



**New York State Bar Association
Committee on Professional Ethics**

Opinion 1047 (2/17/15)

Topic: Government Lawyer; No contact rule

Digest: A government lawyer whose duties include investigation of fraud is subject to Rule 4.2. Whether the government lawyer may interview a party to a proceeding before the agency about the conduct of his or her private lawyer in that proceeding as part of an investigation of the private lawyer depends on whether the investigation is part of a separate matter and, if so, whether the government lawyer knows that the interviewee is represented by counsel in the separate matter. Even if the matter is the same, or, if it is not the same but the lawyer knows that the interviewee is represented in the separate matter, the government lawyer may interview the private lawyer's clients without the consent of the private lawyer if the contact is "authorized by law." That is a question of law beyond our jurisdiction.

Rules: 1.7, 4.2, 4.3

FACTS

1. A lawyer for a government agency (the "Government Lawyer") is performing an investigation involving accusations of fraud against a private lawyer (the "Private Lawyer") relating to claims submitted to the agency. The accusation may have been made in a number of different ways: (i) by the Private Lawyer's client; (ii) by one of the agency's administrative law judges; or (iii) by an anonymous tip on the agency's website. In some cases, the accusation will affect only the Private Lawyer, *e.g.*, a claim that the Private Lawyer has left the law firm that is counsel of record, and has fraudulently signed a consent to change attorneys and therefore is not the person entitled to counsel fees. But in other cases the accusation may involve charges that will affect the rights of the Private Lawyer's client (the "Client"), *e.g.*, by reducing the amount to which the Client is entitled or voiding the Client's claim.

2. The Government Lawyer's duties include investigating such accusations. If, as a result of the investigation, the agency believes there has been fraud or a violation of law, the agency will report the violation to the attorney general or another appropriate law enforcement agency. As part of the investigation, the Government Lawyer would like to interview one or more of the Private Lawyer's Clients. Each Client has a pending administrative case before the agency, but the inquirer states they are not targets of the investigation.

3. The agency has the statutory authority to investigate violations of the laws and regulations enforced by the agency. That includes the authority to conduct investigations of possible fraud and other violations of laws and regulations enforced by the agency. Nothing in the statute or regulations specifically authorizes the agency to interview witnesses represented by

counsel when that counsel is not present and has not consented to the interview.

QUESTION

4. May a government lawyer interview the clients of a Private Lawyer alleged to have committed fraud in connection with a proceeding before the government lawyer's agency, without the consent of the Private Lawyer?

OPINION

5. This inquiry turns on Rule 4.2 of the New York Rules of Professional Conduct (the "Rules"), known as the "no-contact" rule, which concerns communication with a person represented by counsel. Rule 4.2(a) provides as follows:

(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.

6. Comment [1] to Rule 4.2 explains that the 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 lawyer-client relationship, and uncounseled disclosure of information relating to the representation."

7. The issues under Rule 4.2 are evident from the language of the Rule. The rule prohibits a lawyer who represents a client in a matter (Lawyer A) from communicating with (1) a "party," (2) who Lawyer A "knows" is "represented by another lawyer" in the matter (Lawyer B), (3) about the subject of Lawyer A's representation, (4) unless Lawyer A has the prior consent of Lawyer B, or (5) Lawyer A is "authorized by law" to engage in the communication without the consent of Lawyer B.

Is the Client a "Party" Within the Meaning of Rule 4.2 ?

8. To determine the application of Rule 4.2 to this inquiry, we must also determine whether the Client is a "party" in connection with the investigation of the Private Lawyer. A number of federal courts in the Second Circuit interpreting Rule 4.2 or its predecessor in the Code of Professional Responsibility -- DR 7-104 -- in a criminal context have held that a "party" must be a party to a litigation. *See, e.g., In re Chan*, 271 F. Supp. 2d 539, 544 (S.D.N.Y. 2003); *Grievance Comm. for S. Dist. of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995) (criminal defense attorney not subject to discipline for interviewing a cooperating witness who was represented in another matter but was not a "party" to the matter for which he was interviewed; court holds that narrow reading of "party" and "matter" is critical to allow the investigation essential to a defense attorney's preparation for trial.) *But see United States v. Hammad*, 846 F.2d 854, *amended*, 858 F.2d 834 (2d Cir. 1988) (court assumes the disciplinary rule would otherwise apply, but determines that the prosecutor was "authorized by law" to employ legitimate investigative techniques, including the use of an informant).

