Prosecutors Should Be Parties *Ex Parte* When Those Counsel and Not Charged

BY LAWRENCE PALLES

Lawyers' conduct is governed by the ethics rules in the states in which they practice. This is true whether the lawyer represents private parties or government agencies. However, state and federal prosecutors take the position with regard to ER 4.2 (the "no-contact rule")[1] that the rule applies differently to prosecutors in criminal cases than it does for lawyers in civil cases.

Permitting prosecutors to contact *ex parte* represented "parties" who are not charged in criminal cases undermines the policy behind ER 4.2.

Consider the following scenario:

You represent a business accused by a customer of breach of contract and a variety of business torts. Allegations have been made, letters exchanged between counsel for the parties, and litigation threatened if payment is not made and certain activities discontinued.

You receive a call from the CEO of your client who informs you that three management-level employees, whose actions form the basis of the dispute, have been interviewed at their homes by opposing counsel and his investigators. All three employees provided information, including documents and several statements that are not helpful to your defense.

This is clearly a violation of ER 4.2. Opposing counsel knows that you represent the company in this matter, and the employees contacted are clearly within the scope of the Rule's coverage.

Now consider another scenario:

During routine maintenance of an underground storage tank, a worker is overcome by toxic fumes and passes out in the tank. Another worker goes into the tank to rescue him and is also overcome by the fumes. The site supervisor goes into the tank to rescue the two workers, is overcome by the fumes, but is rescued by the fire department. The two workers perish; the supervisor makes a full recovery.

The next day, you are retained to represent the company that employed the deceased workers and site supervisor. The state begins a criminal investigation regarding possible criminal negligence, manslaughter or second-degree murder charges arising out of the workplace deaths. You immediately notify the state that you represent the company in the investigation and that the state should not contact employees of the company directly. Nevertheless, shortly thereafter, the Attorney General's Office sends out investigators who interview the site supervisor without your knowledge. The supervisor, traumatized by the experience, makes statements that potentially incriminate the company in the criminal case. The supervisor's acts or omissions may form the basis for criminal liability on the part of your client. The Attorney General's Office knows that the company is represented in the criminal investigation.

Has there been a violation of ER 4.2? Maybe not, if you adopt the Arizona Attorney General's interpretation of the rule in criminal cases. The Attorney General's Response to this article fails to address the issue head-on. Rather, the Attorney General sets up several "straw men" and then knocks them down. In doing so, the Attorney General avoids the essence of the problem—that it is unfair to allow criminal prosecutors to contact criminal investigative targets once they know that the target has retained counsel regarding the specific subject of the investigation. As explained subsequently, although undoubtedly inconvenient to prosecutors, refraining from contacting represented criminal targets is consistent with the public policy behind and the spirit and intent of the rule.

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Precluded From Contacting Parties Are Represented By With Criminal Offenses.

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BY ATTORNEY GENERAL TERRY GODDARD

Ethical Rule 4.2 has withstood periodic assaults, and it was re-adopted recently by the Arizona Supreme Court, for good reason: It represents an intelligent balance between two dynamic legal principles—the legitimate protection of the attorney–client relationship and the search for truth.

The foundation for the Attorney General's policy on this rule is both legal and practical. It is rooted in case law and common sense. The policy acknowledges important differences in civil and criminal practices, as well as the legal and ethical responsibilities of prosecutors, plaintiffs' attorneys, defense counsel and transactional lawyers.

I believe the rule fairly takes into account competing interests. My Office applies the rule in a manner that promotes full investigation of the facts before civil or criminal proceedings are initiated, a process that serves the administration of justice and the public interest. The rule properly allows us to analyze the facts before making accusations of wrongdoing.

The Attorney General's Challenge

I want to address Rule 4.2 in the context of the realities that civil and criminal prosecutors face.

