

# 93

## **EX PARTE CONTACTS WITH GOVERNMENT OFFICIALS**

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### ***Introduction and Scope***

The Ethics Committee of the Colorado Bar Association (Committee) has received inquiries concerning the scope of the ethical prohibition on *ex parte* contacts with a government organization represented by counsel. Situations frequently arise in and outside of litigation where a lawyer may wish to contact public officials, public bodies, agency employees, and other government personnel about governmental decisions or conduct.

Several years ago, in the broader context of *ex parte* contacts with an organizational party, the Committee issued its Formal Opinion 69, “Propriety of Communicating With Employee of an Adverse Party Organization” (1987, Addendum issued 1995, Revised 2010) (Opinion 69). This opinion supplements Opinion 69 and provides more particular guidance with respect to contacts with government organizations under Rule 4.2 of the Colorado Rules of Professional Conduct (Colo. RPC or the Rules). Because there is a relative dearth of case law on this subject, the Committee has analyzed and relied upon ethics opinions from other state bar associations that have considered the propriety of *ex parte* contacts with a government organization, in addition to the few reported decisions.

### ***Syllabus***

In general, the ethical rule prohibiting *ex parte* contacts with an organization represented by counsel in a particular matter about the subject matter of that representation applies with equal force to a government organization. As in the case of a non-government organization, an attorney may make *ex parte* contact with an employee or official who is not “a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyer concerning the matter,” or who does not have “authority to obligate the organization with respect to that matter.” See Colo. RPC 4.2, cmt. [7]. The individuals who may be contacted despite representation of the organization are sometimes incorrectly referred to as “bystander witnesses.” Opinion 69 provides greater detail on this distinction, but in general the lawyer may not contact those who, with respect to the subject matter of the representation, have the authority to commit the government organization to a position, whose acts or omissions can be imputed to the government, or whose statements may be admissible against the government organization.

The fundamental constitutional rights to speak and to petition one’s government for the redress of grievances may in some circumstances conflict with this general ethical rule. In order to balance these competing concerns, an attorney may make *ex parte* contact with that more limited group of government employees or elected officials whose statements may be admissible against the government organization, but who are not in positions of authority and whose conduct is not

at issue in contemplated or commenced litigation or other proceedings. In addition, in the context of a legislative determination or rulemaking by an agency, *ex parte* contact with the members of the legislative body or agency is permissible even though they would otherwise fall under Rule 4.2, unless the *ex parte* contact is specifically prohibited by law. It is important to keep in mind that in any setting *ex parte* contacts are permissible with the prior consent of the attorney representing the government entity.

### ***Analysis***

The ethical principle at issue is codified in Rule 4.2, which provides as follows:

#### **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.

For the purpose of addressing the narrower issues raised when the organization is a government body, the Committee does not believe it is necessary to restate the substance of Opinion 69. Nevertheless, it should be noted that Opinion 69 analyzed the issue in terms of Rule 4.2's four constituent parts: (1) a "communication"; (2) concerning the "subject of the representation"; (3) made to a person whom the attorney "knows" to be "represented" by counsel in the matter; unless (4) the attorney is "authorized by law or by court order" to communicate with the person without prior consent.

On its face, Rule 4.2 does not distinguish between governmental and nongovernmental organizations, although several of the comments draw some distinction. In general, Rule 4.2 applies to an attorney's communications with a government organization through its employees and elected and other public officials. *See* ABA Formal Op. 97-408, "Communication with Government Agency Represented by Counsel" (1997) (ABA Op. 97-408) (discussing whether a lawyer representing a private party may communicate about the matter with responsible government officials without prior consent from government counsel); Conn. Bar Ass'n Prof'l Ethics Comm., Informal Op. 01-17, "Application of No Contact Rule to Government Officials and Agencies" (2001) (Rule 4.2 permits contact with a represented party if authorized by law, and a comment recognizes that communications authorized by law include the right to speak with government officials about a matter); N.C. State Bar, 2005 Formal Ethics Op. 5, "Communication With Government Entity Represented by Counsel" (2006) (exploring the extent to which a lawyer may communicate with employees or officials of a represented government entity); Ohio S. Ct. Bd. of Comm'rs on Grievances and Discipline, Op. 92-7 (1992); Utah State Bar Ethics Advisory Op. Comm. Op. 115R (1994); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Jud. Ethics, Formal Op. 1991-4 (1991) (NYSBA Op. 1991-4). An attorney's ethical obligations in this regard are not altered when a government employee or official initiates the direct contact with the attorney. Nevertheless, because of the unique issues at stake when the government is a party, in some situations *ex parte* contacts are nonetheless "authorized by law," and, thus, permissible.

