



## NAPD FORMAL ETHICS OPINION 16-2

**Question:** The Ethics Counselors of the National Association for Public Defense (NAPD) have been asked to address the following scenario:

A Public Defender's Office (PDO) represents persons who have been civilly committed to state-run mental health facilities. In representing these individuals with regard to eligibility for release from civil commitment, the Public Defender's Office has requested *ex parte* access to the facility staff, including doctors and other mental health professionals, for the purpose of witness interviews. The state's Office of Attorney General (OAG) claims that, as state employees, facility employees are represented by the OAG, and, in that capacity, the OAG has denied the PDO access to facility staff.

- 1) Does the OAG represent state employees of the state-run mental health facility under Model Rules of Professional Conduct (MRPC) 4.2, Communication with Person Represented by Counsel, thereby allowing the OAG to deny the PDO *ex parte* access to facility employees with regard to the PDO's representation of clients who have been civilly committed to the facility for the purpose of representing these clients as to their eligibility for release?
- 2) If facility staff is not represented by the OAG under MRPC 4.2, does the OAG violate MRPC 3.4, Fairness to Opposing Party and Counsel, by barring the PDO access to facility staff?

## I. SCOPE OF RULE 4.2 AND *EX PARTE* COMMUNICATION WITH EMPLOYEES OF AN ORGANIZATION

### A. Rule 4.2<sup>1</sup> - background.

Model Rule 4.2 is known as the no-contact or the anti-contact rule, and prevents the lawyer of a client from communicating with another person about the matter when the lawyer knows that other person is represented.<sup>2</sup> A lawyer can communicate with the represented person if his or her lawyer gives consent, or if authorized by court order or law.<sup>3</sup> Communications authorized by law may include communications with the government or communications that exercise a constitutional right.<sup>4</sup> The no-contact rule applies to lawyers in criminal and civil actions and to federal and state prosecutors.<sup>5</sup> Rule 4.2 does not prohibit communication with a represented person on issues outside the scope of the matter.<sup>6</sup> The purpose of this rule is to prevent an adversarial attorney from “circumventing opposing counsel to obtain unwise statements from the adversary party,”

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<sup>1</sup> (a) Except as provided in paragraph (c), in representing a client, a lawyer shall not communicate about the subject of the representation with a person who the lawyer knows is represented in the matter by another lawyer unless the lawyer has the consent of the other lawyer or is authorized by law or court order to do so.

(b) If the person represented by another lawyer is an organization, the prohibition extends to each of the organization's (1) current officers, directors, and managing agents and (2) current agents or employees who supervise, direct, or regularly communicate with the organization's lawyers concerning the matter or whose acts or omissions in the matter may bind the organization for civil or criminal liability. The lawyer may not communicate with a current agent or employee of the organization unless the lawyer first has made inquiry to ensure that the agent or employee is not an individual with whom communication is prohibited by this paragraph and has disclosed to the individual the lawyer's identity and the fact that the lawyer represents a client who has an interest adverse to the organization.

(c) A lawyer may communicate with a government official about matters that are the subject of the representation if the government official has the authority to redress the grievances of the lawyer's client and the lawyer first makes the disclosures specified in paragraph (b).

<sup>2</sup> MODEL RULES OF PROF'L CONDUCT r. 4.2 (AM. BAR ASS'N, 2002); BLOOMBERG BNA, *Communications With Person Represented by Counsel*, ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT (JUNE 8, 2016), [http://lawyersmanual.bna.com/mopw2/3300/split\\_display.adp?fedfid=60390462&vname=mopcref\(\)&fn=60390466&jd=mpcr\\_71\\_301&split=01](http://lawyersmanual.bna.com/mopw2/3300/split_display.adp?fedfid=60390462&vname=mopcref()&fn=60390466&jd=mpcr_71_301&split=01).

<sup>3</sup> MODEL RULES OF PROF'L CONDUCT r. 4.2.

<sup>4</sup> *Id.* at cmt 5.

<sup>5</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396 (1995) (discussing communications with represented persons).

<sup>6</sup> MODEL RULES OF PROF'L CONDUCT r. 4.2 cmt 4.

