's federal responsibility to investigate and prosecute violations of the law, essential to a Supremacy Clause defense, is simply not present in this instance. Such a conflict arises if "compliance with both federal and state regulations is a physical impossibility" or where the state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough County v. Automated Med. Lab., Inc.,* 471 U.S. 707, 713, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985). Respondent has not cited and cannot point to any federal law which requires him to carry out his duties as an AUSA in an unethical manner or to any intent of Congress that he even be permitted to do so.

To the contrary, the intent of Congress still appears to be that respondent and others in his position should adhere to the ethical standards prescribed by their licensing courts. In 1990, the House Subcommittee on Government Information, Justice, and Agriculture conducted hearings on the innovative efforts by the DOJ to exclude its attorneys from the obligation to abide by state ethical rules. The Subcommittee concluded in its report:

We disagree with the Attorney General's attempts to exempt departmental attorneys from compliance with the requirements adopted by the State bars to which they belong and in the rules before the Federal courts before which they appear ... we are not persuaded of a need to exempt Departmental attorneys from Model Rule 4.2 as adopted by State bars and Federal Courts.

Federal Prosecutorial Authority in a Changing Legal Environment: More Attention Required, H.R.Rep. No. 986, 101st Cong., 2d. Sess. at 32 (1990).

While Congress unquestionably has the authority to preempt state regulations if it chooses to do so, it

clearly has yet to manifest such an intent with respect to Rule 16-402. Respondent's Supremacy Clause defense therefore must fail.

V. Appropriate Sanction.

[9] Finally, respondent asserts that even if we reject his other arguments and find that he has in fact violated our Rules of Professional Conduct, which we have done, he should not be disciplined for his offenses (a) because he "was simply caught in a dispute between the federal government and the state bar associations" and (b) because the conduct at issue could not recur, as the DOJ has promulgated a new policy which will henceforth govern contacts between AUSAs and represented defendants. *See* 28 C.F.R. Part 77.

We have noted that there was no extant controversy with respect to Rule 16-402 at the time of respondent's actions. The fact that former Attorney General Richard Thornburgh and his successors at the DOJ were part of and continued to engage in such a dispute does not excuse respondent's conduct. While the question of whether 28 C.F.R. Part 77 will control future contacts between DOJ attorneys and represented defendants is not before us, we note that within the past few months at least one court has rejected this most recent effort by the DOJ to exempt its attorney employees from the requirements of Model Rule 4.2 and related rules. *See United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 961 F.Supp. 1288 **170 *322 Thus it remains to be seen whether this latest DOJ " regulation" resolves this issue.

The ABA *Standards for Imposing Lawyer Sanction* (Standard 3.0) suggest that the following factors should be considered in determining what sanction should be imposed after a finding of attorney misconduct: (1) the duty violated; (2) the lawyer's mental state; (3) the actual or potential injury caused by the lawyer's misconduct; and (4) the existence of aggravating or mitigating factors.

The duty violated in this instance involves an attorney's duty to the legal system not to communicate improperly with those who are represented by other attorneys, one of the most elementary premises of the adversary system. Respondent had inappropriate contacts with the defendant directly on at least six (6) separate occasions and on numerous other occasions through an intermediary (the detective). Although defendant initiated the contacts, respondent's repeated willingness to accept defendant's calls and his statement in open court (after defendant's attorney had objected to contacts between defendant and the detective outside of her presence) to the effect that "If he [defendant] wants to call us, we will take his call" indicate that he encouraged and perpetuated the communications and that his actions were intentional rather than the result of negligence or ignorance.

There is no evidence that the contacts resulted in actual injury to either defendant or the legal process in general. The potential for injury, however, is obvious. As Judge Burciaga observed:
When a government lawyer, with enormous resources at his or her disposal, abuses this power and ignores ethical standards, he or she not only undermines the public trust, but inflicts damage beyond calculation to our system of justice. This alone compels the responsible and ethical exercise of this power.

In re Doe, 801 F.Supp. at 480.

While the fact that respondent does not have a prior disciplinary record may be considered as a mitigating factor (ABA Standard 9.32[a]), there are several factors in aggravation of his misconduct. Most notable is the fact that he refuses to this day to accept or even recognize the wrongful nature of his conduct. (ABA Standard 9.22[g]). When asked at one point whether, if put in the same position again he would do the same thing, respondent replied in the negative. His answer, however, appears to have been based more upon his annoyance at having become the subject of disciplinary charges than upon any remorse for his actions, as he went on to say:
I would never put myself in a position again to be a guinea pig, a test case, whether or not [the chief of the felony section] gave me the right directions, whether or not the Attorney General or the

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Thornburgh Memorandum, whether or not the District of Columbia Court of Appeals two years later said what happened was-if it was constitutional, it was proper. I would never again put myself in a position where so many authorities would second-guess what I thought I had done reasonably and within the bounds of my professional responsibilities.

Respondent then proceeded to remove any remaining doubt about whether or not he acknowledges that his actions were improper:
[W]hen you asked me if I would ever do this again, my answer was not to say that what I did then was wrong. I believe I was ethical and proper under those circumstances. And I would, given the same circumstances today, without any other changes, if this happened again, I would do the same thing. I wouldn't change.

We believe respondent's comments indicate a lack of appreciation for the importance of the duty at issue. We are not persuaded that he "was simply caught in a dispute."

A second aggravating factor is that at the time of this incident, respondent had substantial experience in the practice of law. (ABA Standard 9.22[i]). He had graduated from the University of Virginia School of Law in 1978 and had clerked for two Federal judges before joining the U.S. Attorney's Office in 1984. Both the hearing committee and the disciplinary board found that at the time of these actions respondent was "an accomplished, seasoned, and sophisticated attorney." His violations of Rules 16-402 and **171 *323 16-804(A) were due neither to ignorance nor incompetence.

The ABA *Standards* suggest that (absent aggravating or mitigating circumstances) " [r]eprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of a legal proceeding." *ABA Standards for Imposing Lawyer Sanction* (Standard 6.33).

Standard 2.5 notes that "reprimand" is "also known as censure or public censure" and defines it as "a form of public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice." The "Commentary" to Standard 2.5 points out that this sanction " emphasizes the concern of the court with all lawyer misconduct" and "serves the useful purpose of identifying lawyers who have violated ethical standards and, if accompanied by a published opinion, educates members of the bar as to those standards."

We hope that members of the New Mexico bar already appreciate the importance of their professional obligations under Rules 16-402 and 16-804(A) NMRA. We trust that for most, if not all, New Mexico lawyers, this opinion discusses no new legal principle. Nonetheless, this opinion will serve to affirm that our rules apply to all New Mexico lawyers, wherever they practice, and that we intend to continue to enforce our rules.

IT IS THEREFORE ORDERED that G. Paul Howes be, and he hereby is, publicly censured pursuant to Rule 17-206(A)(4) NMRA for his numerous and intentional violations of Rules 16-402 and 16-804(A).

IT IS FURTHER ORDERED that Howes shall reimburse the disciplinary board the costs of this disciplinary proceeding in the amount of $8,663.52 on or before November 19, 1997, with interest accruing thereafter on any balance due at a rate of 8 3/4 % per annum. Additionally, Howes is assessed the board's costs and attorney fees on appeal in an amount to be determined by this Court after reviewing a statement of fees and costs on appeal to be submitted by disciplinary counsel on or before June 19, 1997. All costs assessed in this matter shall be reduced to a transcript of judgment.

IT IS SO ORDERED.

McKINNON, J., not participating.
N.M.,1997.

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American Bar Association

COMMUNICATIONS WITH REPRESENTED PERSONS

July 28, 1995

Rule 4.2 prohibits a lawyer from knowingly communicating with a represented person about the subject matter of the representation without the consent of that person's lawyer. This prohibition applies to the conduct of lawyers in both civil and criminal matters, and covers any person known to be represented by a lawyer with respect to the matter to be discussed.

In the context of criminal investigations, nonetheless, it must be recognized that the Rule has been interpreted by some courts not to prohibit contacts by investigative agents acting under the general direction of a lawyer, with a person known to be represented in the matter being investigated, prior to arrest or the institution of formal charges.

The communicating lawyer is not barred from communicating with the represented person absent actual knowledge of the representation. Such knowledge may, however, be inferred from the circumstances; thus, a lawyer may not avoid the need to secure consent of counsel by closing her eyes to circumstances that make it obvious that the person to be communicated with is represented with respect to the matter in question.

The communicating lawyer is not barred from communicating with a represented person about topics that are not the subject of the representation.

When a corporation or other organization is known to be represented with respect to a particular matter, the bar applies only to communications with those employees who have managerial responsibility, those whose act or omission may be imputed to the organization, and those whose statements may constitute admissions by the organization with respect to the matter in question. Thus, a lawyer representing the organization cannot insulate all employees from contacts with opposing lawyers by asserting a blanket representation of the organization.

The fact that the represented person is the one who initiates a communication does not render inapplicable the prohibition on communicating about the subject matter of the representation.

When a person known to have been represented initiates contact with a lawyer and declares that she has terminated or intends to terminate the representation, the lawyer should obtain reasonable assurance that the representation has in fact been terminated before engaging in substantive discussion of the subject of the representation.

A lawyer may not direct an investigative agent to communicate with a represented person in circumstances where the lawyer herself would be prohibited from doing so. Whether in a civil or a criminal matter, if the investigator acts as the lawyer's "alter ego," the lawyer is ethically responsible for the investigator's conduct.

The bar against contacts with represented persons applies to all communications relating to the subject matter of the representation except those that fall within the narrow category of being "authorized by law." Communications "authorized by law" include communications that are constitutionally protected, and in addition, communications that are specifically authorized by statute, court rule, court order, statutorily authorized regulation or judicial decisional precedent.