This opinion attempts to define the scope of the "authorized by law" exception in addressing the

constitutional rights at issue, but it is not intended to be all encompassing. For example, the Committee does not specifically address the ethical issues involved when a prosecuting attorney attempts to make *ex parte* contact with a criminal defendant. Nor has the Committee attempted to list or discuss specific federal, state, or local laws, rules, or regulations that may specifically authorize direct contact between an attorney and a government employee or official. The Committee believes that a narrower reading of the prohibition on *ex parte* contacts is required to balance properly the salutary purpose of Rule 4.2—shielding a represented party from improper approaches—with the fundamental First Amendment rights at stake when dealing with a governmental organization.

Although the scope of Rule 4.2 is not limited to the litigation setting, the issue of *ex parte* contacts arises most frequently in the context of threatened or existing lawsuits or adversarial administrative proceedings. See Ellen J. Bennett, *et al.*, ABA Ctr. for Prof'l Resp., *Communication with Person Represented by Counsel: "Parties versus Persons,"* Ann. Mod. Rules Prof'l Cond. (8th ed. 2015) (explaining that the language of ABA Model Rule 4.2 was changed from "party" to "person" in 1995 to clarify that the rule applies to "anyone known to be represented regarding the subject of the intended communication"). Because Rule 4.2 is not so limited, this opinion also addresses its scope in non-litigation settings, such as lobbying efforts and business transactions with governmental bodies.

### ***When is the Organization Represented by Counsel?***

As stated in Opinion 69, an attorney must "know" that an organization is represented by counsel in the matter for the *ex parte* prohibition to apply. Under the Rules, to "know" is defined as having "actual knowledge of the fact in question." However, knowledge may be inferred from circumstances." Colo. RPC 1.0 ("Terminology").

An organization, whether it is a private entity or a government body, is not "represented by [a] lawyer" in every matter, adversarial or not, simply because the organization has counsel on general retainer or has an in-house counsel staff. An organization must have taken affirmative steps to retain counsel in a specific matter or referred the matter to its in-house counsel before it is "represented" under Rule 4.2. See Opinion 69; ABA Comm. on Ethics and Prof'l Resp., Formal Op. 95-396, "Communications with Represented Persons" (1995) (Model Rule 4.2, "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"; rather, the subject matter of the representation needs to have crystallized between the client and the lawyer); N.C. State Bar RPC 132 "Communications with Government Officials" (1992) (lawyer representing defaulting borrower may contact city loan officer without knowledge or consent of city attorney because lawyer has not received notice that city attorney is participating in this matter); see also, e.g., *Terra Int'l, Inc. v. Miss. Chem. Corp.*, 913 F. Supp. 1306, 1317 (N.D. Iowa 1996) (rejecting "automatic representation" of all plant employees and permitting *ex parte* interviews of employees); *Carter-Herman v. Philadelphia*, 897 F. Supp. 899, 903 (E.D. Pa. 1995) (rejecting "the notion that every city employee is automatically a represented party simply by virtue of his or her employment without any initiative on the part of the employee to obtain legal help from the City"); *Patriarca v. Ctr. for Living & Working, Inc.*, 778 N.E.2d 877, 880 (Mass. 2002) (organization may not assert a preemptive and exclusive representation by the organization's lawyer of all current (or former) employees as a means to invoke Rule 4.2 and insulate them all from *ex parte* communication with the lawyers of potential adversary parties).

For example, the federal government is generally represented by the Justice Department, the State of Colorado by the Attorney General, and a municipality by its city attorney. If this definition of representation were applied to the governmental organization in both adversarial and non-adversarial matters, it would stultify even ordinary communications with the government. In addition, it may not be obvious to an attorney that the government body is represented by counsel in that matter. Therefore, at the outset of a permissible *ex parte* contact, an attorney should identify himself or herself as such and should state the purpose of the inquiry. This procedure is consistent with Rule 4.3, which addresses contact with unrepresented persons. If an attorney remains in doubt about counsel's involvement in a particular matter, it would be prudent for the lawyer to make inquiries of the government organization's regular counsel to determine whether the organization is "represented" in the particular matter. *See Op. 69.*