9. As we noted in N.Y. State 735 (2001), the scope and application of the no-contact rule have been hotly debated in the criminal context.¹ However, in the non-criminal context, we have uniformly interpreted the rule to apply to any represented party. Indeed, the legal definition of "party" is much broader than the plaintiff or defendant in pending litigation. See Black's Law Dictionary (9th ed. 2009) (a party is "1. One who takes part in a transaction. 2. One by or against whom a lawsuit is brought"); Black's Law Dictionary (4th ed. 1968) (a party is "a person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually"). As we said in N.Y. State 904 (2012):

In the narrowest sense, the term "party" means a plaintiff or defendant (or the equivalent) in pending litigation. But this Committee has never read the term "party" so narrowly. Rather, in civil matters, the definition of "party" as used in Rule 4.2 -- and in the definition of "matter" in Rule 1.0(1) -- is not limited to formal parties to litigation. In N.Y. State 735 (2001), which addressed "noncriminal matters," we stated that the no-contact rule "applies to one who retains counsel in connection with a dispute even prior to the filing of a lawsuit; and during a civil lawsuit it applies to represented witnesses, potential witnesses and others with an interest or right at stake, although they are not nominal parties to the lawsuit."

A number of other bar associations, interpreting Rule 4.2 or its predecessor in the Code of Professional Responsibility (DR 7-104) also have read the rule as applying absent a pending litigation. See, e.g., Indiana Opin. 2008-02 (2008); Illinois Opin. 04-02 (2005); Utah Opin. 95-05 (1995); ABA Formal Opin. 95-396 (1995).² The adoption of the Rules effective in 2009 has not changed our opinion on the scope of the term "party."³ Consequently, we believe the Client is a "party" within the meaning of Rule 4.2, even if the investigation of the Private Lawyer is a separate matter, and even if the Client is only a witness.

¹ In N.Y. State 735, we cited Bruce A. Green, *A Prosecutor's Communications with Defendants: What Are the Limits?*, 24 Crim. L. Bull. 283 (1988). The debate has continued since then. See, e.g., Bruce A. Green, *Prosecutors and Professional Regulation*, 25 Geo. J. of Legal Ethics 873 (2012) (citing authorities expressing various opinions). See also Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. Pitt. L. Rev. 291, 325 n. 4 (1992).

² Many of the non-New York ethics opinions and court cases arose before the ABA amended Rule 4.2 of the Model Rules of Professional Conduct in 1995 to change the term "party" to "person." While a handful of states, including New York, retained the reference to "party," most changed the term "party" to "person," thus eliminating any argument about the meaning of "party," and making it more likely that future disagreements with law enforcement officers in these states would center on the scope of the "provided by law" exception rather than the scope of the term "party."

³ We noted in N.Y. State 884 (2011) that the Committee had applied the no-contact rule more broadly in the past, but we concluded that Rule 4.2 does not apply to a non-party witness in a criminal matters, citing *Grievance Committee for the Southern District of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995), while stressing that this conclusion did not extend to civil matters.

Is the Client Represented in the Matter?

10. Rule 4.2(a) by its terms prohibits a lawyer from communicating about a matter with a party that the lawyer "knows" is represented by another lawyer in the same matter. Comment [2] to the Rule explains that paragraph (a) applies to communications with any party who is "represented by counsel *concerning the matter to which the communication relates*" (emphasis supplied). Although the Definition Section of the Rules contains a definition of "matter," it does not define the scope of a single matter, but rather lists more than a dozen different types of matter that are included within the term. *See* Rule 1.0(I). Significantly, the term "matter" is not limited to litigation, but includes an investigation, an application, a contract, a negotiation or "any other representation involving a specific party or parties."