Recent controversy concerning Rule 4.2 of the Model Rules of Professional Conduct (1983, as amended) has prompted this Committee to undertake a comprehensive consideration of the proper scope of the Rule. [FN1] The Rule as it now stands provides:

Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject matter of the representation with a party 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 by law to do so. [FN2]

The questions framing this examination of the Rule are these: (1) Does Rule 4.2 apply to the conduct of lawyers in criminal as well as civil matters? (2) Does a represented "party," under the Rule, mean only a person who is a formally designated party to an adjudicative proceeding, contract or negotiation, or does it apply more broadly to any person who is represented by counsel with respect to the matter that is the subject of the communication? (3) In the context of criminal investigations, does the prohibition apply differently before arrest or the filing of formal charges than it does after those events? (4) Does the prohibition apply if the communicating lawyer does not have definite knowledge that the person with whom she wishes to communicate is represented in the matter to be discussed? (5) What is the scope of the subject matter about which communication is prohibited? (6) May a lawyer representing a corporation or other organization bar communication with all employees of the organization by declaring a blanket representation of the organization and its employees? (7) May a lawyer communicate with a represented person absent consent of that person's lawyer if that person initiates the contact? (8) May a lawyer communicate with a person known to have been represented in the matter to be discussed who states that she has terminated or intends to terminate the representation? (9) To what extent does the prohibition on a lawyer's communicating with a represented person apply also to investigative agents acting under the direction of a lawyer? (10) What communications with represented persons fall within the "authorized by law" exception in Rule 4.2?

The Background and Purposes of the Anti-Contact Rule

While the debate about the scope and application of Rule 4.2's prohibition on contacts with represented parties has been heated, the controversy appears to be of relatively recent vintage. The ethical prohibition against such contacts has enjoyed a long history and broad acceptance. Its origin appears to be found in Hoffman's treatise, in 1836:

I will never enter into any conversation with my opponent's client, relative to his claim or defence, except with the consent, and in the presence of his counsel. [FN3]

Every ethical code promulgated by the American Bar Association has contained an anti-contact provision. Thus, the Canons of Professional Ethics, promulgated in 1908, included the following provision in Canon 9:

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel.

Since that time, rules embodying this fundamental ethical precept, usually following one or another of the models offered by the ABA, have been adopted in every state. [FN4]

In DR 7-104(A)(1) of the ABA Model Code of Professional Responsibility, which superseded the 1908 Canons and in turn anteceded the Model Rules, the language closely resembles what is now found in Rule 4.2:

Communicating With One of Adverse Interest.

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in the matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

In addition, EC 7-18 of the Model Code set out the central proposition on which all of the anti-contact rules have rested:

The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel.

Implementing this fundamental premise, the anti-contact rules provide protection of the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel,

and reduce the likelihood that clients will disclose privileged or other information that might harm their interests. [FN5]

I. The Bar Against Communication With Represented Parties Applies to Criminal As Well As Civil Matters

Model Rule 4.2, like its predecessors, seeks to maintain a real barrier between the opposing lawyer and the represented person. In the context of a civil matter, the rule has been described as perhaps the sole barrier between the client and an overreaching opponent. [FN6] Similarly, the prohibition against communications with represented persons operates in a criminal matter to protect a represented person against harmful admissions and waivers of privilege that may result from interference with the client-lawyer relationship. Recognizing that communications in a criminal case may entail significant consequences for the represented person, the Department of Justice has noted that the reasons for an anti-contact rule apply to criminal proceedings, "perhaps with more force than in the civil context." [FN7]

Although there have been holdings to the contrary, [FN8] the Committee believes it is clear that Rule 4.2 applies to the conduct of lawyers in criminal as well as civil matters, including both federal and state prosecutors. It has been argued that, because the Rule applies to a lawyer only "[i]n representing a client," the Rule does not reach the conduct of a prosecutor since she does not represent a "client" in the ordinary sense. [FN9] However, the history of the Rule and its predecessors offers no support for any assertion that it was intended to exempt prosecutors. Moreover, a majority of court decisions have concluded that Rule 4.2 and its predecessor anti-contact rules apply to both federal and state prosecutors; [FN10] even though, as discussed in part III below, some decisions have also limited the Rule's application in the context of criminal investigations prior to arrest or indictment.

Defense counsel in criminal cases of course are also subject to the provisions of Rule 4.2. For example, suppose that co-Defendants Able and Baker are charged with a crime, and Lawyer representing Defendant Able wishes to communicate with Defendant Baker because she has reason to believe that he may be able to exculpate her client. If Lawyer knows that Defendant Baker is represented in that matter, she may not engage in any communications with Baker without the consent of Baker's lawyer. [FN11]

II. The Bar Applies to Communications Not Only with Formal "Parties" but Also with Any Person Known to Be Represented with Respect to the Matter to Be Discussed

Although most frequently encountered in the context of litigation, Rule 4.2 applies (as have its predecessor anti-contact rules) in transactional circumstances as well. For example, suppose Buyer and Seller in a real estate transaction are each represented by counsel. The lawyer who represents Seller contacts Buyer, without leave of Buyer's lawyer, to suggest postponement of the closing. That communication would be prohibited under Rule 4.2 absent the consent of Buyer's lawyer. The same would of course apply to separately represented parties to negotiations leading to a closing, or to any other transaction or potential transaction.

Moreover, even in a litigation context, the application of the Rule does not depend on a proceeding having actually commenced, so that those involved in a dispute have become formal "parties." The Comment to Rule 4.2 makes plain that "the rule covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." [FN12]

Much of the controversy regarding the scope of Rule 4.2 has turned on its use of the term "party." There is case law holding that in order for a person to be deemed a "party" under the Rule or its predecessors, at least in the criminal context, formal proceedings must have been initiated in which that person is named as a party. [FN13] A majority of the Committee believe, however, that the term "party," as used in Rule 4.2, should not be given so narrow a meaning. As pointed out above, the Comment to the Rule states that it applies to "any person, whether or not a party to a formal proceeding." And the word "party" has a broad as well as a narrow sense. [FN14]

The Committee recognizes that, as just indicated, the word "party" as used in the Rule is ambiguous -- an ambiguity compounded by the fact that the caption of the Rule refers to a "person" represented by counsel. [FN15] The key to resolving this ambiguity, the Committee believes, is consideration of the purposes intended to be served by the Rule. In this light, the broader sense of the word "party," taking it as equivalent to "person," is clearly the appropriate one. [FN16] The reasons for protecting uncounselled persons against overreaching by adverse counsel, protecting the client-lawyer relationship from interference by such counsel, and protecting clients from disclosing privileged information that might harm their interests, are not limited to circumstances where the represented person is a party to an adjudicative or other formal proceeding. The interests that the Rule seeks to protect are engaged when litigation is simply under consideration, even though it has not actually been instituted, and the persons who are potentially parties to the litigation have retained counsel with respect to the matter in dispute. [FN17]

The harms that may flow from the disparity in sophistication and skill between a lay person and a lawyer are as likely to occur prior to the initiation of formal proceedings as they are following the filing of papers. Indeed, the critical phase in the representation of a client may be precisely the period when a lawyer, using her professional skills and training, attempts to avoid the filing of a suit entirely or to shape prospective litigation. In such circumstances, a lawyer may, intentionally or otherwise, take advantage of unsophisticated persons who are represented by counsel and thereby circumvent the client-lawyer relationship. Rule 4.2 should, therefore, operate to prevent a lawyer from adversely affecting the relationship between a client and her lawyer even in the absence of a formal proceeding. [FN18]

If the Rule is to serve its intended purpose, it should have broad coverage, protecting not only parties to a negotiation and parties to formal adjudicative proceedings, but any person who has retained counsel in a matter and whose interests are potentially distinct from those of the client on whose behalf the communicating lawyer is acting. Such persons would include targets of criminal investigations, [FN19] potential parties to civil litigation, [FN20] and witnesses who have hired counsel in the matter. [FN21] In sum, the Rule's coverage should extend to any represented person who has an interest in the matter to be discussed, who is represented with respect to that interest, and who is sought to be communicated with by a lawyer representing another party. [FN22]

III. The Bar May Have More Limited Application to Criminal Investigations Prior to Arrest or the Filing of Criminal Charges

As has been noted, the reasons for the prohibition on contacts with represented persons apply at least as forcefully in the criminal as in the civil context; and in both contexts they apply before formal proceedings have been initiated as well as afterward. Nonetheless, a number of court decisions, mainly involving the conduct of undercover investigators or informants acting in concert with prosecutors, have limited the applicability of the Rule or its predecessor anti-contact rules in the criminal context, either holding the prohibition wholly inapplicable to all pre-indictment non-custodial contacts, [FN23] or holding it inapplicable to some such contacts by informants or undercover agents. [FN24] Some cases note that the Rule would apply if the communication had been made by the prosecutor himself, or at his specific direction. [FN25] Some courts have specifically relied upon the Rule's use of the word "party"(as opposed to "person") to reach the conclusion that the Rule was not intended to apply to non-custodial pre-indictment communications with represented persons in the criminal context. [FN26] But at least one court has held that an anti-contact rule using the term "person" rather than "party" has no application to pre-indictment non-custodial investigations. [FN27] Some courts have appeared to take the view that since non-custodial pre-indictment communications with persons known to be represented would not violate the Sixth Amendment, such contacts should not be considered violative of anti-contact rules. [FN28] And some courts have expressed the view that applying a no-contact rule before indictment would unduly limit the government's ability to investigate suspected criminal activity. [FN29]

The Committee believes that to the extent those decisions suggest that the Rule has no application at all in the criminal context, or that it does not come into play until Sixth Amendment rights attach, they are not sound. [FN30] As one court has noted, since prosecutors have substantial control over the timing of an indictment, limiting the Rule to post-indictment communications could allow the government to "manipulate grand jury proceedings to avoid its encumbrances." [FN31] Moreover, applying the Rule to prohibit only post-indictment

communications would render the rule of little use in the criminal context. [FN32]

The Committee also believes that, in criminal cases, Rule 4.2 is not simply coextensive with the Fifth and Sixth Amendments. While the Fifth and Sixth Amendments provide protections to individuals in the context of a criminal case, the Constitution establishes only the "minimal historic safeguards" that defendants must receive rather than the outer limits of those they may be afforded. [FN33] Ethics rules, on the other hand, seek to regulate the conduct of lawyers according to the standards of the profession quite apart from other laws or rules that may also govern a lawyer's actions. Consequently, by delineating a lawyer's duties to maintain standards of ethical conduct, ethical rules like Rule 4.2 may offer protections beyond those provided by the Constitution. [FN34]

The Committee recognizes that prohibitions against communications with a represented person can be an obstacle to investigation, but the search for truth is not the only value to which lawyers, including government lawyers, must respond. Indeed, the Sixth Amendment right to counsel puts limits on the government's investigatory efforts. The filing of an indictment, which triggers that constitutional right, may mean that the government can establish a prima facie case against the person charged, but more investigation is generally required ultimately to prove the person's guilt beyond a reasonable doubt. Thus, it could be argued that but for the attachment of the right to counsel, lawyers could arrange for undercover investigations involving contacts with the charged person. However, despite the resulting investigatory problems, the Sixth Amendment bars lawyers from "deliberately eliciting" information from a person who is represented unless her counsel is present or she expressly waives her right to counsel. [FN35] There are also statutory limitations on investigative techniques, which go beyond constitutional requirements. [FN36] And other ethical prohibitions indubitably restrict prosecutors' activities. [FN37] Similarly, Rule 4.2 imposes an additional burden on the opposing counsel to use investigatory means other than direct contact with a represented person.