We routinely receive letters from counsel who claim to represent a corporation and all of its employees.[1] We are admonished not to interview or investigate without the approval or presence of the corporation's lawyer. Although we understand that corporate counsel is doing corporate counsel's job in our adversary system, we have a job to do as well. When pondering the appropriate application of ER 4.2, consider those corporate employees who have had the courage to blow the whistle on the toxic chemicals dumped into water supplies, pension fund raids, accounting practices that rob stockholders, and fraudulent representations about the tobacco product research. But for their *independent* disclosures, important public safety interests would have been defeated.

The Attorney General's policy on ER 4.2, consistent with the language of Arizona's ER 4.2 and case law, interprets the no-contact rule in the context of civil and criminal enforcement proceedings as applying when adverse proceedings have formally commenced.[2]

The law practice at the Attorney General's Office covers a multitude of situations. The Attorney General represents the State—a large and diverse client managed by the Governor, and other elected and appointed public officials. These individuals manage the state's work through agencies, boards and commissions. From a purely civil lawsuit defense perspective, sound legal reason would support limiting contacts between public officials and opposing counsel to confine liability and financial exposure. However, in the interest of maximizing public information, I do not apply ER 4.2 to limit contact between public officials and opposing counsel until adverse proceedings actually begin.

The Attorney General also serves as a criminal and civil prosecutor. In that capacity, I am responsible to determine facts before initiating criminal or civil proceedings. My Office must investigate and analyze the facts before making accusations of criminal or civil wrongdoing. ER 4.2 allows us such wide-ranging investigation before taking action. As prosecutors, the burden of proof and probable cause thresholds require nothing less; more important, the citizens of Arizona expect us to find the truth on their behalf. For an undercover investigator or a monitor of a covert wiretap to worry about who among their contacts is represented by counsel would be patently absurd; equally so is the investigator trying to make sense of a complex financial fraud or environmental crime by widespread interviews. Early in the investigation, when there may not be a clear theory of the wrongdoing committed or the crimes to be charged, there are definitely not any "parties" to a litigation.

Although the author of the counter piece alleges that we fail "to address the issues

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head on" and "avoid the essence of the problem," neither our policy nor our practice overlooks the issue of fairness, as he claims. We make our decisions on Rule 4.2 by applying the language of the rule, the facts, and case law, and considering our responsibilities to the courts and the public. The stakes are too high for Assistant Attorneys General to be careless with our responsibilities. Our resources are too valuable to waste on irresponsible action. The State's lawyers must make critical assessments of ER 4.2 daily. In these decisions, theory and reality intersect; we are charged to protect the State's cases, its limited resources, and the need to quickly and accurately determine who, if anyone, should be prosecuted. We respect the attorney–client relationship, but we recognize how it, and the protections that it carries, can be expanded beyond its intended coverage.

Historical Perspective

The American Bar Association first adopted the predecessor to ER 4.2 in 1908. It was referred to as Professional Canon of Ethics 9 and used the term "party," not "person," in defining its boundaries. It was not until 1995 that the ABA expanded the application of ER 4.2 to "person," first through opinion and then through rule change.[3]

Arizona adopted the ABA 1983 Model Rule in 1985 in applying ER 4.2 to "parties" not "persons." The states who use the term "party" have generally recognized that a party is protected from the point that formal adversarial proceedings begin. The logic of this view is borne out by extensive case law, both criminal and civil, which maintains the delicate balance between protecting the attorney–client relationship and the search for the truth.

During the last decade, many attempts have been made to expand the protections of Arizona's ER 4.2 from "parties" to "persons." Most recently, in 2003, our Supreme Court was urged to make that expansion but declined to do so. My predecessor, along with all 15 County Attorneys and many civil trial lawyers, opposed the change. Our Supreme Court has continued to establish and maintain the formal protections of the no-contact rule at the point when pleadings

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are filed, when a "person" becomes a "party." The distinction is made for good reason.