11. The term "matter" is also discussed in the comments to other Rules, and they make clear that the scope of the term is not defined mechanically but is sensitive to the particular facts and context of the inquiry. For example, Rule 1.9(a), the former-client conflict rule, prohibits a lawyer who has represented one client in a matter from representing another person in the same or a substantially related matter. Comment [2] to Rule 1.9 states: "The scope of a 'matter' for purposes of this Rule depends on the facts of a particular situation or transaction. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited." Rule 1.11(a) prohibits a lawyer who has formerly served as a public officer or employee from thereafter representing a client in connection with a matter in which the lawyer participated personally and substantially as a public officer. Comment [10] to Rule 1.11 provides: "[A] 'matter' may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which (i) the matters involve the same basic facts, (ii) the matters involve the same or related parties, and (iii) time has elapsed between the matters." *See* N.Y. State 1029 (2014) (discussing the facts, parties and time tests); N.Y. State 904 (2012) (asking whether representation in the first matter necessarily would include representation in the second matter).

12. In N.Y. State 904, we discussed whether two matters were the same, so as to determine whether representation in one demonstrated representation in the other for purposes of Rule 4.2. One was a criminal investigation and the other was a civil suit. Although they involved the same underlying conduct and were inextricably intertwined, we determined they were different matters, because the parties, processes and issues were different. Thus, we have determined that the same underlying conduct is not, on its own, sufficient to constitute the same "matter." Rather the extent of a matter depends on a variety of factors, including whether the two matters involve (i) the same underlying events or alleged actions, (ii) the same or related parties, (iii) the same or related issues (which includes whether the matters involve the same interests that the Client has hired the lawyer to protect and whether the outcome of the second matter can affect the outcome of the first matter), and (iv) whether the matters are ongoing at the same time or close in time.

13. Here, the Government Lawyer knows that the Private Lawyer represents the Client in a claim before the government agency. Whether a communication in connection with the Government Lawyer's investigation (which is going on at the same time as the Client's claim proceeding and involves the same or related parties) involves the same "matter" in which the Government Lawyer knows the Private Lawyer represents the Client will depend on the extent to

which the central events and issues of the claim proceeding are the same and on whether the communication may have an effect on the outcome of the claim proceeding.

14. We believe the overlap between the Client's claim before the agency and the Government Lawyer's investigation will often be greater than the overlap we analyzed in N.Y. State 904. If the investigation concerns an allegation of fraud in the prosecution of the Client's claim before the agency, the central facts underlying the claim are also likely to be at the center of the investigation, even if the issues are somewhat different. (For example, the issues in the investigation would include not only whether the facts as presented were true but also the circumstances leading to any misstatement in the application and who participated in that misstatement.) In that case, the investigation would likely constitute the same "matter" as the Client's claim proceeding before the agency, and the Client should be considered represented in the investigation for purposes of Rule 4.2. This is particularly true if the Client's claim is still pending and the investigation may materially affect the amount or validity of the Client's claim or if a prosecutor who receives the results of the investigation may decide to bring charges against the Client, whether or not the Client currently is a "target" of the investigation. In that circumstance, the Client and the Private Lawyer would ordinarily expect the Private Lawyer hired in connection with the Client's claim to protect the Client's interests, at least until the Client retained other counsel to defend the Client against those charges. If, however, the fraud did not involve the Client's claim before the agency, and the investigation cannot affect the outcome of the Client's claim -- for example, where the agency is investigating whether the Lawyer fraudulently forged a consent to change of attorney form -- then the agency's investigation of the Private Lawyer's conduct and the Client's claim before the agency would be different "matters," in which case representation of the client in one of those matters would not imply representation in the other.

15. Even if the investigation of the Private Lawyer's conduct is a separate matter, there is still a question of whether the Government Lawyer "knows" in some other way that the Client is represented in the second matter. The definition of "knows" requires actual knowledge of the fact in question, although a person's knowledge may be inferred from the circumstances. *See* Rule 1.0(k). We concluded in N.Y. State 904 that, where two matters are closely related and there is a strong possibility that the lawyer represents the client in both, then the lawyer must ask the client if he or she is represented in the matter, because "when a lawyer has a reasonable basis to believe that a party may be represented by counsel, then the lawyer has a duty of inquiry to ascertain whether that party is in fact represented by counsel in connection with a particular matter." N.Y. State 904 (2012), (*citing* N.Y. State 768 (2003), which in turn cites N.Y. State 735 (2001), N.Y. State 728 (2000) and N.Y. State 663 (1994)). *See also* N.Y. State 607 (1990) (when it is unclear whether a party is represented by counsel in a matter, the safest approach is to inform the party that, if he or she is represented by counsel, the communication should be referred to counsel). N.Y. State 904 added that the "necessary extent of such an inquiry will depend on the circumstances of a particular matter."

