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***Ex Parte* Communications With Represented
Persons During Criminal and Civil Regulatory
Investigations and Proceedings**

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Introduction

Police and other law enforcement agents historically have possessed broad powers, within constitutional limits, to investigate alleged violations of criminal and civil regulatory laws. These powers include the authority to conduct pre-arrest and pre-indictment investigations, including undercover operations. During these pre-arrest and pre-indictment investigations, police and other law enforcement agents are entitled to interview witnesses, potential suspects, and even the accused if he or she waives his or her constitutional rights to remain silent.

After a person has been taken into custody and/or is charged in an adversarial proceeding, these broad police powers are significantly restricted by the Fifth and Sixth Amendments to the U.S. Constitution. The Fifth Amendment prohibits law enforcement personnel, in the absence of a waiver, from conducting custodial interrogations of the accused. The Sixth Amendment substantially restricts the ability of law enforcement personnel to communicate *ex parte* with criminal defendants once adversarial proceedings have been initiated.

In recent years, prosecutors and other lawyers charged with enforcing criminal and civil regulatory laws have begun to play a larger role in pre-arrest and pre-indictment investigations. This trend has been viewed positively by the general public and the bar because of the perception that a lawyer's involvement in a criminal or civil regulatory investigation may help ensure that the criminal and/or civil regulatory investigation complies with constitutional constraints, as well as high professional and ethical standards.

This expansion of the traditional prosecutorial responsibility for trying and disposing of cases to organizing and supervising criminal and civil regulatory investigations, however, has created considerable uncertainty in the law as to whether ethical rules of conduct should restrain lawyers engaged in criminal and civil regulatory investigations from contacts with persons known to be represented by counsel beyond those restrictions provided for by the U.S. and Colorado Constitutions. The overwhelming preponderance of federal and state court decisions holds that the restriction on contacts with a represented person contained in Rule 4.2 of the Colorado Rules of Professional Conduct (Colorado Rules or Colo. RPC) does not apply during the investigative stage of criminal proceedings and prior to arrest or indictment, but does apply once adversarial proceedings have begun. See *United States v. Talao*, 222 F.3d 1133, 1138-41 (9th Cir. 2000) (applying California’s version of Rule 4.2); *United States v. Ryans*, 903 F.2d 731, 735-36 (10th Cir.) (discussing cases decided under predecessor rule DR 7-104(A)(1)), *cert. denied*, 498 U.S. 855 (1990); *United States v. Lemonakis*, 485 F.2d 941, 955-56 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974); *United States v. Grass*, 239 F.Supp.2d 535, 539-46 (M.D.Pa. 2003) (applying Pennsylvania’s version of Rule 4.2).¹ Authorities similarly hold that Rule 4.2’s restriction does not apply during the investigative stage of civil enforcement proceedings, but does apply once adversarial proceedings have begun. See Colo. RPC 4.2, Comment [5] (noting that “[c]ommunications authorized by law may also include investigative activities of lawyers representing governmental entities . . . prior to the commencement of . . . civil enforcement proceedings”); *United States v. Teeven*, 1990 WL 599373 at *2-*4 (D.Del. Sept. 28, 1990) (finding that *ex parte* interviews by government attorneys conducting civil False Claims Act investigation did not violate Delaware’s version of Rule 4.2); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 95-396 (1995).

The CBA Ethics Committee (Committee) issued an earlier version of this formal opinion based on DR 7-104(A)(1) of the Colorado Code of Professional Responsibility. The Committee believes that it is appropriate at this time to issue a revised opinion based on the current Colorado Rules and, particularly, on Rule 4.2’s use of the term “represented person” rather than “represented party.” Because members of the bar relied on an earlier version of this opinion, in large part this opinion tracks the organization of the earlier version. The Committee has removed discussion of issues that were clarified or changed under the Colorado Rules.