ER 4.2 and Criminal and Civil Enforcement Practice

Consistency in Application

In the criminal arena, it has been the law in Arizona since 1976 that ER 4.2 (then DR 7-104) does not prohibit the questioning of a prospective criminal defendant prior to the defendant's initial appearance or arraignment as long as the requirements of the Constitution are followed.[4]

In *State v. Richmond*, the Arizona Supreme Court found no violation of DR 7-104 where law enforcement officers complied with the requirements of *Miranda v. Arizona* and obtained a voluntary statement from the defendant outside the presence of his counsel prior to indictment for the offense at issue.[5] *Richmond* indicated that DR 7-104 imposed no greater limits on contacts with a represented suspect than are imposed by the Fifth and Sixth Amendments to the U.S. Constitution.[6] Although this statement was arguably dicta, *Richmond* is the Arizona Supreme Court's most direct guidance on how the ethical rules apply to investigative contacts with represented persons. *Richmond* and other cases interpreting DR 7-104 remain relevant because the requirements of the former rule are "substantially similar" to those of ER 4.2.[7]

Consistent with *Richmond*, courts in several other jurisdictions have recognized that investigative contacts are permissible before the formal commencement of enforcement proceedings. These holdings rest on two alternative rationales: Either Rule 4.2 (or its predecessor DR 7-104) does not apply where the person contacted is not yet a "party," or the contacts are "authorized by law."[8]

ER 4.2 does not allow persons to frustrate legitimate investigative activities merely by retaining counsel.[9] Many courts have recognized that the ethical rule prohibiting contact with represented persons takes effect only after the commencement of adversarial criminal enforcement proceedings, such as a formal charge, preliminary hearing, indictment, information or arraignment.[10]

The Attorney General represents most State entities. Our policy recognizes that State clients are different. For example, we recognize that the civil notice of claim statute effectively commences a case against a public body. According to statute, the claim must set forth facts identifying the basis of the claimed liability, the amount for which the claim can be settled, and the facts supporting that amount. I believe our policy conforms to the general practice in the Arizona legal community and prohibits us from contacting a represented claimant. In other words, the protections of ER 4.2 apply to claimants who file a notice of claim against the State. The criticism that our policy is inconsistent because we protect our employees once a notice of claim is filed yet engage in *ex parte* contacts with represented targets in a criminal investigation is not well founded and does not reflect our practice or policy.

> A person or entity should not be allowed to thwart the investigation of possible civil rights, consumer fraud, environmental or similar violations by the general retention of a lawyer.

This Office recognizes that under some limited circumstances, ER 4.2 may prevent contact with a represented person after arrest but before an indictment has been returned. No Arizona case addresses this issue under ER 4.2. Several federal courts of appeal, however, have applied no-contact rules from other states in a pre-indictment, custodial setting.[11] For example, in *United States v. Talao*,[12] the Ninth Circuit determined that although no indictments had been issued, the government and San Luis Gonzaga Construction ("SLGC") had clearly taken adversarial positions concerning payments of prevailing wages, kickbacks and alleged false statements made to the government. The Department of Labor was investigating civil violations of SLGC's wage practices, the Asian Law Caucus had filed a *qui tam* action, and SLGC's lawyer had initiated settlement discussions with the government on its civil and criminal investigations. The court held that under these circumstances, involving fully defined adversarial roles, impending grand jury proceedings and the government's awareness of SLGC's ongoing legal representation, California's no-contact rule governed the United States Attorney's pre-indictment, non-custodial communications with SLGC's bookkeeper, a key witness to the issues in dispute.[13] Nonetheless, the court held that:

> 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.[14]

In civil enforcement, it has been law since 1978 that investigative contacts are authorized before proceedings are formally commenced.[15] A variety of attorneys in different practice areas conduct pre-filing investigations and interviews in a search for the truth and to meet their ethical obligations before they file an action. Examples include personal injury lawyers investigating a product's defective design; lawyers in civil and administrative enforcement of health and safety, public welfare, and environmental laws; and

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criminal defense attorneys who conduct pre-indictment interviews of witnesses and other suspects once their own clients come under suspicion.