“driving a wedge between the opposing attorney and that attorney's client,” obtaining “inadvertent disclosure of privileged information,” and ultimately to “facilitate settlement by channeling disputes through lawyers accustomed to the negotiation process.”<sup>7</sup>

**B. Rule 4.2 does not bar *ex parte* contact by the PDO with state employees of a state run mental health facility for the purpose of representing civilly committed clients as to their eligibility for release, because the employees are not represented by the OAG.**

**(1) When an organization is represented by counsel, which employees are subject to no-contact under Rule 4.2?**

Comment 7 to Rule 4.2 provides guidance on how the no-contact rule applies to employees of a represented organization. When the organization is represented, the no-contact rule applies to a constituent that “supervises, directs or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.”<sup>8</sup> If a constituent has personal representation regarding this matter, consent from that counsel is sufficient for lawful communication.<sup>9</sup>

ABA Formal Opinion 95-396<sup>10</sup> further clarified the application of the no-contact rule to a represented organization’s employees. The opinion states that sweeping claims of blanket representation are improper because the no-contact rule only prevents communication with individuals who have managerial authority within a represented

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<sup>7</sup> *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990).

<sup>8</sup> MODEL RULES OF PROF'L CONDUCT r. 4.2 cmt 4.

<sup>9</sup> *Id.*

<sup>10</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396. The ABA Committee has modified Model Rule 4.2 and the comments since the release of Formal Opinion 95-396. Carl A. Pierce, *Variations on a Basic Theme: Revisiting the ABA's Revision of Model Rule 4.2 (Part I)*, TENN. L. REV. 121, 138-39. Notably, the language from Comment 4 of the 1995 Rule pertaining to “managerial authority” has been replaced with the language in Comment 7 of the 2002 Rule, discussed in the earlier text of this section. *Id.* at 155-58.

organization, those individuals whose statements may qualify as admissions of the organization in regard to the matter, and individuals whose actions or omissions are imputed to the represented organization.<sup>11</sup> Lawyers may ethically contact employees of a represented organization who do not qualify for one of these categories without securing consent from the represented organization's lawyer.<sup>12</sup>

Jurisdictions have adopted a number of tests to determine when an employee of a represented organization is subject to the no-contact rule. These tests include the managing-speaking authority test or the alter ego test, the control group test, the litigation control group test, and the balancing test. There are other interpretations of the no-contact rule as applied to organizational employees outside of these tests.<sup>13</sup> Jurisdictions, however, typically find that blanket assertion of representation of all employees is impermissible as a means to prevent all *ex parte* communication.<sup>14</sup>

Most jurisdictions follow some form of the management-speaking or alter ego test.<sup>15</sup> Under this test, communication is prohibited with those employees who can legally bind the corporation in the matter, those who identify with the interests of the organization to the point that they are indistinguishable from it, those who effectuate the advice of the organization's lawyer, and employees of the organization who have a personal interest at stake in the matter.<sup>16</sup> Witnesses are not considered employees that fall

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<sup>11</sup> Lawyers claiming blanket representation should be cautious that their assertions do not qualify as an unlawful obstruction, pursuant to Model Rule of Professional Conduct 3.4. *See infra* part II for further discussion on Rule 3.4 as it pertains to obstructing access to witnesses.

<sup>12</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-396.

<sup>13</sup> This opinion does not include an exhaustive list of each approach taken by jurisdictions when interpreting Rule 4.2. Other tests are utilized, such as the party opponent test and the scope of employment test. Best practice is to analyze the laws of the relevant jurisdiction.

<sup>14</sup> BLOOMBERG BNA, *supra* note 1.

<sup>15</sup> 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 14:50 (2016).

<sup>16</sup> Ellen J. Messing and James S. Weliky, *Contacting Employees of an Adverse Corporate Party: A Plaintiff's Attorney's View*, SP024 ALI-ABA 1527, 1535 (2008).

within those categories, and thus *ex parte* communication with these individuals is permissible.<sup>17</sup> Jurisdictions<sup>18</sup> and the Restatement of Law Governing Lawyers (3d)<sup>19</sup> have adopted variations of this approach to Rule 4.2.