Scope

The purpose of this opinion is to provide guidance to lawyers in evaluating the ethical propriety of *ex parte* communications with persons known to be represented by counsel. The Committee recognizes that there are a variety of strongly held and cogently articulated positions on the application of Colo. RPC 4.2 to prosecutors and other lawyers involved in enforcing criminal and regulatory laws. The Committee is aware that as a result of this divergence of opinion, prosecutors and other members of the bar need guidance on the applicability of Colo. RPC 4.2 to their contacts with parties known to be represented by counsel during criminal and civil regulatory enforcement proceedings.

Syllabus

Established case law and the Colorado Rules permit communications with represented persons during the investigative stage of criminal and civil regulatory enforcement proceedings, and prohibit such communications once formal proceedings have commenced, subject to several well-defined exceptions.

Analysis

Colo. RPC 4.2, entitled “Communications with Person Represented by Counsel,” governs lawyers’ *ex parte* communications with parties represented by counsel and provides:

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.

The rule generally applies if (1) the person has retained a lawyer or obtained court appointed counsel, (2) the representation concerns the subject matter in question, and (3) the opposing lawyer “knows” the person is represented by counsel concerning the subject matter of the communication. *See generally People v. Bennett*, 810 P.2d 661, 664 (Colo. 1991) (describing conditions in which attorney–client relationship exists); *People v. Morley*, 725 P.2d 510, 517-18 (Colo. 1986) (same); *Klancke v. Smith*, 829 P.2d 464, 466 (Colo.App. 1991) (same). As explained in Comment [8] to Colo. RPC 4.2, the opposing lawyer is required to have actual knowledge that the person is represented, but the opposing lawyer “cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.”

Underlying Colo. RPC 4.2 is the recognition that when two parties in a legal proceeding are represented, it is unfair for a lawyer to circumvent opposing counsel and employ superior skills and legal training to take advantage of the opposing party. Disciplinary authorities in all fifty states and the District of Columbia have enacted some version of Colo. RPC 4.2 or other similar prohibitory rules. The prohibition embodied in Colo. RPC 4.2 against communication with a represented party recognizes the inherent danger in a layperson conducting negotiations with an opposing lawyer and the likelihood that such negotiations would destroy the confidence essential to the attorney–client relationship and hamper the subsequent performance of the represented party’s counsel. *United States v. Batchelor*, 484 F.Supp. 812, 813 (E.D.Pa. 1980).

A. Communications With a Person Represented by Counsel Made During the Course of Investigations or Other Proceedings Into Alleged Unlawful Conduct

In the course of criminal and civil regulatory enforcement investigations, a prosecuting attorney or government lawyer may communicate, or cause another to communicate, with a represented person concerning the subject matter of the representation if the communication is made in the course of an investigation into possible unlawful conduct. Except in those situations described in section C below, the communication must occur prior to the attachment of the Fifth and Sixth Amendment rights to counsel with respect to charges against the person arising out of the criminal activity that is the subject of the investigation or other proceeding. *See United States v. Heinz*, 983 F.2d 609, 613 (5th Cir. 1993); *United States v. Ryans*, 903 F.2d at 739; *United States v. Sutton*, 801 F.2d 1346, 1365-66 (D.C. Cir. 1986); *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir. 1983), *cert. denied*, 464 U.S. 852 (1983); *United States v. Lemonakis*, 485 F.2d at 955-56; *People v. Hyun Soo Son*, 723 P.2d 1337, 1339-42 (Colo. 1986); *People v. Rubanowitz*, 688 P.2d 231, 247 (Colo. 1984).²

Such contact may take the form of attempts to interview the suspect about the matter being investigated, interviews, undercover activity designed to elicit information from the suspect, or simple observation of the allegedly unlawful behavior. On the other hand, a prosecuting attorney or government lawyer may not engage in deceit or misrepresent the lawyer’s role in the matter. *In re Pautler*, 47 P.3d 1175, 1180-81 (Colo. 2002);³ Colo. RPC 8.4(c).