All this said, the Committee recognizes that there is a body of decisional law that in effect concludes that the public interest in investigating crime may outweigh the interests served by the Rule in the criminal context, at least where the contacts are made with represented persons who have been neither arrested nor formally charged, and the contacts are made by undercover agents or informants and not by the government lawyers themselves (or by agents acting so closely under the lawyers' direction as to be their "alter egos"). Accordingly, the Committee believes that so long as this body of precedent remains good law, it is appropriate to treat contacts that are recognized as proper by such decisional authority as being "authorized by law" within the meaning of that exception stated in the Rule. [FN38]

IV. The Bar Applies Only if the Communicating Lawyer Knows That the Person Sought To Be Communicated With Is Represented By Counsel in the Matter To Be Discussed; But Such Knowledge May Be Inferred from the Circumstances

The Rule's requirement of securing permission of counsel is limited to those circumstances where the inquiring lawyer "knows" that the person to whom he wants to speak is represented by counsel with respect to the subject of the communication. [FN39]

The term "knows" is defined in the Terminology section of the Model Rules as follows:

> "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances.

"Know" does not mean "reasonably should know," which is also a defined term in the rules that does not appear in the text of Rule 4.2 although it does appear in Rule 4.3, "Dealing with Unrepresented Person" (which applies to the communication if the lawyer does not know that the person contacted is represented by counsel). [FN40] The Terminology provides that

> "Should have known," when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

Thus, in the Committee's view, Rule 4.2 does not, like Rule 4.3, imply a duty to inquire. Nonetheless, it bears emphasis that, as stated in the definition of "knows" (set out above), actual knowledge may be inferred from the circumstances. It follows, therefore, that a lawyer may not avoid Rule 4.2's bar against communication with a represented person simply by closing her eyes to the obvious. [FN41]

V. The Bar Is Limited to Communications Related to the Subject Matter of Both Representations

Rule 4.2 makes reference to the subject matter of two representations, and requires a link between them. Thus, it provides that "in representing a client," a lawyer shall not communicate "about the subject of the representation" -- referring to the lawyer's representation of her client. It goes on to refer to communications with one whom the lawyer knows to be "represented in the matter" -- requiring that the second representation be within the compass of the inquiring lawyer's representation. This required connection between the two representations, imparted by the phrase "in the matter," significantly limits the scope of the prohibition.

If a person is represented by counsel on a particular matter, that representation does not bar communications on other, unrelated matters. For example, suppose a lawyer represents Defendant on a charge involving crime A. Under Rule 4.2, another lawyer may not, pursuant to a representation, either as prosecutor or as counsel for a co-defendant involving crime A, communicate with Defendant about that crime without leave of Defendant's lawyer. However, if the communicating lawyer represents a client with respect to a separate and distinct crime B and wishes to contact Defendant regarding that crime, the representation by counsel in crime A does not bar communications about crime B. Similarly, the fact that Defendant had been indicted on crime A would not prevent the prosecutor from communicating with Defendant, directly or through investigative agents, regarding crime B. [FN42]

Questions regarding the scope of representation "in the matter" have arisen in the context of investigations of ongoing criminal enterprises. Can a lawyer representing persons believed to be involved in organized crime bar communications with her clients by advising the prosecutor that she represents these clients in all matters, without specification of what the matters are? Or may an individual insulate herself from undercover investigation in a criminal matter by retaining "house counsel?" The Committee believes that in both situations, and quite apart from the latitude that, as explained in part III above, the courts have allowed for undercover investigative contacts before arrest or indictment, the prosecutor is not barred from communicating under the Rule.

By prohibiting communication about the subject matter of the representation, the Rule contemplates that the matter is defined and specific, such that the communicating lawyer can be placed on notice of the subject of representation. Thus, if the representation is focused on a given matter, such as one involving past conduct, and the communicating lawyer is aware of this representation, she may not communicate with the represented person absent consent of the representing lawyer. However, where the representation is general -- such as where the client indicates that the lawyer will represent her in all matters -- the subject matter lacks sufficient specificity to trigger the operation of Rule 4.2.

Similarly, retaining counsel for "all" matters that might arise would not be sufficiently specific to bring the rule into play. In order for the prohibition to apply, the subject matter of the representation needs to have crystallized between the client and the lawyer. Therefore, a client or her lawyer cannot simply claim blanket, inchoate representation for all future conduct whatever it may prove to be, and expect the prohibition on communications to apply. Indeed, in those circumstances, the communicating lawyer could engage in communications with the represented person without violating the rule.

In the civil context also, the "matter" with which the representation is concerned must have been concretely identified. For example, suppose that Corporation A wishes to purchase a subsidiary of Corporation B. Corporation B has an on-going relationship with outside counsel, law firm XYZ, such that the firm represents the corporation on all of its legal matters. In addition, Corporation A knows that XYZ law firm always represents Corporation B in its legal matters. However, Corporation A has not broached with Corporation B the possible purchase of Corporation B's subsidiary, and thus the general counsel for Corporation A has no reason to believe, let alone to know, that Corporation B has consulted its counsel regarding such an acquisition. In such circumstances, because the representation by outside counsel is not specifically focused on the matter, the general counsel for Corporation A is not barred by Rule 4.2 from contacting the president of Corporation B to initiate discussions without asking law firm XYZ for its consent. Correspondingly, the XYZ firm cannot preclude such a communication by announcing that it represents Corporation B for all purposes. A similar analysis applies as

respects in-house general counsel, who represent the corporation for all purposes. [FN43]

VI. Representation of an Organization Does Not Bar Communications with All Employees of the Organization

Questions arise as to the manner in which the Rule applies when the represented party is a collective entity, such as a corporation, rather than an individual. Specifically, the Committee has considered whether a lawyer's representation of an organization extends the Rule's prohibition, either automatically or upon the declaration of the organization's lawyer, to cover communications with all employees or members of that organization.

Some courts addressing this issue have found that the represented party is limited to corporate employees who fall within the "control group": those employees who manage and speak for the corporation. [FN44] The Comment to Rule 4.2, however, makes plain that the term represented party refers not only to those with managerial responsibilities but to anyone who may legally bind the organization with respect to the matter in question. [FN45] Consequently, when the party is an organization, the bar against communication covers not only the control group but in addition anyone "whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." [FN46]

Expansive though the Rule's coverage is with respect to officers and employees of a represented organization, the Rule does not contemplate that a lawyer representing the entity can invoke the rule's prohibition to cover all employees of the entity, by asserting a blanket representation of all of them. So, for example, if in-house counsel for the XYZ corporation announces that no one may talk to any XYZ employee without obtaining in-house counsel's permission, the communicating lawyer is not barred from communicating with all employees. If an employee cannot by statement, act or omission bind the organization with respect to the particular matter, then that employee may ethically be contacted by opposing counsel without the consent of in-house counsel. Of course, if individual employees have their own counsel in the matter, then the bar against communication would apply absent consent of that separate counsel. But the fact that an entity is represented by counsel does not prevent communication with all current employees of the represented corporation. [FN47]

VII. Initiation of the Contact by the Represented Person Does Not Remove the Bar

Another issue arising under the Rule is whether the prohibition against communications with represented persons applies if the represented person initiates contact with the communicating lawyer. Rule 4.2 exempts communications if the lawyer representing the contacted person consents; but the Rule says nothing about permitting the represented person to forego the protection accorded him by the ethical responsibilities of the communicating lawyer. This Committee concluded in Formal Opinion 108 (1934) that the anti-contact rule does not contemplate such a waiver.

Since then, a number of courts have similarly found that because the ethical prohibition is designed, in part, to protect the effectiveness of the lawyer's representation, the represented person may not waive it. [FN48]

While the Committee recognizes that not allowing the represented person to waive the Rule's protection may be seen as paternalistic, it believes that Rule 4.2 requires that result. Reflecting the concern that the represented person may not be in a position to make an informed waiver of the presence of counsel, the Rule operates to reduce the likelihood of the represented person engaging in communications that might ultimately prove harmful to her cause by imposing a strict ethical obligation on the communicating lawyer. [FN49]

VIII. When Contact Is Initiated by a Person Who Is Known to Have Been Represented by Counsel in the Matter But Who Declares That the Representation Has Been or Will Be Terminated, the Communicating Lawyer Should Not Proceed Without Reasonable Assurance that the Representation Has in Fact Been Terminated

Of course, any represented person retains the right to terminate the representation. In the event that such a termination has occurred, the communicating lawyer is free to communicate with, and to respond to communications from, the former represented person. The communicating lawyer's conduct would then be governed by Rule 4.3, Communications with Unrepresented Persons. [FN50]

As a practical matter, a sensible course for the communicating lawyer would generally be to confirm whether in fact the representing lawyer has been effectively discharged. For example, the lawyer might ask the person to provide evidence that the lawyer has been dismissed. The communicating lawyer can also contact the representing lawyer directly to determine whether she has been informed of the discharge. The communicating lawyer may also choose to inform the person that she does not wish to communicate further until he gets another lawyer.

There are some circumstances where the communicating lawyer may need to go beyond determining that the person has discharged her lawyer. One is that in a criminal case where the Court has appointed a lawyer to represent the client, the lawyer is not relieved as counsel of record until the court grants her leave to withdraw. Consequently, even if the contacted person tells the communicating lawyer that she has fired her lawyer, the communicating lawyer may not proceed without reasonable assurance that the court has granted the lawyer leave to withdraw. Similarly, if retained counsel has entered an appearance in a matter, whether civil or criminal, and remains counsel of record, with corresponding responsibilities, the communicating lawyer may not communicate with the person until the lawyer has withdrawn her appearance. In addition, if a communicating lawyer knows that the represented person is incompetent, that person's statement regarding the status of her representation may not be sufficiently reliable to allow the communicating lawyer to assume that she is free to engage in communications with the person.