A few jurisdictions have implemented the control group test.<sup>20</sup> This test permits communication with employees that are not included in the control group of the organization.<sup>21</sup> The control group has been defined as “top management persons who had the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons’ advice or opinion or whose opinions in fact form the basis of any final decision.”<sup>22</sup>

Some jurisdictions will limit the no-contact rule to those groups of individuals in the “litigation control group.”<sup>23</sup> In this test, employees who handle the management of the case or matter, in addition to employees who created the organization’s liability, are subject to the no-contact rule.<sup>24</sup> This test often leaves management level employees available for *ex parte* contact if they do not qualify for the “litigation control group.”<sup>25</sup>

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<sup>17</sup> 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 14:50.

<sup>18</sup> See, e.g., *Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard College*, 764 N.E.2d 825, 833 (Mass. 2002); *Palmer v. Pioneer Inn Assocs., LTD.*, 59 P.3d 1237, 1247–48 (Nev. 2002); *Niesig v. Team I*, 558 N.E.2d 1030, 1035–36 (N.Y. 1990); *Wright v. Group Health Hosp.*, 691 P.2d 564, 569 (Wash. 1984); *Strawser v. Exxon Co., U.S.A.*, 843 P.2d 613, 614 (Wyo. 1992).

<sup>19</sup> *Messing & Weliky, supra* note 16, at 1535 (stating that the Restatement has adopted the alter ego test).

<sup>20</sup> See, e.g., *Fair Auto. Repair, Inc. v Car-X Serv. Sys., Inc.*, 471 N.E.2d 554, 560–561 (1984).

<sup>21</sup> 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 14:51 (2016); John D. Hodson, Annotation, *Right of Attorney to Conduct Ex Parte Interviews with Corporate Party’s Nonmanagement Employees*, 50 A.L.R.4th 652.

<sup>22</sup> *Fair Auto. Repair, Inc.*, 471 N.E.2d at 560.

<sup>23</sup> See, e.g., *Johnson v. Cadillac Plastic Grp., Inc.*, 930 F. Supp. 1437, 1441–42 (D. Colo. 1996); *In re Op.* 668 of Advisory Comm. on Prof’l Ethics, 633 A.2d 959, 964 (N.J. 1993).

<sup>24</sup> 47 N.J. Prac., Civil Trial Handbook § 6:2 (2016).

<sup>25</sup> *Andrews v. Goodyear Tire & Rubber Co., Inc.*, 191 F.R.D. 59, 78 (D.N.J. 2000) (explaining that all management-level employees are not off limits to *ex parte* communications).

Certain courts refuse to adopt a test interpreting which employees of an organization qualify for the no-contact rule, instead interpreting each situation on a case-by-case basis.<sup>26</sup> These jurisdictions balance the necessity of a lawyer to informally gather information against opposing counsel's ability to effectively represent its client.<sup>27</sup> Adoption of this approach generally leads to extensive access to witnesses with certain procedural safeguards.<sup>28</sup>

Because only certain organizational employees are represented by an organization's lawyer in a matter,<sup>29</sup> an organizational lawyer cannot assert blanket representation unless the lawyer does in fact represent all employees. To accomplish this, the organizational lawyer would have to form an attorney-client relationship for the matter with each employee not encompassed by the no-contact rule.<sup>30</sup> This would require each employee to meet with the lawyer in order to authorize the lawyer to act on his or her behalf.<sup>31</sup> The organizational lawyer would also have to check for conflicts of interest between employees and between each employee and the organization.<sup>32</sup> Only after the lawyer forms an attorney-client relationship with each employee and determines that dual

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<sup>26</sup> See, e.g., *NAACP v. Florida*, 122 F. Supp. 2d 1335, 1337 (M.D. Fla. 2000); *B.H. v. Johnson*, 128 F.R.D. 659, 661 (N.D. Ill. 1989).

<sup>27</sup> Messing & Weliky, *supra* note 16, at 1536–37.

<sup>28</sup> *Id.* at 1537.