Consistent with the ethical rules, these attorneys and their agents may interview witnesses and suspects before formal charges are filed. Whether potential violations are criminal or civil in nature, a person or entity should not be allowed to thwart the investigation of possible civil rights, consumer fraud, environmental or similar violations by the general retention of a lawyer. Many, indeed most, of the persons contacted in the investigative phase will never be charged. Moreover, as such investigations progress, they may change from criminal to civil, or vice versa, or they may involve parallel proceedings. Until formal proceedings commence, appropriate investigative contact must be permitted under ER 4.2.

Responsible Application of ER 4.2

Protecting a "party" from communications with opposing counsel or counsel's agents supports consistent, established case law and policy that have been in effect in Arizona and applied with few problems for decades. ER 4.2 prevents wrongdoers from erecting strategic roadblocks to pre-filing investigations and needless wrangling with persons who will never be charged. Because the burden of proof is squarely on prosecutors, government entities and private plaintiffs in vindicating important societal principles, attorneys must be able to conduct pre-filing investigations to meet probable cause thresholds or the Civil Rule 11 reasonable inquiry criterion.

Recently in *Texas v. Cobb*,[16] the United States Supreme Court, in holding that the Sixth Amendment right to counsel is offense-specific, noted:

> It is critical to recognize that the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses. "Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid *Miranda* waivers are more than merely 'desirable'; they 'are essential to society's compelling interest in finding, convicting and punishing those who violate the law.'"[17]

The same policy concerns articulated by the Supreme Court in the Sixth Amendment arena are present in the debate over ER 4.2. Indeed, legal commentators have noted the adverse consequences of a broader ER 4.2 no-contact rule. "A broad interpretation of the no-contact rule would provide a powerful incentive for criminal actors to seek relational representation because having an ongoing relationship with an attorney could insulate them from several of the most effective law enforcement techniques for investigating complex crime."[18]

One commentator on legal ethics noted some of the adverse effects of a broad nocontact rule in civil practice:

> First, … the discovery process, formal or informal, should not be unnecessarily inhibited. Second, … methods that assist in reducing discovery costs and providing reasonable alternatives should be supported. Third, … contemporary litigation is costly and often the "little guy," plaintiff or defendant, is at a distinct disadvantage in the process. Fourth, in certain types of litigation against a corporation a pattern of treatment of employees may be critical to proof of a claim. … Fifth, private litigation is an important means of controlling abuses of corporate power and restraining abuses of law. … [Sixth], an unwise extension of confidentiality restricts access to information and prevents courts from being fully effective in ferreting out the truth of a disputed claim. [Seventh], witnesses may be more willing to discuss a matter informally than in the adversarial context of formal discovery.[19]

ER 4.2 requires that a realistic balance be struck—a balance that my Office diligently works to ensure.

Conclusion

The ER 4.2 policy of the Attorney General's Office is based on the rule, case law and ethical legal practice. Our policy does not seek or provide benefits to the State as a civil defendant that it withholds from criminal defendants. Those who shoulder the burden of proof must have the ability to investigate the facts legitimately before filing formal charges, no more and no less. We seek to safeguard the right of our State's lawyers and investigators to search for the truth, prior to filing a criminal or civil action. That right, that ability to ferret out wrongdoing, is a critical piece of the justice system's ability to protect the public. It must be preserved.

endnotes (con)