On the other hand, there may be situations, particularly in the criminal context, in which the represented person is reluctant to terminate her relationship with counsel, or wishes to negotiate with the prosecutor without the knowledge of her counsel, because of doubt as to whether the lawyer representing her is in fact concerned with protecting her interests as distinct from protecting the interests of others who may have arranged for her representation. Even in such circumstances, the prohibition of Rule 4.2 against communications with the represented party applies, at least until the lawyer seeking to communicate with that person has assurance that the representation that the person is seeking to disclaim has been either terminated or superseded by a new representation. A useful course of action in such circumstances may be to request a court (if there is one with jurisdiction) to hold an ex parte hearing to appoint new counsel or give approval to the communication without counsel. [FN51] While arranging for such a hearing, the communicating lawyer should refrain from offering advice or engaging in other substantive discussions with the person in question until the court has acted. [FN52]

IX. A Lawyer Is Ethically Responsible for Contacts by Investigators Acting Under Her Instructions That Would Violate the Bar if Made by a Lawyer

The next issue the Committee has undertaken to address concerns the applicability of Rule 4.2 to the activities of investigators working with lawyers; and in particular, the circumstances where a lawyer may be held vicariously responsible if an investigator collaborating with her communicates with a represented person without the consent of the representing lawyer.

There is no doubt that the use of investigators in civil and criminal matters is normal and proper. Particularly in the criminal context, there are legitimate reasons not only for the use of undercover agents to conduct investigations, but for lawyers to supervise the acts of those agents. [FN53] And the investigators themselves are not directly subject to Rule 4.2, even if they happen to be admitted to the Bar (as many FBI agents are), because they are not, in their investigative activities, acting as lawyers: they are not "representing a client." [FN54] However, when the investigators are directed by lawyers, the lawyers may have ethical responsibility for the investigators' conduct.

Such responsibility will ordinarily arise under Rule 5.3, which provides in part:

> Responsibilities Regarding Nonlawyer Assistants
> With respect to a nonlawyer employed or retained by or associated with a lawyer:

* * *

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Under these provisions, if the lawyer has direct supervisory authority over the investigator, then in the context of contacts with represented persons, the lawyer would be ethically responsible for such contacts made by the investigator if she had not made reasonable efforts to prevent them (Rule 5.3(b)); if she instructed the investigator to make them (Rule 5.3(c)(1)); or if, specifically knowing that the investigator planned to make such contacts she failed to instruct the investigator not to do so (Rule 5.3(c)(2)).

The Committee believes, however, that if, despite instruction to the contrary, an investigator under her direct supervisory authority (or one not under such authority) made such contacts, she would not be prohibited by Rule 5.3 from making use of the result of the contact. [FN55] Rule 8.4(a) imposes similar, albeit narrower, ethical limits on what a lawyer can direct an investigator to do. Rule 8.4(a) provides:

Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

Since a lawyer is barred under Rule 4.2 from communicating with a represented party about the subject matter of the representation, she may not circumvent the Rule by sending an investigator to do on her behalf that which she is herself forbidden to do. [FN56] Whether in a civil or a criminal matter, if the investigator acts as the lawyer's "alter-ego," the lawyer is ethically responsible for the investigator's conduct.

X. There Are Several Categories of Communications That Are "Authorized by Law"

The final issue the Committee has undertaken to address is the scope of the exception in Rule 4.2 permitting otherwise prohibited communications if they are "authorized by law." That exception first appeared in the black letter text of DR 7-104(A)(1), but had been found to be implied in Canon 9, [FN57] and is now to be found in the anti-contact rule of every jurisdiction but one. [FN58]

The Comment to Rule 4.2 identifies, as an example of a communication authorized by law, "the right of a party to a controversy with a government agency to speak with government officials about the matter" -- the right in question being First Amendment right of petition. [FN59] The "authorized by law" exception to the Rule is also satisfied by a constitutional provision, statute or court rule, having the force and effect of law, that expressly allows a particular communication to occur in the absence of counsel -- such as court rules providing for service of process on a party, [FN60] or a statute authorizing a government agency to inspect certain regulated premises. [FN61] Further, in appropriate circumstances, a court order could provide the necessary authorization. [FN62]

As has been explained in part III above, an additional category of circumstances that appear to be fairly treated as "authorized by law" are those where courts have held that certain criminal investigative activities prior to arrest or the filing of formal charges, such as the use of undercover agents or informers not acting as the prosecutor's "alter ego," are not prohibited by the Rule.

A more difficult issue is raised by the Department of Justice regulations on Communications with Represented Persons, [FN63] which are evidently intended to rest squarely on the "authorized by law" exception in Rule 4.2. That issue is what, if any, directives by a governmental department or agency purporting to permit contacts with

represented parties fall within the "authorized by law" exception? The Committee believes that such directives will qualify as "law" for purposes of the Rule only when embodied in formal regulations that have been properly promulgated pursuant to statutory authority that contemplates regulation of the character in question. Were any other regulation or fiat by an agency head to be considered an authorization by law, any government agency could "authorize" its lawyers to engage in conduct expressly prohibited by ethical codes simply by promulgating a regulation or policy. [FN64]

The Committee's view finds support in Chrysler v. Brown, 441 U.S. 281, 198 (1979), where the Supreme Court rejected the view that any agency conduct that has been directed or approved by an agency head is "authorized by law," within the meaning of a statute prohibiting such conduct except where "authorized by law." Rather, the Court held that for a government agency's regulation to have the force and effect of law, it must be a substantive regulation, which has been adopted in accordance with the procedural requirements imposed by Congress, and also rooted in a Congressional grant of authority. Chrysler v. Brown teaches that when an agency promulgates regulations purporting to authorize conduct in derogation of other law, those regulations must be grounded in a statute which contemplates regulations of the kind issued. A general grant of regulatory authority to an agency is not sufficient to support the issuance of regulations that permit what other law forbids. Although in Chrysler v. Brown the federal agency regulations in issue would have overridden requirements of a federal statute, the Committee believes the same result should be reached if the other law involved were rules of professional conduct adopted by state courts -- or, for that matter, federal courts. [FN65]

CONCURRENCE

This is an important opinion addressing critical issues arising under Model Rule 4.2 and putting to rest a series of misguided notions that have been asserted by those who seek to undermine the sanctity of the lawyer-client relationship embodied in the provisions of Model Rule 4.2. There is nothing more central to what it means to be a client in the American system of justice than to know that, having hired a lawyer, the client need not worry about being taken advantage of by lawyers, with special skills and training, who represent others. Once the client's representation is disclosed, all lawyers are on notice that they must deal with the client's lawyer on all matters, unless the represented person's lawyer provides otherwise. Whether the matter is civil, criminal or transactional, whether a complaint has been filed, an indictment brought, a tax audit commenced or an agreement of sale signed, whether an adverse party, a co-defendant or plaintiff, a witness or a participant in a transaction, all clients who have hired lawyers should benefit from the protection of Rule 4.2. Nor may a lawyer avoid the rule by using non-lawyer agents to undertake what the lawyer is prohibited from doing, by maintaining studied ignorance of the representation, or by claiming the represented person initiated the contract.

This concurrence is filed to address several points on which the author believes the majority opinion and the dissents do not have it quite right. First, the Committee observes in the headnote that "the Rule has been interpreted by some courts not to prohibit contacts by investigative agents acting under the general direction of a lawyer with a person known to be represented . . . " While this statement is correct, it doesn't explain to the unsuspecting, who might only read the syllabus, that almost all of those cases rely on reasoning which this opinion rejects, reasoning which this Committee, in issuing this Opinion describing what it believes to be the correct interpretation of the Rule, hopes courts in the future will also reject.

For too long, the mere repetition of the words "legitimate needs of prosecutors" has been used by the opponents of the principles of Model Rule 4.2 to undermine the protections the Rule is intended to provide. In responding to this litany, some of these courts, quite incorrectly, have eviscerated the Rule in the very situations where it is most needed: to protect from improper contacts those represented persons who face the awesome power of the government. Once a person has retained a lawyer in a matter, as this Opinion so carefully reasons, then all contacts are to be through that lawyer, and any contacts that are made on any basis other than through the lawyer, are in violation of the Rule.

Second, the majority opinion addresses by indirection the Department of Justice regulations on Communications with Represented Persons, regulations which by their terms are premised on so-called principles that are rejected out-of-hand in this opinion. More important, those regulations are clearly not authorized by law.

There is no Congressional grant of authority to the Justice Department to issue regulations undermining the fundamental rights of clients to be represented by counsel. Moreover, regulation of lawyers, including Justice Department lawyers, has been traditionally and quite properly left to the states. Indeed, in the author's view, there could never be a delegation to the Justice Department or other law enforcement agency to set its own ethics rules unilaterally. When the drafters of Model Rule 4.2 inserted the words "authorized by law" they must have had in mind law established by either the courts or the legislature.

The Department of Justice regulations demonstrate the evil of having one party to disputed matters have that power. The regulations provide for loopholes so large that in some contexts they render the protections of Model Rule 4.2 meaningless. To ever permit a litigant (particularly one as powerful and capable of threatening represented parties as the Justice Department) to decide what rules will govern its own lawyers unbalances the judicial process in a fundamental, unfortunate and inequitable way.

Third, addressing Mr. Elliot's dissent, its flawed interpretation of Model Rule 4.2 as limited to "parties," not "persons," becomes apparent if one analyzes one of his opinion's examples. In trying to explain how, on the basis of principle, he is able to decide who is a party (and therefore entitled to the protection of the rule) and who is a person (and therefore not), Mr. Elliot explains that "[i]n a real estate transaction, the buyer and seller would be 'parties,' and, if represented, could not contacted by the other's attorney absent consent of their own attorney. The buyer's mortgagee bank and the seller's bank whose mortgage the buyer would have to pay off would not be 'parties,' even if represented." This result will come as a great surprise to those in our profession who represent lenders, underwriters and other key "players" in transactions; in those situations, when it is made known that the bank or investment company will be represented by counsel, there should be every expectation, based on Model Rule 4.2, that lawyers for the buyer and seller would not be contacting the bank or investment company directly. If Mr. Elliot thinks otherwise, then that is but one more reason to conclude that Model Rule 4.2 was intended to reach these "persons" as well as the buyer and seller "parties." The buyer, the seller, the bank, the title company, the investment banker, the auditor and any other represented persons to a transaction, by the sole fact they choose to be represented by counsel, are entitled to the full protection of Model Rule 4.2, whether they meet Mr. Elliot's strained interpretation of party or not.