<sup>29</sup> See *supra* Part I.B.(1) and (2) for a discussion of when an organizational employee is represented by the organization's lawyer.

<sup>30</sup> See, e.g., *Carter-Herman v. City of Phila.*, 897 F. Supp. 899, 902–903 (E.D.Pa. 1995) (stating that every organizational employee is not represented simply by virtue of his employment but must actively obtain representation from the organization's lawyer); *Brown v. Saint Joseph Cnty.*, 148 F.R.D. 246, 250 (N.D.Ind. 1993) (stating that all employees of an organization cannot be represented without each employee agreeing to form an attorney-client relationship).

<sup>31</sup> *Brown*, 148 F.R.D. at 250.

<sup>32</sup> MODEL RULES OF PROF'L CONDUCT r 1.13(e), 1.7 (AM. BAR ASS'N). It would be very difficult for an organizational lawyer to represent all employees without encountering conflicts of interest. For instance, an organizational lawyer's ability to represent an employee is called into question when an employee simply provides information that is "supportive of the plaintiff's position." See, e.g., *Michaels v. Woodland*, 988 F. Supp. 468, 474 (D.N.J. 1997).

representation will not create conflicts of interest, may the organizational lawyer claim blanket representation of all organizational employees.<sup>33</sup> The greater the number of organizational employees, the more difficult it is for a lawyer to secure individual representation without creating conflicts of interest.

Rule 4.2 does not specify different treatment for government agencies although its comments suggest there may be exceptions to the rule for contact with the government.<sup>34</sup> The rule applies to communications with represented government agencies.<sup>35</sup> A government officer or employee who may be personally liable for a matter is entitled to the full protection of the no-contact rule when personally represented by counsel.<sup>36</sup> However, the rule’s commentary suggests there are instances when communication with employees of a represented government agency may be permissible.<sup>37</sup>

The ABA and most jurisdictions have also rejected the notion that counsel, per its representation of a government organization, represents all of its employees.<sup>38</sup> The Department of Justice, in its Criminal Resource Manual, interprets Rule 4.2 to bar assertions of blanket representation of the person or entity in all subjects and matters.<sup>39</sup>

Most jurisdictions recognize that *ex parte* communications with a government agency or officer are permissible if they involve the settling of a policy matter or the First

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<sup>33</sup> See *Michaels*, 988 F. Supp. at 474.

<sup>34</sup> MODEL RULES OF PROF’L CONDUCT r. 4.2 cmt. (AM. BAR ASS’N 1983).

<sup>35</sup> See ABA Comm’n on Ethics and Prof’l Responsibility, Formal Op. 97-408 (1997).

<sup>36</sup> *Id.*

<sup>37</sup> See MODEL RULES OF PROF’L CONDUCT r 4.2 cmt. (AM. BAR ASS’N).

<sup>38</sup> See ABA Comm’n on Ethics and Prof’l Responsibility, Formal Op. 95-396 (1996) (asserting that a “lawyer representing an organization cannot insulate all employees from contacts with opposing lawyers by asserting a blanket representation of the organization”). See also ABA Comm’n on Ethics and Prof’l Responsibility, Formal Op. 97-408 (1997) (Acknowledging instances where a lawyer representing a private party, without prior consent from the government’s lawyers, can communicate with the responsible government officials about the controversy).

<sup>39</sup> DOJ: *Communications with Represented Persons—Issues for Consideration* (June 9, 2016), <https://www.justice.gov/usam/criminal-resource-manual-296-communications-represented-persons-issues>.

Amendment right to petition the government to redress grievances.<sup>40</sup> The settling of a controversy can be a policy matter; examples might include individuals held against their will by the government in prison or in a mental health facility.<sup>41</sup> If triggered, the rule's exception allows for communications with any official with the authority to resolve that policy matter or recommend a resolution.<sup>42</sup> To ensure the scope of communications are appropriately related to a policy matter, advance notice prior to initiating contact should be given to allow the government an opportunity to involve its lawyers in the petition. Exceptions to Rule 4.2 with respect to government agencies do not apply to lawyers seeking to gather evidence to use in litigation.<sup>43</sup> In addition to First Amendment and policy petitions, some jurisdictions have indicated that non-managerial employees of represented organizations are not necessarily precluded from having *ex parte* communications with opposing counsel.<sup>44</sup>