1. Of course, this practice does not comport with Arizona law. In the case of a represented organization, ER 4.2 does not limit *ex parte* communications with all employees of the organization. Rather, only communications with employees with managerial responsibility, employees whose acts or omissions in connection with the matter may be imputed to the organization, and employees whose statement may constitute an admission on the part of the organization are restricted. *See Lang v. Superior Court*, 826 P.2d 1228, 1230-31 (Ariz. Ct. App. 1992). With respect to former employees of a represented organization, the court in *Lang* held that *ex parte* communications are permissible unless the acts or omissions of the former employee gave rise to the underlying litigation or the former employee has an ongoing relationship with the former employer in connection with the litigation. *Id.* at 1233.
2. This interpretation is consistent with the rule set forth in *Lang*. That case involved a matter in litigation, and the court's holding did not extend ER 4.2's prohibition against *ex parte* communications beyond parties to a formal proceeding.
3. In July 1995, the American Bar Association issued Opinion 95-396, which determined that the term "party" in ER 4.2 really meant "person." The ABA amended ER 4.2 later in 1995 to substitute the word "person" for "party." Arizona's rule has not been similarly amended.
4. *State v. Richmond*, 560 P.2d 41, 46 (Ariz. 1976), *abrogated on other grounds by State v. Salazar*, 844 P.2d 566 (Ariz. 1992).
5. *Richmond*, 560 P.2d at 46.
6. *Id.*
7. *See Lang*, 826 P.2d at 1231 n.3 (recognizing substantial similarity between DR 7-104 and ER 4.2).
8. *See, e.g., United States v. Powe*, 9 F.3d 68, 69 (9th Cir. 1993) (holding that California's RPC 2-100 does not apply to pre-indictment, non

custodial conversations with a suspect); *United States v. Ryans,* 903 F.2d 731, 740 (10th Cir. 1990) (relying, in part, on the use of the term "party" in DR 7-104(A)(1) to hold that the ethical rule does "not attach during the investigative process before the initiation of criminal proceedings"); *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir. 1981) (interpreting California's DR 7-104); *United States v. Lemonakis*, 485 F.2d 941, 955-56 (D.C. Cir. 1973) (ruling that DR 7-104 does not apply before indictment).

9. *See Ryans*, 903 F.2d at 740; *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir. 1983) (interpreting DR 7-104).
10. *Ryans*, 903 F.2d at 740; *but see United States v. Talao*, 222 F.3d 1133, 1138-39 (9th Cir. 2000) (recognizing that, under certain circumstances, the rule may be applied to pre-indictment, non-custodial communications.)
11. *See United States v. Killian*, 639 F.2d 206, 210 (5th Cir. 1981); *United States v. Durham*, 475 F.2d 208, 211 (7th Cir. 1973); *United States v. Thomas*, 474 F.2d 110 (10th Cir. 1973).
12. 222 F. 3d at 1139-40.
13. *Id*. at 1139.
14. *Id*. at 1140 (Rule 2-100 is California's version of ER 4.2).
15. *See Flieger v. Reeb*, 583 P.2d 1351, 1353 (Ariz. Ct. App. 1978) (observing that DR 7-104 did not apply to a private investigator's contact before a civil complaint was filed); *see also Johnson v. Cadillac Plastic Group, Inc.*, 930 F. Supp. 1437, 1441 (D. Colo. 1996) (barring informal discovery during investigatory stages of civil litigation would be fundamentally unfair and would frustrate the purposes of Rule 11); *Weider Sports Equip. Co., Ltd. v. Fitness First, Inc.* 912 F. Supp. 502, 507-08 (D. Utah 1996) (noting that Rule 4.2 should not be applied to block investigation of such matters as civil rights violations, age discrimination, or other improper corporate or labor practices); *Jorgensen v. Taco Bell Corp.*, 58 Cal. Rptr. 2d 178 (Ct. App. 1996) (declining to apply California Rule 12-100 to bar pre-litigation investigative contacts of corporate employees in a sexual harassment lawsuit).
16. 532 U.S. 162 (2001).
17. *Id*. at 171-72 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991) and *Moran v. Burbine*, 475 U.S. 412, 426 (1986)).
18. Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 701 (1992).
19. Sherman L. Cohn, *The Organizational Client: Attorney Client Privilege and the No Contact Rule,* 10 GEO. J. LEGAL ETHICS 739, 773 (1997) (citing *Bouge v. Smith's Management Corp.*, 132 F.R.D. 560, 565 (D. Utah)).