Finally, addressing Mr. Amster's dissent, while I share his view that the protections of Model Rule 4.2 are even more important in the criminal context, this does not mean that those protections should not be available to all clients, including organizations. The Rule recognizes, quite properly it seems, that the lawyer who represents an organization should not be able to prevent unsupervised contacts with all organization employees. By the same token, it recognizes that in order for an organization's lawyer to provide effective representation, contacts with employees having managerial responsibility, and any person whose act or omission in connection with the matter may be imputed to the organization or whose statement may constitute an omission must be prohibited. Any other rule would make it impossible for organization clients to receive the same level and quality of representation accorded to individuals. This may, as Mr. Amster notes, interfere with informal fact gathering but the need to resort to formal fact gathering is a very small price to pay for the important protections Model Rule 4.2 provides.

Lawrence J. Fox

Kim Taylor-Thompson

DISSENTS

I cannot go along with this opinion. It is overbroad and obstructs the legitimate search for the facts and the truth in civil litigation. In concentrating upon the applicability of Rule 4.2 in the criminal context where the constraint upon communication with represented persons is based upon the constitution and concern for the rights of criminal defendants which might be overwhelmed by the resources of law enforcement agencies, this committee has overlooked its impact upon the pursuit of the truth and facts in civil litigation. The opinion provides counsel for organizations with even broader power to isolate potential adverse witnesses than presently exists under Rule 4.2. [FN66] By erecting this wall blocking the fact-seeker from persons who may have knowledge of the matter in both criminal and civil litigation, the committee has thrown out the baby with the bath water. This

opinion in the civil context protects lawyers and their clients rather than individuals who might shed light on the factual basis of civil litigation.

Some members of the majority have asserted that the above-cited comment to Rule 4.2 fixed the direction of this opinion and that this dissent should have been directed at the rule rather than the opinion. If that is so, somewhere in this opinion the committee should have suggested modifications to the rule which would have made it less onerous to a fact-seeker in civil litigation, especially one with limited resources. Not only did they not do so, but they compounded the problem by opining that even if the contact is initiated by a low-level employee of a represented organization, the rule bars any contact. This means that in the run-of-the-mill civil case, where a lawyer announces that he represents the organization in all personal injury matters, it will be more time-consuming and expensive to marshall facts from persons who in many cases will be best situated to witness the event which resulted in the litigation, i.e., low-level employees of a represented organization who may be willing to tell what they know about the incident.

During the committee's lengthy discussions, a paragraph was suggested which would exempt communication initiated by a whistle-blower for the purpose of disclosing wrongdoing on the part of a corporation. Such a provision to this writer made common sense, but a majority of the committee voted to delete the paragraph. The opinion also fails to take into account the endless variety of factual situations where a noncontrol employee far down on the food chain might provide relevant information in civil litigation and makes it almost impossible to develop the facts without the oversight of lawyers thus making the search for the truth an obstacle course.

In addition to my substantive concern about this opinion, its length and complexity requires some comment. Several members of this committee tried their hand at writing an opinion upon which a majority of the committee might agree, and it is fair to say that the opinion ultimately took on a life of its own. The end result is a protracted and global interpretation of Rule 4.2 which is so convoluted and complex that it provides little comfort for the lawyer seeking facts to support his client's case as to precisely what conduct is permissible.

I envisage that the role of this committee is to furnish all members of the legal profession with guidelines which if followed would aid the ordinary practicing lawyer to comply with those ethical standards embodied in the Model Rules. This opinion is more appropriate for a learned legal periodical and does not take into account the real world where individual lawyers are confronted with time constraints in making hard decisions in the field of ethics. It just does not show them the way; to the contrary, it will add to their confusion.

The committee might have been better off had it abandoned its efforts and not written this opinion once the problems which gave rise to our interminable discussions and revisions surfaced. Unfortunately, it did not do so, and we are now issuing this massive work product which, in this writer's opinion, creates more problems for the average practicing attorney than it solves.

In light of the foregoing, I dissent.

Richard L. Amster

* * *

The fundamental premise of much, if not most, of the Committee's opinion is the proposition that when Rule 4.2 uses the word "party", it really means "any person". The distinguished American writer, thinker and philosopher, Johnny Carson, was wont to observe: "You buy the premise, you buy the joke." I do not buy the premise. Accordingly, I dissent.

My dissent, however, is limited to the premise. I have no quarrel with the reasoning of the Committee on those points that do not require its latitudinarian interpretation of the word "party". Indeed, if I were to accede to that definitional view, I would have no quarrel with the elaboration of those points that do depend upon that premise. My dissent is simply based upon the fact that despite best efforts at textual archeology, the Committee can find no basis whatsoever in legislative history for its conclusion; the conclusion it reaches violates basic and universally-applied canons of statutory construction that govern the interpretation of these Rules; other jurisdictions have, by

their actions on the Rules of Professional Conduct, recognized that "party" does not mean "any person"; and the conclusion itself is reduced in the end to a desperate exercise in wish fulfillment. The Model Rules, for better or worse, are not and never have been a wishing well.

Legislative History

The Committee concedes, as it must, that it hasn't a clue as to why Rule 4.2 uses the word "party" instead of "person" when describing the protected communicatee. It recognizes that Canon 9 of the 1908 Canons of Professional Ethics used the word "party", and did so in a context clearly disclosing that the "party" was one with whom a dispute or transaction was involved. That same word "party" was repeated in DR 7-104(A)(1) under the title "Communicating With One of Adverse Interest". The word "party" again was employed in Model Rule 4.2, this time under the title "Communicating With Person Represented by Counsel". The Committee can find no discussion in the legislative history as to the meaning of "party" in any of these iterations of the rule.

Canons Of Constructions

In light of the fact that throughout the Model Rules the word "person" is frequently used, but the word "party" is used in Rule 4.2, canons of statutory construction, universally applied as well in construing court rules like the Model Rules of Professional Conduct, compel the conclusion that "party" means something different from "person".

There is a presumption of purpose behind every sentence, clause or phrase of a rule, and no word in a rule is to be treated as superfluous. DeSisto College, Inc. v. Town of Howey-in-the-Hills, 706 F. Supp. 1479, 1495 (M.D. Fla. 1989), affirmed 888 F.2d 766; Fox-Knapp, Inc. v. Employees Mutual Casualty Co., 725 F. Supp. 706, 709 (S.D.N.Y. 1989), affirmed 893 F.2d 14; Peck v. Jacquemin, 196 Conn. 53, 64, 491 A.2d 1043 (1985). The use of different words in the same Rules must indicate a difference in legislative intent. BFP Resolution Trust Corp., 114 S. Ct. 1757, 1761 (1994); Lankford v. Law Enforcement Assistance Administration, 620 F.2d 35, 36 (4 Cir.; 1980); Tafoya v. U.S. Dept. of Justice, LEAA, 748 F.2d 1389, 1392 (10 Cir.; 1984). Fritz v. Madow, 179 Conn. 269, 272, 426 A.2d 268 (1979); Hinchcliffe v. American Motors Corporation, 184 Conn. 607, 613, 440 A.2d 810 (1981); Farricielli v. Personnel Appeal Board, 186 Conn. 198, 203, 440 A.2d 286 (1982).

We are not permitted to "torture words to import ambiguity where the ordinary meaning leaves no room for it." Mingachos v. CBS, Inc., 196 Conn. 91, 98, 481 A.2d 368 (1985). A rule does not become ambiguous solely because people disagree as to its meaning. As much as we may think a rule should have meant something else, its intent is to be found not in what its enactors meant to say, but in the meaning of what they did say. We are not permitted to read into the terms of a rule something which manifestly is not there in order to reach what we think would be a just result. In re Pederson, 875 F.2d 781, 784 (9 Cir. 1989). Commissioner v. Freedom of Information Commission, 204 Conn. 609, 620, 529 A.2d 692 (1987). Neither does a rule become ambiguous simply because different courts might have interpreted it differently. Jones v. Brown, 41 F.3d 634, 639 (Fed. Cir. 1994).

Fidelity to the canons of construction which govern courts in interpreting the Model Rules, and therefore ought to govern this Committee, compels the conclusion that this Committee cannot impose upon the word "party" the meaning of "any person".

As a simple matter of logic, the Committee cannot, by the ipse dixit of an opinion, ignore the fact that for almost 90 years a different word -- "party" -- has been used in Rule 4.2 and its antecedents at the same time that the Committee's favored word -- "person" -- has been used elsewhere in the same Canons, Code and Rules by the same authors. To import synonymy where the drafters used different words is resolutely to close one's eyes to the obvious, and to flout the canons of construction that govern our deliberations.

What Other Jurisdictions Have Done

That "party" does not mean "any person" is demonstrated as well by the understanding of the jurisdictions --

now, some 40 -- which have adopted the Model Rules or variants of them. Simply put, when these jurisdictions wanted Rule 4.2 to protect more than just parties, they amended Rule 4.2 to say so. Thus, Alaska Rule 4.2 ("party or person"); Texas Rule 4.2 ("person, organization or entity of government"); Florida Rule 4-4.2 ("person"); and see Oregon DR 7-104(A)(1) ("person"). This Committee itself has -- in what one presumes is not an act of supererogation -- proposed to the House of Delegates in August, 1995 changing the word "party" to "person" in Model Rule 4.2.

Presumably, the 40 or so jurisdictions that have adopted the Model Rules -- indeed those still operating under the Code of Professional Responsibility -- have long understood that "party" is a subset, and not a synonym, of "person". Those who wanted a more expansive protection have amended the rule. Amendment, not wish-fulfilling interpretation, is the way to pour the new wine of "person" into the old bottle of "party".

Unambiguous Meaning

The Committee for some reason (probably because it wants an excuse to construe it so that it can then apply it as it does in the Opinion) and contrary to universally-applied canons of construction, supra, purports to find the word "party" ambiguous, and finds the ambiguity "compounded" by use of the word "person" in the title to the Rule. But that latter fact should not affect the meaning of "party" in the Rule. All parties are persons, but not all persons are parties. The overall title to the section comprising Model Rules 4.1 - 4.4 is "Transactions With Persons Other Than Clients."

The Committee chooses to treat "party" as meaning "person" despite the fact that the drafters knew full well how to employ the broader "person" when they meant "person" -- they used that word in Rules. 4.1, 4.3 and 4.4 -- but avoided using it in Rule 4.2. The Committee, seeking to buttress the logic of interpreting "party" to mean "person", notes that the word "party" is used as a synonym for "person" in the phrase "third party discovery". In the Model Rules, however, when "third person" is meant, "third person" is the phrase the drafters use. See, e.g., Model Rules 4.1(a) and (b) and 4.4.

