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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Lawrence Palles is a Director and Shareholder in Fennemore Craig's Phoenix office. His practice is focused on white-collar criminal defense and tort litigation. He is a 1997 graduate of Boston College Law School.

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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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Terry Goddard is the Attorney General for the State of Arizona.

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Ethical Rule 4.2

Ethical Rule 4.2 governs communications with persons represented by counsel. The rule provides:

> 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 do to so. (Emphasis added)

The Official Comment to the rule provides the following additional guidance:

> 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.
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> …
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> 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.[2] (Emphasis added)

Although *ex parte* contact with a represented party is an ethical violation, not a substantive or evidentiary violation, courts may impose sanctions including, but not limited to, suppression of evidence,[3] disqualification of counsel[4] and sanctions or fines.[5]

The Policy Underlying ER 4.2

E.R. 4.2 is intended to:

> (1) prevent unprincipled attorneys from exploiting the disparity in legal skills between attorneys and lay people, (2) preserve the integrity of the attorney–client relationship, (3) help to prevent the inadvertent disclosure of privileged information, and (4) facilitate settlement.[6]

The rule preserves "the proper functioning of the administration of justice"[7] by protecting clients from squandering a possible claim or defense.[8] For individuals, the danger of these types of abuses is especially high in criminal cases, in which a party's liberty, or even life, is at stake. The case law is replete with examples of interrogation abuses and coerced confessions.[9]

The no-contact rule cannot be waived by the represented party.[10] "It is irrelevant that the represented person initiates the discussion or is otherwise willing to communicate because the rule focuses on the duties of attorneys, not the rights of the parties."[11]

Criminal Cases and ER 4.2

It is well settled that ER 4.2 applies to prosecutors in criminal cases.[12] The issue was not always so clear, especially with regard to federal prosecutors.

The Department of Justice historically took the position that *ex parte* contacts by federal prosecutors were "authorized by law." The DOJ position was criticized in *United States v. Hammad*.[13] The *Hammad* court rejected the government's argument that the "no-contact rule" was "coextensive with the sixth amendment" and therefore remained inoperative until the onset of adversarial proceedings—indictment.[14] The court noted that the timing of the indictment "lies substantially within the control of the prosecutor" and the potential for prosecutorial misconduct is great: "A government attorney could manipulate grand jury proceedings to avoid its encumbrances."[15] The court declined to apply a bright-line test, preferring to apply the rule on a case-by-case basis, policing clear prosecutorial misconduct while keeping in mind that prosecutors are "authorized by law" to employ legitimate investigative techniques in conducting or supervising criminal investigations.[16]

In response to *Hammad,* then-Attorney General Richard Thornburgh issued the now infamous "Thornburgh Memo" in 1989, which reiterated the DOJ position and stated that the DOJ would resist on "Supremacy Clause grounds" any disciplinary action against federal prosecutors. In 1995, Attorney General Janet Reno issued formal regulations that codified the Thornburgh Memorandum.

The regulations were uniformly rejected by the courts, holding that there was no statutory support for the promulgation of a rule exempting federal prosecutors "from the local rules of ethics which bind all other lawyers appearing in that court of the United States."[17] One court characterized the government's assertion that federal prosecutors were exempt from state and local rules as "to put it bluntly, preposterous."[18] In response, Congress passed the McDade Act in 1999, which requires that all federal lawyers comply with the rules of professional conduct for the state in which they practice.[19]

The Arizona Attorney General's Interpretation of ER 4.2

The Arizona Attorney General's Office interprets ER 4.2 to allow "investigative contacts by an assistant attorney general, directly or through investigative agents, before criminal or civil enforcement proceedings are formally commenced."[20] The Attorney General defines "formal commencement" as indictment, arrest or filing of a complaint.[21]

The theory is that the person being contacted is not yet a "party" if formal charges have not been filed, because the term "party" refers to a filed case.[22] Therefore, pre-indictment undercover contacts fall within the "authorized by law" exception.

