

RI-302**October 20, 1997****SYLLABUS**

It is not professional misconduct for a criminal defense lawyer to communicate *ex parte* with a complaining witness without notice to or consent of the prosecutor.

In any contact by a criminal defense attorney with a complaining witness, the lawyer must make it clear that the lawyer represents the defendant in the criminal case, and the lawyer must not use any deception, give any advice, request the witness to testify falsely or to refrain from giving information to the prosecutor or offer any inducement that is prohibited by law.

It is not professional misconduct for a criminal defense lawyer to inquire whether the complaining witness wishes to have the prosecution of the case continue or to request that the complaining witness ask the prosecutor to dismiss the charges.

It is professional misconduct for a prosecutor to request or to advise a complaining witness to refrain from talking with the defendant or defense lawyer, or to urge a law enforcement officer to make, or to knowingly acquiesce in a law enforcement officer making such a request or giving such advice.

References: MRPC 1.2, 3.4, 3.6, 3.8, 4.1, 4.2, 4.3, 5.3(b) and (c), 8.4.

TEXT

A criminal defense lawyer asks a number of questions about the permissibility and scope of *ex parte* contact with a complaining witness in a criminal case. These include whether *ex parte* contact with a complaining witness is covered by MRPC 4.2, and whether a defense lawyer can interview a complaining witness about the facts of the case, or about the

complaining witness' desire to continue the prosecution of the case? The lawyer also asks whether the prosecutor has a right to be present at any interview and whether the prosecutor or a law enforcement officer involved in the case be allowed to advise the complainant not to speak with the defense attorney?

The defense lawyer makes it clear that any such contact would involve the lawyer being clearly identified as the lawyer who represents the defendant in the criminal case. The defense lawyer also acknowledges that it is the legal prerogative of the prosecutor to determine whether to prosecute or not, not the complainant.

MRPC 4.2 states:

"In representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by

another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

In certain limited cases, a complaining witness might retain a lawyer to advise the witness concerning the criminal case, in which case the defense lawyer would need to comply with MRPC 4.2. The term "represented in the matter" in MRPC 4.2 means that the lawyer has a lawyer-client relation with the individual or entity. It does not mean simply that the goals or interest of that person are being asserted, protected or advanced by some lawyer. While the prosecutor prepares and presents the testimony of the complaining witness, a complaining witness in a criminal case is not the "client" of the prosecutor. The client of the prosecutor is the governmental entity employing and empowering the prosecutor to bring criminal cases. The government is the named party in the criminal charge. While state criminal charges are brought in the name of "The People of the State of Michigan," this does not make individual citizens of the state, even the complaining witness, a client of the prosecutor. The prosecutor is not the agent of the complaining witness as would be the case if a lawyer-client relation existed. As noted above, the prosecutor is not bound to move to dismiss the case at the request of the complaining witness, as would be the case if the prosecutor represented the complaining witness as a client. Thus, a criminal defense attorney does not violate MRPC 4.2 by initiating an *ex parte* interview with a complaining witness without notice or consent of the prosecutor.

A similar conclusion was reached by the Committee on Professional Ethics of the New York County Lawyer's Association in their December 27, 1995, Opinion 711. This opinion interpreted DR 7-104(A) (2), **Communicating With One of Adverse Interest**, the nearly identical predecessor to Rule 4.2. Opinion 711 cites *United States v. Medina*, 922 F.2d 573, 579 (4th Cir. 1993), for the proposition that "Witnesses are neither the property of the government nor of the defendant." While noting that the defense lawyer cannot give the complaining witness any legal advice, nor use any deception, threats or other improper inducements, there was no ethical restriction "to prevent defendant's counsel from asking the complaining witness to request the prosecution to drop the charges." Opinion 711 at 2.

A defense lawyer in making any contact with a complaining witness is bound by a number of ethical constraints.

MRPC 4.1 states:

"In the course of representing a client, a lawyer shall not knowingly make

a false statement of material fact or law to a third person."

MRPC 4.3 states:

"In dealing 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. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."

The COMMENT to MRPC 4.3 notes that "During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel."

MRPC 3.4 (a) (b) and (f) state:

"A lawyer shall not:

"(a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;

"(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

". . .

"(f) request a person other than a client to refrain from voluntarily giving relevant information to another party, unless:

"(1) the person is a relative or an employee or other agent of a client; and

"(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."

While this Committee does not give advise on questions of law, it may raise such issues if they are relevant to the application of an ethical rule. While certain requests may not be unethical under exception (1) to MRPC 3.4(f), other rules, MRPC 1.2(a), 1.2(c) and 8.4, make it unethical for a lawyer to violate a criminal law in representing a client. In a criminal context, a defense lawyer's effort to invoke the exception to MRPC 3.4(f) for a relative (e.g. a spouse in an abuse case) or an employee of the defendant would not likely provide a defense to a criminal charge against the lawyer for obstruction of justice or a similar charge.

MRPC 8.4 (b) and (c) state:

"It is professional misconduct for a lawyer to:

"(b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer;

"(c) engage in conduct that is prejudicial to the administration of justice."

A prosecutor is also bound by the above noted rules and as noted in the Comment to MRPC 3.8 **Special Responsibilities of a Prosecutor**, "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Because the complaining witness is not a client of the prosecutor, the prosecutor cannot under MRPC 3.4(f) request a complaining witness not to talk to the defendant or defense lawyer. The above noted Comment to MRPC 4.3 would preclude the prosecutor from giving the complaining witness advice not to talk to the defense lawyer. This Comment does not preclude the prosecutor from informing the complaining witness that he or she is free to talk to the defense lawyer or to refuse to talk to the defense lawyer except during cross-examination in court, so long as it is made clear by the prosecutor that the choice whether to talk or not is fully that of the complaining witness.

While MRPC 3.8(e) specifically requires a prosecutor to exercise reasonable care to prevent law enforcement officers from making extrajudicial statements that the prosecutor would be prohibited from making under MRPC 3.6 **Trail Publicity**, there is no similar specific rule requiring the prosecutor to take reasonable care to prevent law enforcement officers from requesting or advising the complaining witness not to talk to the defense lawyer. The ethical conduct of a nonlawyer and the legal issue of

whether such a request or advice from a law enforcement official would violate defendant's constitutional rights is beyond the scope of this opinion and jurisdiction of this Committee. Yet, it would be a violation of MRPC 3.4(f) and 8.4 (a) for the prosecutor to urge or to knowingly acquiesce in a law enforcement officer's requesting or advising a complaining witness not to talk with the defendant or defense lawyer. See MRPC 5.3(b)-(c) for a lawyer in private practice. MRPC 8.4(a) **Misconduct** makes it clear that it is professional misconduct for a lawyer "to violate or attempt to violate [a rule such as MRPC 3.4(f)] . . . through the acts of another."

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3. It is not professional misconduct for a criminal defense lawyer to inquire whether the complaining witness wishes to have the prosecution of the case continue or to request that the complaining witness ask the prosecutor to dismiss the charges.
4. It is professional misconduct for a prosecutor to request or to advise a complaining witness to refrain from talking with the defendant or defense lawyer, or to urge a law enforcement officer to make, or to knowingly acquiesce in a law enforcement officer making such a request or giving such advice.