Seeking support for its expansive interpretation, the Committee cites part, but not all, of the Black's Law Dictionary definition of "party". A more instructive citation would have included the entire definition:

Party, n. A person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually. A "party" to an action is a person whose name is designated on record as plaintiff or defendant. M & A Elec. Power Co-op v. True, Mo. App., 480 S.W.2d, 310, 314. Term, in general, means one having right to control proceedings, to make defense, to adduce and cross-examine witnesses, and to appeal from judgment. City of Chattanooga v. Swift, 223 Tenn. 46, 442 S.W.2d 257, 258.

"Party" is a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or in equity, the party plaintiff or defendant, whether composed of one or more individuals and whether natural or legal persons; all others who may be affected by the suit, indirectly or consequently, are persons interest by not parties. Golatte v. Mathews, D.C. Ala. 394 F. Supp. 1203, 1207.

See also Nominal defendant; Parties; Prevailing party.

Black's Law Dictionary (5th ed.)

When we accept the lexicographers' invitation to see related words and turn to "parties" we find a definition which, quite rightly, takes the word beyond the confines of litigation:

Parties. The persons who take part in the performance of any act, or who are directly interested in any affair, contract, or conveyance, or who are actively concerned in the prosecution and defense of any legal proceeding. Green v. Bogue, 158 U.S. 478, 15 S. Ct. 975, 39 L.Ed. 1061 See also Party.

Id.

Indeed, in light of the clearly limited meaning of "party" as a common law term, the Committee's diktat that "party" means "any person" contravenes yet another canon of statutory construction: that unless those promulgating a rule make manifest an intent to the contrary, a presumption obtains that when they use a common

law term, they intend to use it in its common law sense. United States v. Shabani, 115 S.Ct. 382, 385 (1994); Resolution Trust Corp. v. Diamond, 45 F.3d 665; 672 (2 Cir. 1995); Citizens Action League v. Kizer, 887 F.2d 1003, 1006 (9 Cir. 1989), cert. den. Department of Health Services of California v. Citizens Action League, 110 S. Ct. 1524; U.S. v. Patterson, 882 F.2d 595, 603 (1 Cir. 1989), cert. den. 110 S. Ct. 737; and see Gilbert v. United States, 370 U.S. 650, 655 (1962).

The Committee's discussion is also unpersuasive because the Committee appears constantly to be shifting ground in identifying the concept against which it is fighting. Too often the Committee seeks to justify its "person" choice by arguing that for policy reasons the communicatee need not be a "party to an adjudicative or other formal proceeding." But the Comment already says that. The issue, with which the Committee never comes to grips, is whether by using the word "party" the drafters intended to mean a person who had an interest in the matter -- be it a lawsuit, a contract negotiation, a real estate closing, or whatever -- which it was the purpose and foreseeable outcome of the matter significantly and directly to affect. Such persons would have an interest qualitatively different from others in the matter, a qualitative difference signified by the word "party". The Committee neither acknowledges nor addresses this natural -- and in my view, correct -- rationale for the use consistently since 1908 of the word "party" instead of the word "person". Such an interpretation, however, is exactly what "parties" supra, is defined as meaning.

In this scenario, for instance, a plaintiff and defendant in a lawsuit would be "parties", because the purpose and foreseeable outcome would directly affect their interests. The fact or expert witness would not be a "party", even if for whatever reason he had retained a lawyer to advise him in his capacity as a witness. In a matrimonial case, where custody, visitation rights or support are issues, the represented children of the marriage would be parties because of the centrality of their interests to the matter, even though they are not formal parties to the litigation.

In a real estate transaction, the buyer and seller would be "parties", and, if represented, could not be contacted by the other's attorney absent consent of their own attorney. The buyer's mortgagee bank and the seller's bank whose mortgage the buyer would have to pay off would not be "parties", even if represented; so that the buyer's lawyer could contact directly the seller's mortgage officer to find out the precise amount of the pay-off figure without the intermediation of the bank's lawyer. While both banks have an interest in the transaction, the interest is qualitatively ancillary to the central interest of the buyer and the seller.

As a policy matter, of course, it might conceivably be better if the word "person" were used in Rule 4.2 instead of "party". It certainly would be easier to apply the Rule (though the consequences of such a broad applicability have only begun to be discerned in the Committee's opinion). Indeed, the Committee has proposed changing the Rule to substitute "person" for "party"; and if that change is adopted, this discussion will be moot for the Model Rule, though still relevant in the vast majority of jurisdictions which have adopted Rule 4.2 using "party".

But ease of application and logical consistency cannot effect a change in the meaning of a word used consistently since 1908 in this particular rule, especially where, as here, there is a perfectly normal, natural meaning to be accorded to the word "party" that acknowledges its more limited ambit as a subset, instead of a synonym, of "person".

Conclusion

If the Committee's expansive reading of "party" to mean "person" is correct, there is no need for the House of Delegates in August of 1995 to change the text of Model Rule 4.2, as proposed by the Committee. If the Committee's reading is correct, the Judges of Oregon, Alaska and Texas did not know what they were doing when they amended their rules, thinking they were expanding "party". If the Committee's reading is correct, the ABA House of Delegates stands accused of bizarre and irrational behavior for using the word "party" in Rule 4.2 to mean the same thing as that for which everywhere else it had used "person" (and so do the Houses that adopted the Model Code and the Canons).

Of course, this is not so. This Committee, in proposing the rule change, understood that it was proposing just

that: a change in the rule. The Judges of Alaska, Oregon and Texas did not engage in futile gestures of rule-making. The House of Delegates in adopting Model Rule 4.2 and deliberately using the word "party" where everywhere else it had used the word "person" clearly intended a difference in meaning.

If my colleagues want Model Rule 4.2 to protect "any person", their remedy is not to imagine ambiguity in the current term "party" and then through construction transform it into the broader term "person". Their remedy is to proselytize the members of the House to change the words as the Committee has proposed. Theirs must be the route of legislation, not interpretation.

Ralph G. Elliot

FN1. This opinion was prompted in part by the dialogue between the American Bar Association and the United States Department of Justice in connection with the promulgation of the Department's regulations on Communications with Represented Persons, 28 C.F.R. Part 77.

FN2. This Committee has proposed an amendment to the Rule, to substitute "person" for "party" in the text of the Rule. That proposal will be submitted to the House of Delegates for consideration in August 1995. The change would resolve the ambiguity in the present Rule that is discussed in Part II of this Opinion. The Committee's proposal would also amend the Comment to the Rule to clarify certain matters regarding its proper scope as discussed in this Opinion in the text accompanying notes 36 and 38.

FN3. 2 David Hoffman, A Course of Legal Study Addressed to Students and the Profession Generally 771 (2d ed. Baltimore 1836), quoted in John Leubsdorf, Communicating with Another Lawyer's Client: the Lawyer's Veto and the Client's Interests, 127 U. Pa. L. Rev. 683, 684 n.6 (1979).

FN4. See Roger C. Cramton & Lisa K. Udell, State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules, 53 U. Pitt. L. Rev. 291, 292 n.3 (1992).

FN5. Cramton & Udell, supra note 4 at 325.

FN6. Id. See also Polycast Technology Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 625 (S.D.N.Y. 1990) (stating that the anti-contact rule prevents lawyers from using superior skills and training to obtain "unwise statements" from an opposing party, protects privileged information, and aids in settlements by allowing lawyers skilled in negotiating to conduct discussions about the matter).

FN7. 4 Op. Off. Legal Counsel 576, 584 (1980) (concluding, however, that DR 7-104 did not prohibit federal criminal investigative activities because such activities are "authorized by law").

FN8. See, e.g., State v. Richmond, 560 P.2d 41, 46 (Ariz. 1976), cert. denied, 433 U.S. 915 (1977); State v. Nicholson, 463 P.2d 633, 636 (Wash. 1969).

FN9. See F. Dennis Saylor, IV & J. Douglas Wilson, Putting a Square Peg in a Round Hole: The Application of Model Rule 4.2 to Federal Prosecutors, 53 U. Pitt. L. Rev. 459 (1992).

FN10. See generally, United States v. Hammad, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990); United States v. Thomas, 474 F.2d 110 (10th Cir.), cert. denied, 412 U.S. 932 (1973); In re Doe, 801 F. Supp. 478 (D.N.M. 1992); United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991), rev'd on other grounds, 4 F.3d 1455 (9th Cir. 1993); Suarez v. State, 481 So.2d 1201 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986); People v. Green, 274 N.W.2d 448 (Mich. 1979).

FN11. See United States v. Santiago-Lugo, Crim. No. 95-029 (D. P.R. June 6, 1995), 11 ABA Law. Man. Prof. Conduct 192 (criminal defense counsel who conducted ex parte interviews with co-defendants of their client censured for violating Rule 4.2); but cf. Grievance Comm. for the Southern District of New York v. Simels, 48 F.3d 640 (2d Cir. 1995) (holding that the lawyer for a criminal defendant was not barred from interviewing, without consent of his lawyer, a potential witness against his client in one matter, who was also a potential codefendant of his client in another

matter, since in neither case was this individual a "party" in the same "matter" as the lawyer's client within the meaning of DR 7-104(A)).

FN12. Rule 4.2 cmt. [3].

FN13. See United States v. Ryans, 903 F.2d 731, 739 (10th Cir.), cert. denied, 498 U.S. 855 (1990) ("We are not convinced that the language of [DR 7-104(A)(1)] calls for its application to the investigative phase of law enforcement" because "the rule appears to contemplate an adversarial relationship between litigants, whether in a criminal or a civil setting".) But see United States v. Hammad, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990) (DR 7-104(A)(1) applies prior to filing of formal charges).

FN14. Thus, the term "party" is commonly used to refer to persons beyond the technical parties involved in a matter. For example, "third party discovery" is frequently used with the same meaning as "non party discovery." Moreover, the definition of "party" appears in Black's Law Dictionary (6th ed. 1990) as "[a] person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually."
See also Charles W. Wolfram, Modern Legal Ethics 611 (1986) (observing that "party" is a lawyerism that is intended to refer broadly to any "person" represented by a lawyer in a matter, and suggesting that while DR 7-104(A)(1) of the Model Code of Professional Responsibility "probably" prohibited contact with any represented person, Model Rule 4.2 clearly does); N.Y. State Bar Assoc. Comm. on Profl. Ethics, Op. 656 (1993) (interpreting N.Y. Disciplinary Rule 7-104(A)(1) as applying to communications between lawyer representing parent in child custody proceeding and child for whom a law guardian had been appointed even though the child is not a "party" to the proceeding); N.Y. State Bar Ass'n Comm. on Prof. Ethics Op. 463 (1977) (describing DR 7-104(A)(1) as an absolute proscription against communications with a represented person, not merely a technical party).