This position finds some support in the case law.[23] The Attorney General argues that "ER 4.2 should not allow persons to frustrate legitimate investigative activities merely by retaining counsel" and "A person or entity should not be allowed to thwart the investigation of possible civil rights, consumer fraud, environmental or similar violations merely by hiring a lawyer."[24]

In contrast with its position on contacting represented parties before com-

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mencement of formal proceedings in criminal and civil enforcement cases, the Arizona Attorney General prohibits Assistant Attorney General *ex parte* contacts with represented parties, as a matter of policy in non-litigation settings, because "this policy conforms to general practice in the Arizona legal community."[25] *Ex parte* contacts are also prohibited in the civil defensive context once a statutory notice of claim is filed because that constitutes "formal commencement" of an action.

The Attorney General's policy is internally inconsistent. There is little difference between the filing of a statutory notice of claim in civil proceedings and the issuance of a target letter or Civil Investigative Demand in criminal or regulatory proceedings. The prevailing practice in all jurisdictions should be consistent whether the case is civil or criminal, pre or post filing: Lawyers should not have *ex parte* contacts with parties they know to be represented in that matter. The state objects to *ex parte* contacts with covered employees following the filing of a notice of claim in a civil matter to protect against the possible squandering of a claim or defense, yet it engages in *ex parte* contacts with targets in a criminal investigation because "a person or entity should not be allowed to thwart the investigation of possible civil rights, consumer fraud, environmental or similar violations merely by hiring a lawyer."

In the hypothetical criminal investigation above, the Attorney General's Office interviewed an employee with managerial responsibility whose acts or omissions formed the basis for the company's possible criminal liability.[26] Under the Attorney General's interpretation, there was no violation of ER 4.2 because there had not yet been "formal commencement" of a criminal case. Because the prosecutor has decided not to file charges or seek an indictment yet under the Attorney General's policy, he or she was free to contact individuals covered by the rule without the consent or presence of counsel.

Although the Attorney General's interpretation finds some support in the case law, it is contrary to the plain language of the comment to ER 4.2, which provides, "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" (emphasis added). It also runs contrary to the spirit of the rule. The purpose of the rule is to preserve the attorney–client relationship by protecting clients from squandering possible claims or defenses and preventing lawyers from taking advantage of nonlawyers.[27] Furthermore, recent cases on the issue have held that ER 4.2 applies even before an indictment is issued.[28] As explained previously, the dangers the rule seeks to prevent are especially high in criminal cases.

The Attorney General's position demonstrates a cynical view of defense counsel and their role in the justice system.

The Attorney General's position demonstrates a cynical view of defense counsel and their role in the justice system and is not supported by the language or intent of the rule. This cynical view is best demonstrated by the Attorney General's Response: "ER 4.2 prevents wrongdoers from erecting strategic roadblocks to pre-filing investigations and needless wrangling with persons who will never be charged."[29]

The fact that an individual is investigated by a law enforcement or prosecuting agency does not necessarily make them a "wrongdoer." Furthermore, an investigative target who specifically retains counsel has implicitly stated that he or she feels incapable of protecting his or her interests alone. This individual likely would not consider his or her lawyer's representation of their interests as "needless wrangling," whether he or she ultimately is charged or not.

It is clear that prosecuting agencies have the right and duty to employ legitimate investigative techniques to investigate crimes.[30] Equal application of ER 4.2 in the criminal context does not unfairly hinder law enforcement's legitimate investigative activities.

ER 4.2 does not permit wealthy parties to insulate themselves from all *ex parte* contacts with law enforcement or prosecutors. ER 4.2 only applies to *ex parte* contacts with parties regarding the specific subject of the representation in which the government knows that the party is represented by counsel in that specific matter.[31] A wealthy party cannot avail itself of ER 4.2's protections simply by keeping a lawyer on retainer at all times, for any legal matter that may arise. In addition, defense counsel and the government often work cooperatively to discover the facts and settle upon a reasonable resolution (i.e., a plea bargain or consent decree). When cooperation is not in the client's best interests, which is often the case, a lawyer's involvement furthers the goals of an adversarial system.

