NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

Opinion 884 (11/14/11)

Topic: Communication in criminal matter with a witness who is the subject of a separate criminal indictment, in which he is represented by counsel.

Digest: Under Rule 4.2, a lawyer may not communicate about the subject of a criminal representation with a party the lawyer knows to be represented by another lawyer in the matter without the consent of the other lawyer. A non-party witness in a criminal matter is not protected by Rule 4.2. Consequently, a lawyer for a party may communicate with such witness without the consent of counsel who represents the witness in a related matter. This, however, does not prevent the witness' lawyer from advising his client not to speak with anyone about the facts of the case outside the presence of his lawyer. The conclusion of this opinion does not extend to civil matters.

Rules: Rule 1.0(k), Rule 4.2(a), Rule 3.4(a)(2), Rule 4.4, DR 7-104

QUESTION

[1] May counsel for the defendant in a criminal case ("Defendant") interview the complaining witness ("Witness"), who is the subject of a separate criminal indictment, in which he is represented by counsel, without the consent of such counsel?

OPINION

[2] Defendant has been charged with burglary and robbery. He allegedly entered the Witness's apartment holding a gun, robbed the Witness at gunpoint and took money from Witness. Witness is cooperating in the prosecution of the Defendant. Because the police who investigated the crime found drugs in the apartment of the Witness, they arrested Witness, who is represented by counsel in connection with the drug possession matter. Conviction of the Witness for drug possession would be a violation of his probation in a prior drug case. The prosecutor has informed Defendant's lawyer that Defendant's actions in the robbery may have been related to a former drug exchange between the Defendant and the Witness.

[3] Rule 4.2(a) of the New York Rules of Professional Conduct (the "Rules") states:

> (a) In representing a client, a lawyer shall not communicate or cause another to 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 prior consent of the other lawyer or is authorized to do so by law.

This rule, like DR 7-104, its predecessor in the former Code of Professional Responsibility (the "Prior Code"), is often called the "no-contact" rule.

[4] The purpose of the no-contact rule is explained in Comment [1] to the Rule:

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

[5] In applying the facts of this hypothetical to Rule 4.2, two issues are raised – whether the Witness is a party to the matter, and whether the Witness is represented "in the matter."

[6] Although, by its terms, Rule 4.2 applies to a "party," Comment [2] to the Rule states that the Rule applies to communication with any person who is represented by counsel concerning the matter to which the communication relates. If the Comment were dispositive, the fact that Witness is not a co-defendant in the matter would be irrelevant as long as Witness's counsel represents Witness in the robbery matter, as well as the drug possession matter. However, the Comments are not dispositive. The comments were adopted by the New York State Bar Association to provide guidance for attorneys in complying with the Rule. They have not been adopted by the Appellate Divisions. Where a conflict exists between a Rule and a Comment, the Rule controls.

[7] The history of this provision in the former Code is instructive. The former Code had both a Disciplinary Rule – DR 7-104(A) – and an Ethical Consideration – EC 7-18 – which addressed contact with third parties. The disciplinary rule, like Rule 4.2, prohibited a lawyer from communicating with a "party" the lawyer knew to be represented by a lawyer in the matter. EC 7-18, on the other hand, was broader, applying to any person the lawyer knew to be represented in the matter by a lawyer. The rationale for the Ethical Consideration was set forth in its first sentence: "The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel." In 1999, a committee of the New York State Bar Association recommended that the term "party" in the Disciplinary Rule be changed to "person," following a similar change in the ABA Model Rules of Professional Conduct. Although the amendments adopted by the Administrative Board initially used the term "person" in DR 7-104(A), shortly thereafter, the Administrative Board issued an order changing "person" back to "party." *See* Simon's New York Code of Professional Responsibility Annotated (2007) at 1170. According to Professor Simon, the change was apparently made at the urging of prosecutors, who feared that the word "person" in the no-contact rule would require them, among other things, to obtain the consent of counsel to interview every non-party witness who was represented by counsel.

[8] The argument that "party" means an actual party to a transaction -- at least in a criminal case -- is supported by *Grievance Committee for the Southern District of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995), in which the Second Circuit held that a criminal defense lawyer did not violate DR 7-104(A)(1) by interviewing a witness in a drug conspiracy matter even though the lawyer knew the witness was represented by counsel with respect to charges in a related matter. The court held that the related matter was not the same "matter," and the witness therefore was not a "party" in the same "matter." *See United States v. Santiago-Lugo*, 162 F.R.D. 11, 12 (D.P.R. 1995)(interpreting "party" in Rule 4.2 of the ABA Model Rules and holding that the word "party" should be interpreted restrictively.