FN15. The comprehensive record of the deliberations of the Kutak Commission casts no light on the reason why the word "person" was used in the caption of the Rule while "party" was used in its text.

FN16. In order to eliminate the ambiguity arising from use of the term "party," described in the accompanying text, the Committee has proposed that the Rule be amended to substitute the word "person" for "party" in the body of the Rule. See note 2, supra.

FN17. See, e.g., United States v. Jamil, 546 F. Supp. 646, 654 (E.D.N.Y. 1982), rev'd on other grounds, 707 F.2d 638 (2d Cir. 1983) (stating that DR 7-104(A)(1) protects a person who is a potential litigant); Florida State Bar Assoc. Comm. on Prof. Ethics, Op. 78-4 (1978) (stating that DR 7 104(A)(1) applies "whenever an attorney-client relationship has been established . . . regardless of whether or not litigation has commenced."); Mississippi State Bar, Op. 141 (1988) ("The actual filing of a lawsuit or intent to file a lawsuit is irrelevant to the question of whether the lawyer may communicate with the adverse party."); Texas State Bar Prof. Ethics Comm., Op. 492 (1994) (prohibitions of the Texas anti-contact rule, which is similar to Rule 4.2, apply "despite the fact that litigation is neither in progress nor contemplated.").

FN18. See Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 730 (1993 Supp.). See, e.g., Comm. on Prof. Ethics and Conduct of the Iowa State Bar Assoc. v. Shepler, 519 N.W.2d 92 (Iowa 1994) (attorney's violation of DR 7-104(A)(1) resulted in disbarment when he obtained personal gain in a direct transaction with an elderly woman after being instructed to contact either her family or attorney regarding business matters).

FN19. See, e.g., United States v. Jacobs, 547 F.2d 772 (2d Cir. 1976), cert. dismissed as improvidently granted, 436 U.S. 31 (1978). But see the discussion in Part III infra, regarding decisional authority limiting the Rule's application in criminal investigations prior to arrest or the filing of formal charges.

FN20. See, e.g., Triple A Machine Shop, Inc. v. State, 261 Cal. Rptr. 493, 498 (Ct. App. 1989)(California anti-contact rule's prohibitions "attached once an attorney knew that an opposing party was represented by counsel even where no formal action had been filed."). See also decisions cited in note 17, supra.

FN21. See, e.g., United States v. Pinto, 850 F.2d 927 (2d Cir.), cert. denied, 488 U.S. 867 (1988) (holding that DR 7-104 applied where the prosecutor interviewed a represented witness who was a potential defendant); ABA Formal Op.

187 (1938) (holding that the prohibition in Canon 9 covers a party in a civil case who also is a prospective witness in the matter).

FN22. In the Committee's view, the decision in the Simels case, supra note 11, took an unduly narrow view of the anti-contact rule there involved, DR 7-104, in declining to hold the rule applicable to contact with a represented adverse witness and potential co-defendant.

FN23. See United States v. Ryans, 903 F.2d 731, 740 (10th Cir.), cert. denied, 498 U.S. 855 (1990)(DR 7-104(A)(1) does not apply "during the investigation process before the initiation of criminal proceedings"); United States v. Heinz, 983 F.2d 609, 613 (5th Cir. 1993) (following Ryans).

FN24. See United States v. Jamil, 707 F.2d 638, 645-46 (2d Cir. 1983) (communication by undercover informant in pre-indictment non-custodial setting did not violate DR 7-104(A)(1) where informant was not acting as "alter ego" of prosecutor); United States v. Lemonakis, 485 F.2d 941, 954-56 (D.C. Cir. 1973) cert. denied, 415 U.S. 989 (1974) (DR 7-104 did not prohibit use of undercover informant in a pre-indictment, noncustodial circumstance because the informant's instructions from the prosecutor were not such as to make him the prosecutor's alter ego).

FN25. See United States v. Hammad, 858 F.2d 834, 838-40 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990) (DR 7-104(A)(1) applies prior to filing of formal charges, and undercover informant's use of sham subpoena, under specific direction of prosecutor, to trick suspect contributed to the informant's becoming the prosecutor's alter ego); United States v. Jamil, 546 F. Supp. 646, 654 (E.D.N.Y. 1982), rev'd on other grounds, 707 F.2d 638 (2d Cir. 1983) ("Any direct communication between the Assistant United States Attorney, or a representative of his office, and the defendant occurring after the government became aware that he was represented by counsel would constitute a violation of DR 7-104(A)(1)."); People v. White, 567 N.E.2d 1368, 1386-87 (Ill. App.) appeal denied, 575 N.E.2d 922 (Ill. 1991) (holding, following Hammad, that DR 7-104 applies prior to filing of formal charges, but is only violated by use of an informer in such circumstances when the attorney/prosecutor is "intimately involved in the investigation", so as to make the informer his alter ego). See also United States v. Heinz, 983 F.2d at 615 (Parker, J., concurring in part and dissenting in part) (prosecutor's use of lawyer as undercover informant violated DR 7-104 because he was able to act as a "prosecutorial alter ego" for the government).

FN26. See, e.g., United States v. Ryans, 903 F.2d at 739 ("We are not convinced that the language of [DR 7-104(A)(1)] calls for its application to the investigative phase of law enforcement" because the rule's use of the word "party" "appears to contemplate an adversarial relationship between litigants, whether in a criminal or a civil setting.").

FN27. See In re Disciplinary Proceedings regarding John Doe, 876 F. Supp. 265 (M.D. Fla. 1993) (Florida version of Model Rule 4.2 should be interpreted consistently with that Rule in other circuits, notwithstanding the fact that it uses the word "person" rather than "party".).

FN28. See, e.g., United States v. Dobbs, 711 F.2d 84 (8th Cir. 1983); United States v. Kenny, 645 F.2d 1323 (9th Cir.), cert. denied, 452 U.S. 920 (1981); United States v. Heinz, 983 F.2d 609 (5th Cir. 1993).

FN29. See, e.g., United States v. Ryans, 903 F.2d at 739-40; United States v. Jamil, 707 F.2d at 745.

FN30. Accord ABA Informal Op. 1373 (1976) (finding that Canon 9 bars a prosecutor from sending a letter containing a plea offer to a represented person, even though the communication was pre-indictment).

FN31. United States v. Hammad, 858 F.2d at 839.

FN32. See Alafair S.R. Burke, Reconciling Professional Ethics and Prosecutorial Power: The Non-Contact Rule Debate, 46 Stan. L. Rev. 1635, 1642-45 (1994).
It should be noted that the Department of Justice's regulations on Communications with Represented Persons recognize that in limited circumstances, an anti-contact prohibition applies pre-indictment. Specifically, although the regulations take a categorical position that no one is a "party" until there is a formal proceeding in which he is named as such, 28 C.F.R. § 77.3(a), they prohibit negotiation of a plea agreement, settlement, immunity agreement and other disposition of potential criminal charges with a represented person unless the communication was initiated by that person and the procedure referred to in the text, infra at note 51, has been followed, 28 C.F.R. § 77.8. In addition, the accompanying

amendments to the United States Attorneys' Manual forbid ex parte contacts with represented "targets" of investigations in all but exceptional circumstances. U.S.A.M. 9- 13.240 Overt Communications with Represented Targets. The manual defines a target as a person against whom the lawyer for the government "(a) has substantial evidence linking that person to the commission of a crime or to other wrongful conduct; and (b) anticipates seeking an indictment or naming as a defendant in a civil law enforcement proceeding."

FN33. United States v. Hammad, 858 F.2d at 839 (quoting McNabb v. United States, 318 U.S. 332, 340 (1943)).

FN34. Id. See also 4 Op. Off. Legal Counsel 576, 581 (1980) (stating that "DR 7-104, as generally interpreted, provides suspects and defendants with protections that the Constitution does not.").

FN35. See Maine v. Moulton, 474 U.S. 159 (1985); Brewer v. Williams, 430 U.S. 387 (1977); Massiah v. United States, 377 U.S. 201 (1964).

FN36. E.g., 18 U.S.C. § 2511 (prohibiting wiretapping without a warrant); 12 U.S.C. § 3402 (limiting governmental access to financial records of customers of financial institutions).

FN37. E.g., Model Rule 3.8 (Special Responsibilities of a Prosecutor); Model Rule 4.1(a) (Truthfulness in Statements to Others); Model Rule 4.3 (Dealing with Unrepresented Persons); Model Rule 4.4 (Respect for Rights of Third Persons).

FN38. The Committee's proposal for amendment of Rule 4.2, discussed in note 2, supra, includes a proposed amendment to Comment [2] to the Rule, to recognize as "authorized by law" governmental investigative activities prior to the commencement of criminal proceedings and in addition civil enforcement proceedings when they have been held permissible by such judicial authority.

FN39. The purposes of the Rule, which is to say the reasons for requiring consent of counsel representing the person with whom communication is sought, clearly apply whether or not the inquiring lawyer is aware of the representation. Thus, the requirement that that lawyer know of the representation serves not to implement the purposes of the Rule but only to frame a rule of conduct that can as a practical matter reasonably be imposed. It would not, from such a practical point of view, be reasonable to require a lawyer in all circumstances where the lawyer wishes to speak to a third person in the course of his representation of a client first to inquire whether the person is represented by counsel; among other things, such a routine inquiry would unnecessarily complicate perfectly routine fact-finding, and might well unnecessarily obstruct such fact-finding by conveying a suggestion that there was a need for counsel in circumstances where there was none, thus discouraging witnesses from talking.

FN40. Rule 4.3 provides:

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.

FN41. The Committee's proposed amendment to Rule 4.2 to substitute "person" for "party," discussed in note 2, supra, would also amend the Comment to deal more clearly with the requirement that the communicating lawyer know of the representation.

FN42. As a practical matter, in the course of contact with a person represented by counsel in another matter, the communicating lawyer would be well advised to take care not to elicit comments or attempt to communicate about crime A. However, Rule 4.2 does not preclude discussions of crime B.

FN43. As a practical matter, to be sure, a lawyer wishing to open a dialogue with a person or entity known to be generally represented by a particular firm or by in-house counsel may find it more expeditious and less likely to generate dispute to communicate through counsel.

FN44. See, e.g., Wright ex rel. Wright v. Group Health Hosp., 691 P.2d 564 (Wash. 1984) (applying Model Code of Professional Responsibility DR 7-104(A)).