Although most jurisdictions agree that First Amendment and policy petitions are exceptions for Rule 4.2's bar against *ex parte* communications, there are variations with regards to the rule's application in other contexts.<sup>45</sup> To determine who is a represented government employee under Rule 4.2, jurisdictions use many of the same tests used by private corporations. Some jurisdictions limit the applicability of the government no-contact rule to managerial employees, employees whose actions may be imputed to the

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<sup>40</sup>ABA Comm'n on Ethics and Prof'l Responsibility, Formal Op. 97-408 (1997). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §101 (AM. LAW INST. 2000).

<sup>41</sup> *See* ABA Comm'n on Ethics and Prof'l Responsibility, Formal Op. 97-408 (the settling of policy issues includes the settling of controversies).

<sup>42</sup> *Id.* (This exception requires "the balancing of the interests served by the no-contact rule against the constitutionally-based policy of providing access to government decision makers who have the authority to recommend action in the matter").

<sup>43</sup> 30 Law. Man. Prof. Conduct 392 (AM. BAR ASS'N).

<sup>44</sup> *See, e.g., Brown v. Dep't of Corrs.*, 173 F.R.D. 265, 267-68 (D. Or. 1997).

<sup>45</sup> ABA Comm'n on Ethics and Prof'l Responsibility, Formal Op. 97-408.

organization, or employees whose statements have the power to serve as an admission.<sup>46</sup>

A minority of states have adopted a narrower view called the “Managing Test” where employees excluded must have sufficient managing authority to give them the right to bind and speak on behalf of the organization.<sup>47</sup>

**(2) The staff of the mental health facility is not represented by the OAG under Rule 4.2.**

Maryland courts have found that psychiatrists who provide expert testimony and serve as expert witnesses with regard to their impressions of the mental state of their patients are independent of either party.<sup>48</sup> This is true whether or not the psychiatrists are paid privately or by the state.<sup>49</sup> They are “not partisans of the prosecution, though their fee is paid by the State, any more than is assigned counsel for the defense.”<sup>50</sup> In the present fact scenario, the OAG claims, as general counsel, it represents all the staff, as state employees, at the state-run mental health facility, but it has not offered any claim that such representation is sufficiently specific to the matter at hand, which is not about the appropriateness of the treatment received by the patient, but about the current mental health of a patient and his/her eligibility for release. Information sought from the doctors and other mental health professionals only relates to the status of the patient and, likewise, is completely unrelated to general representation that the OAG would provide to the facility.

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<sup>46</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §101 (AM. LAW INST. 2000). See also 30 Law. Man. Prof. Conduct 392 (AM. BAR ASS’N).

<sup>47</sup> 30 Law. Man. Prof. Conduct 392 (AM. BAR ASS’N).

<sup>48</sup> *Ellison v. State*, 104 Md. App. 655, 660, 657 A.2d 402, 405 (Md. Ct. Spc. App. 1995).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* quoting (*Johnson v. State*, 292 Md. 405, 414, 439 A.2d 542, 548 (Md. Ct. App. 1982)).

Furthermore, neither the doctors or other mental health professionals, nor the employer facility where they work, are adversarial parties in these civil commitment cases where the issue is eligibility for release, and the PDO is not in an adversarial role vis-à-vis the facility or its employees. Again, in such cases the employees are merely witnesses to the patient's behavior and mental state.

The PDO wishes to interview the doctors and other mental health professionals as independent witnesses, and it is irrelevant that the salaries of these professionals are paid by the state. The OAG has failed to show that the doctors and other mental health professionals in question requested, wanted or needed representation by the OAG. Instead, the OAG has issued a blanket claim that it represents all doctors and other mental health professionals that staff the facility by virtue of their employment status as state employees. The OAG is claiming this broad and general representation applies for each state employee and in every matter for which an interview is sought. However, as stated above, courts require specificity on the matter and persons being represented, and such broad claims of general representation have been rejected. As such, communication under these circumstances does not trigger a violation of MRPC Rule 4.2.