### ***"Authorized by Law" Exception***

Comment [5] to Rule 4.2 contains a broad statement about the "authorized by law" exception to the *ex parte* prohibition: "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." If this statement were taken literally, it might vitiate the Rule. At face value, this comment could permit *ex parte* contacts in litigation with a government decision maker or a government employee named in the suit. However, the Committee does not believe that this comment was intended to support *ex parte* contacts with managerial government employees or with government employees whose conduct is at issue in a matter that is in active litigation or in an adversarial administrative proceeding. *See Op. 69; ABA Comm. on Ethics & Prof'l Resp., Informal Op. 1377 (1977) (ABA Informal Op. 1377) (where city is defendant in property damage suit arising from allegedly defective sewer system, plaintiff's counsel may not interview the building marshal ex parte; because of his authority to enforce the building code, he is the city's alter ego).*

Beyond these groups, however, counsel is free to make *ex parte* contact with government employees. *Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n Op. 94, "Communication With an Employee or Official of a Municipality" (1989) (attorney may contact any municipal employee who does not make decisions about the litigation, is not responsible for seeking legal advice for the city or informing city council about policy matters, and does not direct staff preparation for the litigation); State Bar of Mich. Standing Comm. on Prof'l & Jud. Ethics Op. RI-316 (1999) (lawyer may communicate with government caseworker for the family independence agency and may discuss matters without the Attorney General's consent); State Bar of Mont. Ethics Op. 940430, "Witness (Ex Parte Contact)" (1994) (an attorney may conduct ex parte interviews with state government employees provided the employees lack authority to bind the government and settle disputes); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 652, "Communications with Adverse Party; Governmental Entity" (1993) (an attorney may communicate with an official or employee of a governmental entity in connection with pending litigation provided the employees contacted lack the power to bind the entity); State Bar Ass'n of N.D. Ethics Comm. Op. 95-06 (1995) (government agencies are included in Rule 4.2's meaning of a party; attorney representing workers compensation claimant may contact employees of worker's compensation bureau); Or. State Bar Bd. of Governors, Formal Ethics Op. 2005-152, "Communicating with Represented Persons: Current and Former Employees of State Agency" (2005) (lawyer may not speak to a current employee at state agency if the conduct of the current employee is at issue in the matter or the current employee is part of agency management); *see also, e.g., Hammond v. City of Junction City*, 167 F. Supp. 2d 1271, 1284-85 (D. Kan. 2001)*

(individual managerial employees are considered to be “parties” for purposes of prior version of Rule 4.2; law firm was prohibited from communicating with city employees with managerial responsibility, whose acts or omissions may be imputed to the city, or whose statements may constitute an admission on the part of the city); *Rivera v. Rowland*, 1996 WL 753943, \*5 (Conn. Super. Ct. 1996) (assistant public defenders and other non-managerial employees should be considered “fact witnesses” and not “parties”; plaintiffs’ counsel should have unrestricted access because limiting access might choke off the flow of information or diminish willingness of those to be interviewed, to talk freely); *B.H. v. Johnson*, 128 F.R.D. 659, 663 (N.D. Ill. 1989) (rejecting the application of DR 7-104(A)(1) (predecessor to Rule 4.2) to low-level employees whose statements may be deemed admissions and, as a counterbalance, refusing to allow informal *ex parte* statements by such employees to be admitted); *Frey v. Dep’t of Health & Human Servs.*, 106 F.R.D. 32, 36 (E.D.N.Y. 1985) (to include non-managerial employees within term “party” under DR 7-104(A) would conflict with goal of broad access to witnesses to uncover and present all relevant evidence); *Vega v. Bloomsburgh*, 427 F. Supp. 593, 595 (D. Mass. 1977) (the interest of state officials who were parties to an action in being protected from the statements of their employees in informal *ex parte* interviews is outweighed by the First Amendment right of those employees to speak if they wish).