Most courts interpreting Colo. RPC 4.2 or its predecessor, DR 7-104(A)(1), have reached the conclusion that a lawyer's actions as described above are "authorized by law." For example, in *United States v. Ryans*, the Tenth Circuit held that the use of an informant, on instructions from the prosecutor, to surreptitiously record incriminating conversations with suspects who had retained counsel, but who had not been either arrested or indicted, did not violate DR 7-104(A)(1). *Ryans*, 903 F.2d at 740. *See also United States v. Balter*, 91 F.3d 427, 436 (3d Cir. 1996); *United States v. Powe*, 9 F.3d 68, 69 (9th Cir. 1993); *Sutton*, 801 F.2d at 1366; *Fitterer*, 710 F.2d at 1333.

The rationale for the court's conclusion in *Ryans* and in similar cases is that prosecutors, by the very nature of the office they hold, are required to investigate possible criminal conduct and, thus, their actions in directing or supervising such investigations are "author-ized by law." *Ryans*, 903 F.2d at 738.

A district attorney is a member of the Executive Branch of government and is obligated to perform duties as are provided by law. Colo. Const. art. VI, § 13; *People v. District Court*, 767 P.2d 239, 241 (Colo. 1989); *Beacom v. Board of County Comm'rs*, 657 P.2d 440, 445 (Colo. 1983); *People v. District Court*, 186 Colo. 335, 338, 527 P.2d 50, 52 (1974). A district attorney has the power to investigate and determine who should be prosecuted. *People v. Schwartz*, 678 P.2d 1000, 1007-08 (Colo. 1984); *People v. District Court*, 632 P.2d 1022, 1024 (Colo. 1981). Statutorily, district attorneys are required to appear on behalf of the state, counties, or judicial districts, CRS § 20-1-102(1), to employ necessary investigators, CRS § 20-1-209, and to render advice to law enforcement officers concerning preparation and review of affidavits for search warrants, CRS § 20-1-106.1.

District attorneys are classified as peace officers and are empowered to enforce state laws while acting within the scope of their authority and in the performance of their duties. CRS § 16-2.5-132. By way of example, district attorneys not only prosecute violations of law, they are also required to assist grand juries in their investigations, CRS § 20-1-106; conduct investigations into organized crime, CRS § 18-17-107; and investigate consumer fraud, CRS § 6-1-107. Federal prosecutors also have statutory or similar authority to prosecute federal crimes, *see* 28 USC § 547, and to participate in federal criminal investigations, *see* Fed.R.Crim.P. 6.

On previous occasions, we have defined what "authorized by law" means in other areas of professional conduct. *See* CBA Formal Ethics Op. 69 (2010 Revision);⁴ CBA Formal Ethics Op. 93. The Colorado Supreme Court has offered guidance as to what "authorized by law" means as applied to public servants. In *People v. Buckallew*, 848 P.2d 904, 908 (Colo. 1993), the Court stated:

A public servant is authorized by law to perform particular acts if there is a legislative enactment, a legally adopted administrative rule or regulation, or a judicial pronouncement which defines his duties. . . . Moreover, a county official is “authorized by law” to perform any other acts necessary to carry out these express responsibilities.

See also Gomez v. United States, 490 U.S. 858, 864 (1989) (noting that any additional duties performed pursuant to a general authorization in a statute should reasonably bear some relation to the specified duties). Thus, “authorized by law” may be authorization by way of legislative enactment, administrative rule or regulation, or judicial decisions. Additionally, prosecutors may rely on fundamental decisions of law in the areas of criminal law and procedure, as discussed below.