A rule that permits the government *ex parte* access to a represented person puts that person at a disadvantage. As the Minnesota Supreme Court explained:

> We do not perceive that the application of [ER] 4.2 should be limited, in a criminal context, to contacts with an attorney's client after the client has been charged. Adverse counsel's contacts with an attorney's client can be disruptive and deleterious to the attorney's relationship with a client irrespective of whether the client has been charged with a crime, and the need for an attorney's counsel in an

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adverse interview is certainly no less before the client is charged than after.[32]

Few would argue that the state does not have a legitimate interest in investigating and prosecuting alleged crimes—but at what price? The basic tenants of the American justice system provide those being investigated for or accused of criminal acts with critical protections, including the presumption of innocence, the right to counsel and the right against self-incrimination. Surely the right to have counsel present, once retained in a specific matter, ranks among these important protections. ER 4.2 exists for the purpose of preventing a party from unwittingly squandering these and other important rights at the hands of overzealous lawyers. The government should not be permitted to take advantage of parties who already have expressed a need for representation in their contacts with government lawyers and agencies.

Conclusion

It has been said that "You cannot have your cake and eat it too." However, with regard to ER 4.2, government agencies seem to have it both ways. While availing themselves of ER 4.2's protections in civil litigation, government agencies interpret the rule to permit *ex parte* contacts with represented parties until they choose to formally commence criminal proceedings.

This disparate treatment of "parties" not yet indicted or charged in criminal cases is unfair, undermines the policy behind ER 4.2 and demonstrates a cynical view of defense counsel's role in the criminal justice system. All should agree that the government has a legitimate right to undertake legitimate investigative techniques to investigate suspected crimes. Wealthy parties should not be permitted to insulate themselves from undercover or other investigative contacts merely by keeping a lawyer on permanent retainer regarding any and all matters that might arise. However, the government's legitimate right to investigate suspected crimes should not trump ER 4.2's policy of protecting parties from overzealous lawyers, preserving the integrity of the attorney–client relationship, preventing the inadvertent disclosure of privileged information and facilitating settlement.

All lawyers owe the same duties under the ethical rules no matter whom they represent or how legitimate their litigation goals.

endnotes (pro)

1. E.R. 4.2 provides:
   > 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 do to so.
2. Although the official comments had previously been interpreted to carry the force of law, *see Towne Dev. of Chandler, Inc. v. Superior Court,* 842 P.2d 1377 (Ariz. Ct. App. 1992), the preamble to the rules now make clear that the comments do not carry the force of law and that the text is authoritative. *See* Preamble, Arizona Rules of Professional Conduct, ¶ 14.
3. *See United States v. Hammad,* 858 F.2d 834, 841-42 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990) (recognizing that suppression of evidence may be the appropriate remedy for ethical violations, but finding it the inappropriate remedy in that case); *White v. Illinois Central R.R. Co.,* 162 F.R.D. 118 (S.D. Miss. 1995); *University Patents, Inc. v. Klingman,* 737 F. Supp. 325, 329 (E.D. Pa. 1990); *Papanicolaou v. Chase Manhattan Bank,* 720 F. Supp. 1080, 1085 (S.D.N.Y. 1989); *Cagquila v. Wyeth Lab., Inc.,* 127 F.R.D. 653 (E.D. Pa. 1989); *In re FMC Corp.,* 430 F. Supp. 1108 (S.D. W. Va. 1977).
4. *See Cronin v. Eighth Judicial Court,* 781 P.2d 1150 (Nev. 1989) (attorney's *ex parte* communications with management-level employees justified disqualification); *Zachair, Ltd. v. Driggs,* 965 F. Supp. 741, 754 (D. Md. 1997) ("The appropriate remedy for this violation of the Rules of Professional Responsibility is to disqualify counsel from any further representation in the matters covered by this lawsuit"); *MMR/Wallace Pioneer & Indus., Inc. v. Thames Assocs.,* 764 F. Supp. 712, 726-27 (D. Conn. 1991); *Shoney's Inc. v. Lewis,* 875 S.W.2d 514 (Ky. 1994).
5. *See United States v. Lopez,* 4 F.3d 1455, 1464 (9th Cir. 1993) (reversing dismissal of indictment: "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 the profession").
6. *Lang v. Superior Court of Arizona,* 826 P.2d 1228, 1230 (Ariz. Ct. App. 1992) (citing *Polycast Tech. Corp. v. Uniroyal, Inc.,* 129 F.R.D. 621, 625 (S.D.N.Y. 1990)).
7. *United States v. Talao,* 222 F.3d 1133, 1138 (9th Cir. 2000).
8. *Parker v. Pepsi-Cola General Bottlers, Inc.,* 249 F. Supp. 2d 1006, 1009 (N.D. Ill. 2003).
9. In the criminal context, the prohibition against *ex parte* contacts with represented parties should not be confused with the constitutional right to counsel. *See State v. Miller,* 600 N.W.2d 457, 464 (Minn. 1999). ER 4.2 protects the right of counsel to be present during communications between the client and the prosecutor. *Id.* The right of counsel to be present pursuant to ER 4.2 may arise before the Sixth Amendment right to counsel attaches.
10. *Parker,* 249 F. Supp. 2d at 1009-10.
11. *Id.*
12. *See, e.g., United States v. Longo,* 70 F. Supp. 2d 225, 268 (W.D.N.Y. 1999) (Rule is applicable to government attorneys in criminal prosecutions); *United States v. Santiago-Lugo,* 162 F.R.D. 11, 12 (D.P.R. 1995) ("Rule 4.2 is applicable to both civil and criminal litigation"); *United States v. Scozzafava,* 833 F. Supp. 203, 208 (W.D.N.Y. 1993) (rule applies to Assistant United States Attorneys in criminal prosecutions).
13. 858 F.2d 838 (2nd Cir. 1988).
14. *Id.*
15. *Id.*
16. *Id.* at 839.
17. *United States v. McDonnell Douglas Corp.,* 132 F.3d 1252, 1257 (8th Cir. 1998); *see also New York State Bar Ass'n v. Federal Trade Comm'n,* 276 F. Supp. 2d 110, 131-33 (D.C. Cir. 2003); *United States v. Lopez,* 765 F. Supp. 1433, 1453 (N.D. Cal. 1991), *vacated on other grounds,* 989 F.2d. 1032 (9th Cir.), *amended*, 4 F.3d 1455 (9th Cir. 1993).
18. *Lopez,* 765 F. Supp. at 1453.
19. 28 U.S.C. § 530B ("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").
20. *See* Attorney General's Policy Statement at p. 1.
21. *Id.* at p. 3.