The Committee believes that a balancing test favoring *ex parte* contacts in close cases is appropriate, based on the fundamental right to petition the government for a redress of grievances under both the First Amendment of the United States Constitution and Article II, Section 24, of the Colorado Constitution. This is particularly true in a legislative, regulatory, or administrative setting. The First Amendment right at issue constitutes “an authorized by law” exception to Rule 4.2. *See Am. Canoe Ass’n v. St. Albans*, 18 F. Supp. 2d 620, 621-22 (S.D. W. Va. 1998) (right to contact and communicate with government officials is right of citizenship); *Camden v. State of Md.*, 910 F. Supp. 1115, 1118 n.8 (D. Md. 1996) (“Insofar as a party’s right to speak with government officials about a controversy is concerned, Rule 4.2 has been uniformly interpreted to be inapplicable.”); Ala. State Bar Off. of Gen. Counsel Op. 88-84 (1989) (attorney for plaintiff homeowners in suit against county officials for reconsideration of zoning decision may meet with defendants *ex parte* because plaintiffs have constitutional right to petition elected officials for redress of grievances); Iowa Sup. Ct. Bd. of Prof’l Ethics & Conduct Op. 87-29, “Witnesses: Interviewing City Council Members” (1988) (attorney of potential defendant in proposed suit by city council may contact council members to lobby against filing of suit without knowledge or consent of city attorney); Kan. Bar Ass’n Ethics Advisory Comm. Op. 00-06, “Communicating with a Government Official While Representing a Client” (2000) (lawyer for zoning applicant may contact city officials about client’s application despite city attorney’s contrary directive because “a citizen must always have access to his or her government”); N.Y. State Bar Ass’n Comm. on Prof’l Ethics Op. 812, “Communication with a Represented Party” (2007) (a lawyer may communicate with individual town planning board members because the proposed communications fall within the protection of the First Amendment right to petition); State Bar of S.D., Ethics Op. 98-9, “Contact with Represented Persons; Municipal Officials” (1998) (attorney’s lobbying efforts to members of the city council and mayor regarding the passage of an ordinance does not require the city attorney’s permission under “authorized by law” exception).

The “authorized by law” exception also applies to federal, state, and local statutes that specifically permit a lawyer to contact a represented party directly. For example, Rule 4 of the Colorado or Federal Rules of Civil Procedure permits service directly on a party. Another example would be where parents are given the right to attend planning and placement team

meetings of the local school board, the parent's lawyer may communicate with the school board employees present at the meeting. Conn. Bar Ass'n Informal Op. 87-15, "Propriety of Opposing Counsel Having Discussions with Government Employees without the Consent of Counsel for the Government" (1988).

There appears to be little case law concerning the right to petition one's government; nonetheless it is a freedom protected by the Bill of Rights and the Supreme Court has been loathe to impute to any legislative or rulemaking body, executive agency, or court an intent to curtail this freedom. *See, e.g., Calif. Motor Transp. Co. v. Trucking Unltd.*, 404 U.S. 508, 510 (1972); *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). Rule 3.4(f) states: "A lawyer shall not . . . (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless: (1) the person is a relative or an employee or other agent of a client and the lawyer is not prohibited by other law from making such request; and (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."

Both courts and bar associations troubled by the potential breadth of the "authorized by law" exception have imposed common sense constraints on *ex parte* contacts in order to give government attorneys some notice of the contact. Consistent with Opinion 69, in *Frey*, 106 F.R.D. at 38, and *Morrison v. Brandeis Univ.*, 125 F.R.D. 14, 19-20 (D. Mass. 1989), the courts conditioned *ex parte* interviews on counsel's disclosing to the employee immediately (at the initial contact) counsel's position and the purpose of the contact. *See also* ABA Op. 97-408 (the lawyer must give government counsel "reasonable advance notice of intent to communicate"); *In re Anonymous*, 729 N.E.2d 566, 568 (Ind. 2000) (attorney's *ex parte* communication seeking emergency relief for the transfer of child custody without providing notice or an opportunity to contest was impermissible); *Hammond v. City of Junction City*, 2002 WL 169370, \*6 (D. Kan. January 23, 2002) (unpublished) (court granted protection order prohibiting *ex parte* communications because city did not receive any notice of communications).

The Committee notes that, in balancing the First Amendment rights at issue with the government's right to the protections of Rule 4.2 or DR 7104(A)(1), several courts have permitted *ex parte* contacts conditioned upon a form of "Miranda" warning. *E.g., Frey*, 106 F.R.D. at 38; *Morrison*, 125 F.R.D. at 19-29 (the person to be contacted was to be told he or she had the right to refuse the interview or to have the interview conducted in the presence of the public body's attorney or his or her personal attorney).