B. *Ex Parte* Communications With Represented Persons Concerning Pending Criminal Matters

After attachment of a person’s Fifth and Sixth Amendment rights to counsel, a lawyer may not communicate, or cause another to communicate, with a represented party. *See Dickerson v. United States*, 530 U.S. 428, 432 (2000); *Maine v. Moulton*, 474 U.S. 159, 180 (1985); *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966); *Massiah v. United States*, 377 U.S. 201, 206-07 (1964); *People v. Martinez*, 789 P.2d 420, 422 (Colo. 1990). Consequently, it is improper and unethical for a lawyer to direct or approve police or informer contacts designed to elicit information from a represented party that would violate the suspect’s rights under the Fifth and Sixth Amendments. Thus, in situations where it would be improper under the Fifth and Sixth Amendments for a police officer or a police informant acting at the direction of the police to attempt to elicit incriminating information from a represented suspect, it would be unlawful and unethical for a lawyer to direct or participate in such conduct. *See United States v. Henry*, 447 U.S. 264, 274-75 (1980); *Brewer v. Williams*, 430 U.S. 387, 400-01 (1977); *Massiah*, 377 U.S. at 206-07. *See also* Colo. RPC 4.4(a), 8.4(a).

C. Exceptions to the General Prohibition of *Ex Parte* Communications With Represented Persons Concerning Pending Criminal Matters

There are certain well-recognized exceptions to the general rule against *ex parte* contacts with a represented party that permit a lawyer to communicate, or cause another to communicate, with a represented person concerning the subject matter of the representation after the attachment of the Fifth and Sixth Amendments rights to counsel. These exceptions are applicable when:

1. -The purpose of the communication is to determine whether the person is in fact represented by counsel. *See, e.g.*, CRS § 16-7-301; *Edwards*, 451 U.S. 490 (Powell, J. concurring).

2. Counsel for the represented person is given notice of the communication and consents to it. *See, e.g., Gennings v. People*, 808 P.2d 839, 845 (Colo. 1991).

3. The communication is made pursuant to discovery procedures, or judicial or administrative process, including but not limited to the service of subpoenas. *See, e.g., Colo.R.Crim.P.* 16, 41.1.

4. The communication is made in the course of an investigation of new or additional criminal activity to which the Sixth Amendment right to counsel has not attached, and the new or additional criminal activity may include:

a. Criminal activity that is separate from the criminal activity that is the subject of the pending criminal charges;

b. Criminal activity that is intended to impede or evade the administration of justice as to the pending charges, such as obstruction of justice; subornation of perjury; jury tampering; murder, assault, or intimidation of a witness; bail jumping; or unlawful flight to avoid prosecution; and

c. Criminal activity that represents a continuation, after the filing of an information or indictment, of criminal activity that is the subject of pending criminal charges, such as the continuation of a conspiracy or scheme to defraud after the filing of an information or indictment. *See People v. Hyun Soo Sun*, 723 P.2d 1339-42; *People v. Rubanowitz*, 688 P.2d 247.

5. -The prosecutor reasonably believes that there is an imminent threat to the safety or life of any person, the purpose of the communication is to obtain information to protect against the risk of serious injury or death, and the communication is reasonably necessary to protect against such risk. *But see Pautler*, 47 P.3d 1180 (rejecting argument that imminent public safety exception applies if a prosecutor has available alternatives that do not involve violating the Colorado Rules). If circumstances permit, it is preferable for a prosecutor to seek a court order to engage in communication with a represented person.⁵

Conclusion

The Committee recognizes that in the context of criminal and civil enforcement proceedings, lawyers may perform duties that are distinctly different from those performed in the private practice of law. Recognizing those distinctions, we interpret Colo. RPC 4.2 and the case law to permit communications by prosecutors and government lawyers with parties represented by counsel during the investigative stage of criminal and civil proceedings, and to prohibit such communications, subject to several well-defined exceptions, once formal proceedings have commenced.

Formal Ethics Opinions are issued for advisory purposes only and are not in any way binding on the Colorado Supreme Court, the Presiding Disciplinary Judge, the Attorney Regulation Committee, or the Office of Attorney Regulation Counsel, and do not provide protection against disciplinary actions.