FN45. Comment [2] provides:
In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee 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 3.4(f).

FN46. Accord, Upjohn Co. v. United States, 449 U.S. 383 (1981); Chancellor v. Boeing Co., 678 F. Supp. 250, 253 (D. Kan. 1988); Shearson Lehman Bros., Inc. v. Wasatch Bank, 139 F.R.D. 412 (D. Utah 1991); Morrison v. Brandeis University, 125 F.R.D. 14, 16-17 (D. Mass. 1989); Niesig v. Team I, 76 N.Y.2d 363 (1990). See ABA Informal Op. 1410 (1978) (stating that DR7-104(A)(1) bars communication with an officer or employee of a corporation in a particular situation unless the communicating lawyer has the prior consent of the lawyer representing the corporation).

FN47. It should be noted that Rule 4.2 does not prohibit contacts with former officers or employees of a represented corporation, even if they were in one of the categories with which communication was prohibited while they were employed. This Committee so concluded in ABA Formal Op. 91-359 (1991).

FN48. See, e.g., United States v. Lopez, 4 F.3d 1455, 1459 (9th Cir. 1993) ("the trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition. As a result, uncurbed communications with represented parties could have deleterious effects well beyond the context of the individual case...."); People v. Green, 274 N.W. 2d 448, 453 (Mich. 1991) (defendant's willingness to speak does "not excuse compliance with the standard of professional conduct prescribed by DR 7-104(A)(1)"); United States v. Thomas, 474 F.2d 110, 111 (10th Cir.), cert. denied, 412 U.S. 932 (1973); United States v. Batchelor, 484 F. Supp. 812 (E.D. Pa. 1980); State v. Morgan, 646 P.2d 1064, 1068-70 (Kan. 1982); State v. Ford, 793 P.2d 397, 401 n.4 (Utah App. 1990).

FN49. See Lopez, 4 F.3d at 1462 (finding that "[t]he rule against communicating with represented parties is fundamentally concerned with the duties of attorneys, not with the rights of parties.").

FN50. See note 40, supra.

FN51. The Department of Justice regulations on Communications with Represented Persons contemplate such a procedure. 28 C.F.R. § 77.6(c).

FN52. Accord, Mich. State Bar Comm. on Prof. and Jud'l. Ethics, Op. 202 (April 5, 1965).

FN53. Lawyer supervision of the activities of investigators is likely to make their work product more useful, and to provide assurance against the commission of improprieties by the investigators.

FN54. Although there appears to be no decisional authority on the point, it seems clear, and widely understood, that the fact that an investigator is also a member of the bar does not render him, in his activities as an investigator, subject to those ethical rules -- the overwhelming majority of the provisions of the Model Rules -- that apply only to a lawyer "representing a client." Such an investigator would nonetheless be subject to those few provisions of the Model Rules, such as portions of Rule 8.4 (Misconduct) that apply to lawyers even when they are not acting as such. See, e.g., Rule 8.4(b): "It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."
Thus, the Department of Justice regulations on Communications with Represented Persons exclude from the defined term "attorney for the government" (with whose activities the regulations are principally concerned), "any attorney employed by the Department of Justice as an investigator or other law enforcement agent who is not authorized to represent the United States in criminal or civil law enforcement litigation or to supervise such proceedings." 28 C.F.R. § 77.2(a).

FN55. Although the question is a close one, the Committee does not believe that a lawyer's making use of evidence offered by an investigative agent by means that would have been forbidden to the lawyer herself but in which she was not complicitous would constitute "ratification" under Rule 5.3(c)(1).
"Ratify" is defined by Black's Law Dictionary (6th ed. 1990) as:
To approve and sanction; to make valid; to confirm; to give sanction to. To authorize or otherwise approve, retroactively, an agreement or conduct either expressly or by implication.

FN56. See ABA Informal Op. 663 (finding that Canon 9 prohibits employment of investigator in defense of malpractice suit to communicate with plaintiff who was represented by counsel); ABA Formal Op. 95 (1933) (finding that it is improper under Canon 9 for a municipal lawyer to permit police officers to obtain written statements from persons having personal injury claims against the municipality when the lawyer knows that the claimants are represented by counsel). See, e.g., Shantz v. Eyman, 418 F.2d 11, 13 (9th Cir. 1969); cert. denied, 397 U.S. 1021 (1970) (finding that a prosecutor acted unethically by sending a psychiatrist to speak with a represented defendant without counsel's knowledge).

FN57. See ABA Informal Op. 985 (1967) (opining that a formal offer of judgment could, consistently with Canon 9, be served directly upon a represented opposing party, but only if this was specifically authorized by statute, and if a copy was simultaneously served on counsel).

FN58. The single exception is Florida. See Florida Rules of Prof. Conduct, Rule 4-4.2. See also In re Disciplinary Proceedings regarding John Doe, 876 F. Supp. 265 (M.D. Fla. 1993), discussed in note 27 supra.

FN59. Rule 4.2 cmt. [2]. See also Wolfram, supra note 14, at 614-15.

FN60. See Hazard & Hodes, supra note 18, at § 4.2.109 (1994 Supp.)

FN61. See ABA Informal Op. 1496 (1983) (an agency lawyer may conduct an inspection of regulated business premises without first contacting the lawyer for the business).

FN62. See United States v. Lopez, 989 F.2d 1032, 1099 amended, 4 F.2d 1455 (9th Cir. 1993) (noting that a court order, if it is to authorize an exception to the Rule's prohibition, must be based upon accurate, and not misleading, information).

FN63. 28 C.F.R. Part 77.

FN64. As has been noted above, ethical rules prohibiting communications with represented persons have been adopted in every state as a part of comprehensive ethics regulations. Lawyers representing the federal government are governed by these rules as a result of the specific requirement by Congress that federal attorneys be "duly licensed and authorized to practice as an attorney under the laws of a State, territory, or the District of Columbia." Department of Justice Appropriation Authorization Act, Fiscal Year 1980, Pub. L. No. 96-132, § 3(a), 93 Stat. 1044, as carried forward in Pub. L. No. 103-317, § 102, 108 Stat. 1734 (1994).

FN65. Although the Committee believes, as stated, that the Chrysler v. Brown test is an appropriate one for interpreting the term "authorized by law" in Rule 4.2, we express no view as to whether the Department of Justice regulations have sufficient statutory authorization to meet that test.

FN66. Comment to Rule 4.2 provides that in the case of a represented organization, communications are prohibited with "persons having managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with this matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

ABA Formal Op. 95-396

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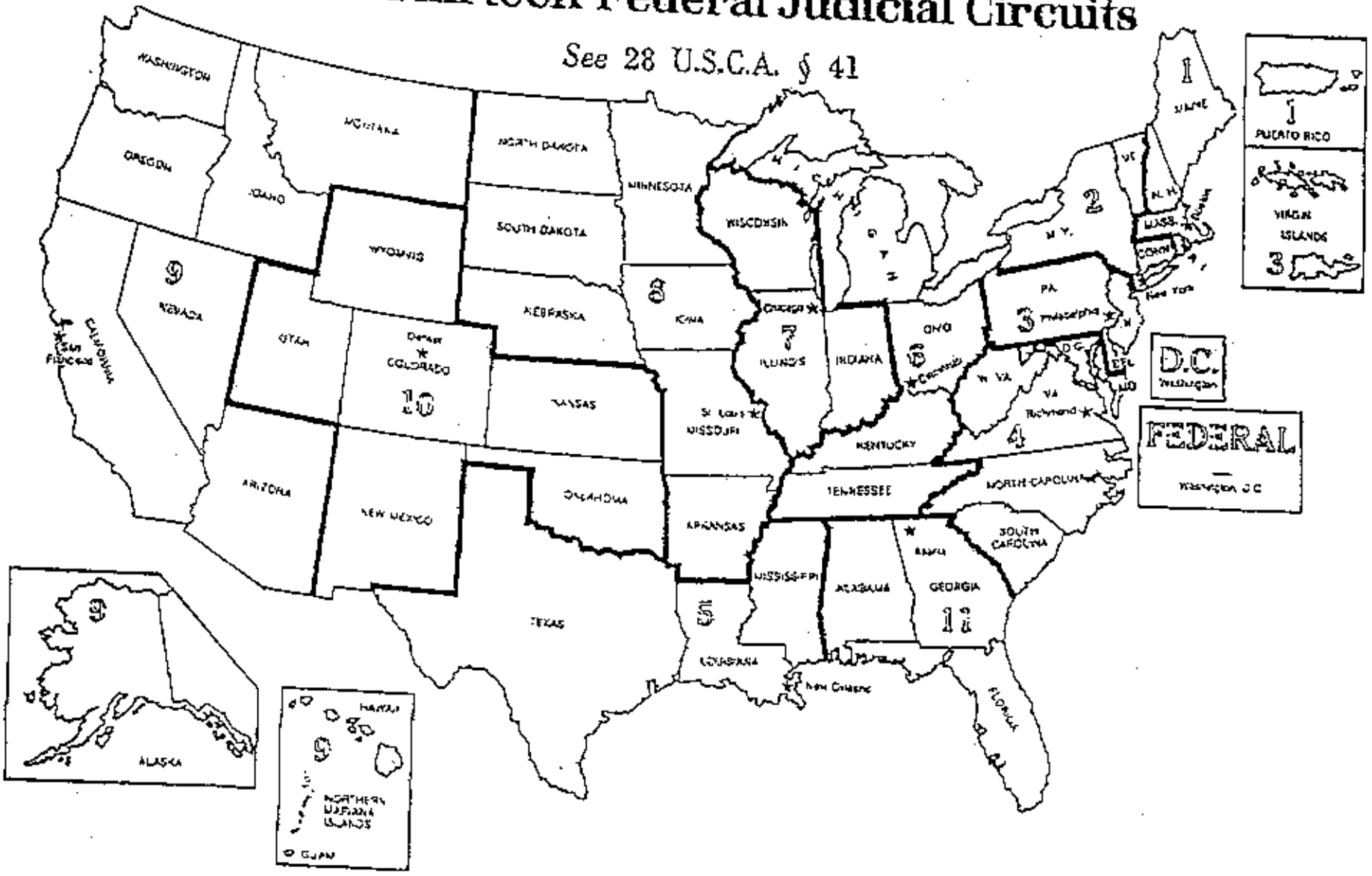
The Thirteen Federal Judicial Circuits

See 28 U.S.C.A. § 41



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