The Committee also notes that several bar associations have taken a slightly different tack and required prior or subsequent notice to the government's attorney of the *ex parte* contact. For example, the Association of the Bar of the City of New York Committee on Professional and Judicial Ethics has reconciled the competing concerns by permitting counsel to send written comments about an agency decision directly to the government decision maker, but requiring the commenting lawyer to (a) notify the official that the matter is in litigation and that the official may want to consult counsel before responding, and (b) provide a copy of the letter to the government's counsel. NYSBA Op. 1991-4. *See also* Ill. State Bar Ass'n Advisory Op. on Prof'l Conduct 94-07, "Ex Parte Communications" (1994) (attorney did not provide "timely notice" to opposing counsel when judge initiated *ex parte* communication); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Jud. Ethics Formal Op. 1988-8 (1988); Phil. Bar Ass'n Prof'l Guidance Comm., Op. 98-15 (1999) (copying opposing counsel on a letter to a judge removes the objection that it is an *ex parte* communication, provided the letter is received by

opposing counsel at the same time or before it is received by a judge; *Bublitz v. E.I. duPont de Nemours & Co.*, 196 F.R.D. 545, 549 (S.D. Iowa 2000) (any communication by the defendant to the putative class members—all current managerial employees of the defendant—relating to the merits or settlement of the action or participation in the action must be in writing with a copy of the writing filed with the court); *Summers v. Rockwell Int'l Corp.*, No. C-2-92-301, slip op. at 6 (S.D. Ohio Apr. 9, 1993) (magistrate permitted *ex parte* contact with former employees under conditions that the plaintiff's counsel would provide written notice making certain disclosures to former employees in advance of the interview and would obtain the employees' consent); .

In summary, the First Amendment right to petition one's government should not be read into every contact with a government employee, which would otherwise negate Rule 4.2 in every instance. *See, e.g.*, ABA Informal Op. 1377, Va. State Bar Ass'n Op. 777, "Communicating with One of Adverse Interest" (1986); Me. Bd. of Overseers of the Bar Prof'l Ethics Comm'n Op. 90, "Written Communication with Amicus Curiae Regarding Matter in Litigation" (1988). In general, as stated above, when the government is a party it is entitled to the benefits of Rule 4.2.

### ***Non-Litigation Settings***

As noted above, Rule 4.2 is not limited to formal adversarial settings such as litigation, arbitration, or adjudicative proceedings before an administrative body. In any transaction—such as the negotiation of a contract or a lease with a government entity; or a public meeting, hearing, or colloquy with public officials or employees that could lead to litigation—Rule 4.2 remains applicable. This does not mean, however, that the *ex parte* contact is necessarily prohibited. For example, the "authorized by law" exception generally applies to an attorney's communications with public officials at a public meeting. *See* Ohio S. Ct. Bd. of Comm'rs on Grievances & Discipline, Op. 92-7 (1992). It is important to keep in mind that regardless of the setting, for the *ex parte* contact to be prohibited, all of the elements of the Rule discussed above and in Opinion 69 must be met.

### ***Judicial and Quasi-Judicial Settings***

The issue of *ex parte* contacts with a government official also can arise when an attorney appears before a decision maker, whether an individual or a public body, in a judicial or quasi-judicial setting. Such situations would include a zoning proceeding before a city council or board of county commissioners or a licensing or permit application to a federal, state, or local body or administrative agency. In these settings, in addition to Rule 4.2, Rule 3.5(b) applies. Rule 3.5(b) states: "A lawyer shall not . . . communicate *ex parte* with [a judge or other official] during the proceeding unless authorized to do so by law or court order." *See also* N.J. Advisory Comm. on Prof'l Ethics Op. 583, "Ex Parte Communications with Professional Boards in Disciplinary Proceedings" (1986) (deputy attorney general prosecuting matter before agency may not contact head of agency *ex parte* to determine acceptability of settlement to agency). Due process protections dictate a similar result. *See* Or. State Bar Bd. of Governors, Formal Ethics Op. 2005-83, "Ex Parte Contact with Administrative Law Judge" (discussing Rule 3.5 and explaining that *ex parte* communications with county employees who are also *quasi*-judicial decision makers are generally prohibited—but such communications may be permissible in administrative law proceedings under Oregon law if they are disclosed and other parties have the opportunity to rebut the substance of the communications); N.C. State Bar Formal Ethics Op. 15, "Ex Parte Communication With a Judge When Permitted by Law" (2001) (a lawyer may not engage in an