16. If the investigation into the Private Lawyer's actions is part of the same matter as the Client's claim before the agency, then the Government Lawyer will know that the Client is represented by the Private Lawyer in the matter. If, however, the investigation into the Private Lawyer's conduct involves different facts and issues, and cannot affect the outcome of the Client's claim, then it is a separate matter, and it is likely that Government Lawyer would not

"know" that the Client was represented by the Private Lawyer with respect to the investigation. The two are especially likely to be separate matters if the Private Lawyer's Client, rather than a third party, made the allegation of fraud that the Government Lawyer is now investigating. In that case, it would be unlikely that the Private Lawyer also represented a witness in the investigation. Indeed, representing the Client as the complaining witness would probably involve a personal interest conflict for the Private Lawyer under Rule 1.7(a)(2) (A lawyer may not represent a client if a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own personal interests.)

17. If the Client is not represented in connection with the investigation, the Government Lawyer may treat the Client as an unrepresented person with respect to the investigation. *See* Comment [4] to Rule 4.2 ("This Rule does not prohibit communication with a represented party or person . . . concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party or person . . . does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter."). In doing so, the Government Lawyer must observe the requirements of Rule 4.3 ("Communicating with Unrepresented Persons"), which provides:

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. . . . The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Is the Government Lawyer Authorized by Law to Communicate with the Represented Person?

18. Rule 4.2 by its terms authorizes a lawyer to communicate about a matter, even with a party that the lawyer knows is represented by another lawyer in the matter, if the lawyer is "authorized to do so by law."

19. A number of courts have held that contacts between prosecutors or their agents and represented persons in criminal matters are an investigative technique "authorized by law." *See United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988). In a Report and Recommendation in *In re Amgen Inc.*, 2011 WL 2442047, *adopted in its entirety*, 2011 WL 2418815 (E.D.N.Y. 2011), U.S. Magistrate Judge James Orenstein points out that neither *Hammad* nor subsequent cases identify the specific "law" that authorizes the uncounseled contact. Magistrate Judge Orenstein finds that a statute that authorizes prosecutors to enforce the law does not authorize specific investigative techniques, but that the part of *Hammad* that held a Federal prosecutor's communication with a represented target to be "authorized by law" continued to be good law in the Second Circuit.

20. We have issued only one prior opinion based on the "authorized by law" exception. That opinion involved a statute that specifically authorized a limited form of communication with a party that the lawyer knew to be represented by counsel in the matter. *See* N.Y. State 894 (2011) (because the Real Property Actions and Proceedings Law provides for process to be personally served upon the respondent, a lawyer may personally serve process on a represented party and

ask certain related questions, but may not go beyond service of process to communicate on the subject of the representation without the consent of such party's lawyer). The ABA ethics committee, in ABA 95-396 (1995), approved such service of process and also additional interactions "authorized . . . by law," including "a constitutional provision, statute or court rule, having the force and effect of law, that expressly allows a particular communication to occur in the absence of counsel, such as court rules providing for service of process on a party, or a statute authorizing a government agency to inspect certain regulated premises."

21. Ultimately, what is "authorized by law" is a legal question beyond the jurisdiction of this Committee. Comment [5] to Rule 4.2 states: "Communications authorized by law *may* . . . include investigative activities of lawyers representing governmental entities . . . prior to the commencement (as defined by law) of criminal or civil enforcement proceedings." (emphasis added). In our opinion, this statement does not constitute a blanket exemption from Rule 4.2 for government lawyers conducting investigations in criminal and non-criminal proceedings, unless the communications are indeed authorized by law.

CONCLUSION

22. A government lawyer whose duties include investigation of fraud is subject to Rule 4.2. Whether the government lawyer may interview a party to a proceeding before the agency about the conduct of his or her private lawyer in that proceeding as part of an investigation of the private lawyer depends on whether the investigation is part of a separate matter and, if so, whether the government lawyer knows that the interviewee is represented by counsel in the separate matter. Even if the matter is the same, or, if it is not the same but the lawyer knows the interviewee is represented in the separate matter, then the government lawyer may interview the private lawyer's clients without the consent of the private lawyer if the contact is "authorized by law," but that is a question of law beyond our jurisdiction.

(12-14)