Notes

1. Articles discussing issues related to contacts between prosecutors and targets of criminal or civil enforcement proceedings under the current versions of ABA Model Rule of Professional Conduct 4.2 (which is substantially identical to Colo. RPC 4.2) include Richmond, “Deceptive Lawyering,” 74 *U. Cinn. L.Rev.* 577 (2005), and Joy and McMunigal, “Anti-Contact Rule in Criminal Investigations,” 16 *Wtr. Crim. Just.* 44 (2002). These issues also are discussed in a three-part article by Carl A. Pierce, the reporter for the ABA committee that issued the updated version of ABA Model Rule 4.2, entitled “Variations on a Theme: Revisiting the ABA’s Revision of Model Rule 4.2,” 70 *Tenn. L.Rev.* 121 (2002) (Part 1), 70 *Tenn. L.Rev.* 321 (2003) (Part 2), and 70 *Tenn. L.Rev.* 643 (2003) (Part 3).

2. The Second Circuit has suggested that Disciplinary Rule 7-104(A)(1) (and by analogy Colo. RPC 4.2) may prohibit certain conduct by law enforcement agents and lawyers even before arrest or indictment. *See United States v. Hammad*, 858 F.2d 834, 838-39 (2d Cir. 1988); *United States v. Pinto*, 850 F.2d 927, 935 (2d Cir.), *cert. denied*, 488 U.S. 867 (1988); *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).

In *Hammad*, the defendant sought to suppress statements obtained by an informant sent by the prosecutor to obtain a statement from the suspect. The prosecutor had issued a grand jury subpoena to the informant as a pretense to help the informant gain the suspect’s trust so as to elicit the admissions from the suspect. Starting from the premise that DR 7-104(A)(1) (and consequently Colo. RPC 4.2) generally is inapplicable to prosecutors because the investigation of possible criminal activities, even as to suspects who have retained counsel, fits within the “authorized by law” exception to DR 7-104(A)(1), the Second Circuit went on to hold that DR 7-104(A)(1) applied on the facts of the case to render the contact improper. The court concluded that the prosecutor had overstepped the already broad powers of the prosecutor’s office and thus the prosecutor’s conduct was not “authorized by law.”

Hammad gives little guidance to prosecutors as to which actions would be viewed as not “authorized by law” under Colo. RPC 4.2. The Second Circuit has since affirmed, however, that the “authorized by law” exception applies to legitimate investigative techniques such as using informants to record conversations with charged defendants about other, uncharged conduct. *See United States v. DeVillio*, 983 F.2d 1185, 1192 (2d Cir. 1993). Given the fact-intensive nature of these determinations, the Committee believes that a lawyer contemplating *ex parte* contacts between law enforcement agents or government informants and persons who have retained counsel prior to the attachment of the Fifth and Sixth Amendment should be careful not to overstep the lawyer’s authority.

3. *Pautler*’s application to prosecutors who are not themselves engaged in deceit or making misrepresentations is unclear. Prosecutors should consider the application of *Pautler* when advising law enforcement officers about communicating with represented persons in specific circumstances.

4. All CBA Ethics Committee Formal Ethics Opinions are available at www.cobar.org/index.cfm/ID/386/CETH/Formal-Ethics-Opinions.

5. In other circumstances where a prosecutor, acting in good faith, has a reason to believe that contact with a represented person is necessary to prevent the obstruction of justice or other interference with the proper functioning of the legal system, a prosecutor should seek a court order authorizing communication with the person. *See* Colo. RPC 4.2, Comment [6]. These circumstances could include, for example, a situation in which an organization’s constituent, whom a lawyer has claimed to represent in the constituent’s individual capacity, initiates a communication for the purpose of disclosing attempts by the organization or other organizational constituents to suborn perjury or obstruct justice. ¹¹