*ex parte* communication with a judge or other official unless permitted by law through statute or case law; authorization may not be inferred by notice to the adverse party or counsel prior to *ex parte* communication); Ala. State Bar Off. of Gen. Couns. Op. 2003-03, “Communication With Represented Government Officials Permitted” (2003) (lawyer defending employees and officials of state board of education in suit by county board of education may communicate directly with county board members only to discuss settlement). *See also, e.g., Weissman v. Bd. of Educ. of Jefferson Cnty. Sch. Dist. No. R-1*, 547 P.2d 1267, 1276 (Colo. 1976); *Worman Enters. v. Boone Cnty. Solid Waste Mgmt. Dist.*, 805 N.E.2d 369, 375-76 (Ind. 2004) (consideration of permit application by board of county solid waste management district was hybrid function of adjudication and legislation, and thus *ex parte* communications by board members with public citizens regarding the application was proper; board was local agency expected to be open and to respond to concerns of its constituents, and board was expected to receive input in less formalized manner than court proceeding); *Cooper v. Parrish*, 203 F.3d 937, 945-46 (6th Cir. 2000) (chancellor acting in his judicial capacity did not violate constitutional rights when he engaged in *ex parte* contact with prosecutors and gave them legal advice regarding their case).

Officials of an agency governed by the state Administrative Procedure Act (APA) who are acting in a judicial or quasi-judicial capacity may not receive or consider *ex parte* materials or representations. C.R.S. § 24-4-105(14). *See Wells v. Del Norte Sch. Dist. C7*, 753 P.2d 770, 772 (Colo. App. 1987). An attorney’s *ex parte* contact in such a situation is both an ethical violation and, potentially, cause for invalidating the agency’s decision. *See, e.g., Peoples Natural Gas Div. of N. Natural Gas Co. v. Public Utils. Comm’n*, 626 P.2d 159, 163-64 (Colo. 1981). In the context of agency rulemaking or adjudications governed by the federal APA, Congress has restricted *ex parte* communications in “on the record” proceedings, 5 U.S.C. § 557(d)(1), rendering Rule 4.2’s “authorized by law” exception unavailable.

### ***The Validity of a Blanket Prohibition on Government Employee’s Contact With Opposing Counsel***

The Committee is aware of instances where government bodies have directed their employees not to discuss matters in litigation or administrative proceedings with counsel for the opposing party. At first blush such an admonition may appear reasonable and within the bounds of Rule 3.4(f). However, several courts and state ethics opinions have deemed such “gag” rules to be ethically impermissible either because they would violate First Amendment rights or would preempt counsel’s right to approach certain employees *ex parte*. This Committee concludes that as a general matter, such “gag” rules are impermissible. Limited exceptions do exist, for example, where a public employee speaks out on matters of personal interest, as opposed to matters of public concern. *See Connick v. Myers*, 461 U.S. 138 (1983).

In *Vega*, the Deputy Commissioner of the Department of Public Welfare issued a memorandum to his employees responsible for the Medicaid program at issue, instructing them not to meet with plaintiffs’ attorneys without specific approval of the Department’s attorney, at the risk of disciplinary action. The court found the memorandum violative of the First Amendment rights of those department employees who wished to speak with plaintiffs’ counsel. 427 F. Supp. at 595; *see also Rodriguez v. Percell*, 391 F. Supp. 38, 41-43 (S.D.N.Y. 1975) (directive by Chancellor of New York City school district pursuant to city charter prohibiting teachers from making statements in suit on behalf of Spanish-speaking children violated First and Fourteenth Amendments); Ohio S. Ct. Bd. of Comm’rs on Grievances & Discipline, Op. 92-7 (1992) (under the First Amendment, a government department, agency, or its counsel may not forbid

employees' communications with an adversary's attorney unless the government's attorney is present); *cf. Wright v. Group Health Hosp.*, 691 P.2d 564 (Wash. 1984) (under DR 7-104 (A)(1), hospital corporation may not prohibit current employees from participating in *ex parte* interviews with plaintiffs' attorneys).

### ***Conclusion***

When the organizational party is a government entity, Rule 4.2's prohibition on *ex parte* contacts is both broader and narrower in scope than Comment [5] to the Rule might suggest.

Notwithstanding the comment's statement that the "authorized by law" exception permits *ex parte* contacts with government officials about a controversy with a government agency, in general, Rule 4.2 prohibits such contacts with "a constituent of the [governmental] organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter," or one who has "authority to obligate the [governmental] organization with respect to that matter," absent the consent of counsel who is representing the organization in the matter.

Nevertheless, because of the "authorized by law" exception, the Rule does not prohibit *ex parte* contacts with any government official or employee acting in a legislative or rulemaking capacity (except when specifically prohibited by law). Nor does it prohibit contact with government employees or officials whose statements could be deemed admissions against the governmental organization under the applicable rule of evidence. In addition, where a specific statute, rule, ordinance, or court order permits contact with the government employee or official, counsel may proceed *ex parte* without notifying the government's counsel.