[9] Although counsel for the Defendant may interview the complaining witness without the consent of the Witness' counsel, during such interview Defendant's counsel may not violate Rules 3.4(a)(1) or (2) or 8.4(b) or (d).

[10] This Committee has treated the application of the no-contact rule more broadly than the courts where the issue arose in a non-criminal context. While recognizing the holdings in various court cases applicable to prosecutors, we have declined to follow that rule in civil matters. For example, in N.Y. State 735 (2001), we stated "we do not understand that the decision to retain the term 'party' was intended to cut back on the long-standing, universal understanding concerning the scope" of the "no contact" rule in noncriminal cases." (emphasis added) See also N.Y. State 785 (2005)(The 'no contact' rule will bar unconsented communication with an insurance adjuster if the insurance company is known to be separately represented by counsel with respect to the matter.) In N.Y. State 463 (1977), we opined that a lawyer for the putative father in a paternity

proceeding instituted by the Commissioner of Social Services was free to communicate with the mother, since the mother "could hardly be deemed a party," although we also considered it important that the mother was not represented by counsel. However, since the hypothetical discussed here involves a criminal proceeding, we need not address, in this opinion, whether Rule 4.2 applies to persons connected with civil proceedings who are not "parties."

[11] Although the history of Rule 4.2 indicates that the Administrative Board was concerned with the right of prosecutors to interview potential witnesses, we see no basis for reaching a different conclusion where the lawyer who wishes to have an unconsented communication with a potential witness in a criminal case represents the defendant rather than the People.

[12] We do not believe a prosecutor may avoid the application of the no-contact rule by dividing the same matter into separate matters, so that only one defendant is a "party" to a particular matter. However, in this case, the matters, although related, seem distinct, and the complaining witness is only a witness and not a co-conspirator.

[13] If Rule 4.2 applied to all "persons," rather than to "parties," then the question for counsel for the Defendant would be whether he "knows" that the Witness is represented in the robbery matter. The term "know" is defined in Rule 1.0(k). Although it is defined as denoting actual knowledge of the fact in question, it states that a person's knowledge may be inferred from circumstances. Since there is a relationship between the robbery proceeding and the Witness' drug possession proceeding, it might be logical to conclude that the Witness' lawyer in the drug possession proceeding also represents him as a witness in the robbery proceeding. Thus, any questions the Defendant's lawyer might ask would be about the subject matter of the representation. However, given our conclusion with respect to the meaning of the term "party," we need not reach those questions. Rule 4.2 by its terms is not applicable, and Defendant's lawyer need not obtain the permission of Witness' lawyer. Nevertheless, Defendant's lawyer should be mindful of Rule 4.4 (Respect for Rights of Third Persons)("In representing a client, a lawyer shall not use methods of obtaining evidence that violate the legal rights of such a person.")

[14] Even though Rule 4.2 does not require the consent of the Witness' lawyer, this does not prevent the Witness' lawyer from advising his client not to speak with anyone about the facts of the case outside the presence of his lawyer. A lawyer may not advise or cause a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness in the a matter. Rule 3.4(a)(2). But the Witness may insist on his right to the presence of counsel. *See* N.Y. State 463 ("Where the lawyer's intended informant refuses to divulge information unless and until he obtains legal advice, if the informant's interests are either presently or potentially adverse to those of the lawyer or his client, the lawyer must desist.")

CONCLUSION

[15] Under Rule 4.2, a lawyer may not communicate about the subject of a criminal representation with a party the lawyer knows to be represented by another lawyer in the matter without the consent of the other lawyer. A non-party witness in such matter is not protected by Rule 4.2. Consequently, a lawyer for a party may communicate with the witness without the consent of counsel who represents the witness in a related matter, provided that during such interview the lawyer does not violate Rules 3.4(a)(1) or (2) or 8.4(b) or (d). This, however, does not prevent the witness' lawyer from advising his client not to speak with anyone about the facts of the case outside the presence of his lawyer. The conclusion of this opinion does not extend to civil matters.

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