22. *Id.*
23. *See, e.g., United States v. Grass,* 239 F. Supp. 2d 535, 541 (M.D. Pa. 2003) ("pre-indictment non-custodial investigations do not violate the no-contact rule because such contacts are authorized by law"); *United States v. Balter,* 91 F.3d 427 (3d Cir. 1996). *But see United States v. Ward,* 895 F. Supp. 1000, 1001-02 (N.D. Ill. 1995) (wiretap as "contact"); Florida State Bar Ass'n, Fla. Ethics Op. 90-4 (1990) (undercover investigation as "contact").
24. *See* Attorney General's Policy Statement. Some courts have raised similar concerns. *See Grass,* 239 F. Supp. 2d at 545-46 ("adopting a rule … that prohibits the Government from contacting any person known to be represented by counsel in any way whatsoever, will insulate from undercover investigation any defendant with enough financial resources to permanently obtain private counsel").
25. *See* Attorney General's Policy Statement at p. 4.
26. It is important to remember that in situations in which a lawyer has been retained to represent the business, he or she probably does not also represent the individuals being interviewed. As counsel for the company, a lawyer has the right to be present for any contacts with the individuals by virtue of the fact that they are management-level employees, because their act or omission may form the basis of a claim against the business or because their statements may constitute an admission on the part of the business.
27. *Parker,* 249 F. Supp. 2d at 1009.
28. *See, e.g., Talao,* 222 F.3d at 1139 (interpreting a similar rule; the rule governed the "pre-indictment, non-custodial communications with [the witness]"); *Hammad,* 858 F.2d at 839 (finding a violation during the investigative stage); 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).
29. Attorney General's Response at § D.
30. *Hammad,* 858 F.2d at 839.
31. The Attorney General argues that *ex parte* contacts with represented individuals prior to indictment are proper because it is unduly burdensome for "an undercover investigator or a monitor of a covert wiretap to worry about who among their contacts is represented by counsel." The Attorney General misses the point. First, the rule only applies to the actions of an attorney, or the actions of an agent or subordinate that are directed by the attorney. Furthermore, the rule requires that the attorney, or his or her agent, know that the person is represented in that specific matter before the prohibition applies. It is only once the attorney knows that the individual is represented that he or she must avoid *ex parte* contact.
32. 600 N.W. 2d at 467.