The doctors and other mental health professionals that the PDO wishes to interview should be considered general employees under these readings of Rule 4.2. They are neither managers of the facility nor do they have frequent contact with the OAG. Nor could the doctors and other mental health professionals bind the facility to future action, as the testimony sought merely relates to the professionals' personal observations of the patient's condition and mental state. Even if the doctors and other mental health professionals were able to admit to something that would create liability, *Terra*

*International* holds that observed or personal liability would not be enough to be considered as representation for purposes of Rule 4.2. By providing information on the mental states of the PDO clients, the doctors and other mental health professionals do not bind the facility to any future action. Additionally, if the professionals were to say something that would create liability, the link from the individual doctor to the OAG's client - the facility - would be far too attenuated for the doctors and other mental health professionals to be represented by the OAG. Because the doctors and other mental health professionals are not managers of the facility, they do not regularly interact with the OAG, nor do they possess the capacity to bind the facility to future conduct. They are, therefore, not considered represented by the OAG under Rule 4.2.

## **II. APPLICATION OF RULE 3.4 WHEN RULE 4.2 DOES NOT APPLY**

### **A. Rule 3.4(f) – background.**

Organizations will often attempt to exercise their privileges under Rule 4.2 by advising employees and other parties against communicating with opposing counsel.

However, this may in some instances violate Rule 3.4(f) which provides:

A lawyer shall not: (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.

Prohibiting *ex parte* contact may place valuable information exclusively within the control of one party due to the impracticality or difficulty in obtaining the information through discovery. Nonetheless, Rule 3.4(f) permits a lawyer to instruct a client not to communicate with an opposing party. This Rule enables the lawyer to prevent

uncounseled disclosures by a client that are adverse to the client's interests. In addition, Rule 3.4(f) permits lawyer instruction against communication to relatives and employees of a client where non-communication will not harm their interests.<sup>51</sup> It is also likely permissible for a lawyer to advise a company to send out a directive ordering employees not to communicate with opposing counsel unless a lawyer is present. Since the client company has a right to silence, it should be able to compel its employees to do the same in furtherance of its interests.<sup>52</sup> In the government context, however, many state courts and ethics committees frown upon government directives banning all government employees from communicating with opposing counsel.<sup>53</sup>

Whenever a lawyer is requesting the silence of a non-client, including employees of an organization, the lawyer must clearly explain that the request for silence is in the interest of the lawyer's client and not the non-client.<sup>54</sup> This is because instructions to non-party witnesses not to cooperate with opposing counsel may obstruct justice and might be impermissible under Rule 3.4(f). Lawyers are generally not barred from advising witnesses of their right to refuse cooperation with opposing counsel.<sup>55</sup> However, many jurisdictions have favored access to non-party witnesses for both sides. The D.C. Bar

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<sup>51</sup> See GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* 30-28 (2011 Supp.).

<sup>52</sup> *Id.*

<sup>53</sup> See, e.g., *Vega v. Bloomsburgh*, 427 F. Supp. 593, 595 (D. Mass. 1977) (criticizing a government policy that prohibited all employees from communicating with plaintiffs' counsel and threatened disciplinary consequences for employees violating the policy); Ohio Supreme Court, Ethics Op. 92-7 (1992) (recommending that government agencies and government counsel refrain from instructing all employees not to cooperate with opposing counsel without the government's counsel present"); Kentucky Bar Association, Ethics Op. E-332 (1988) (Opining that a government agency's counsel cannot inhibit opposing counsel's ability to contact every employee).

<sup>54</sup> *Id.* at 30-29. See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §101 (AM. LAW INST. 2000).

<sup>55</sup> See *Radford v. Lovelace*, 212 S.W.3d 72, 82 (Ky.2006), overruled on other grounds, *Cardine v. Commonwealth*, 283 S.W.3d 641, 646 (Ky. 2009) (advising a witness that they can answer yes or no to questions over the phone if they choose is a correct statement of the witness's right); see also *Commonwealth v. Peters*, 353 S.W.3d 592, 597-98 (Ky. 2011); *U.S. v. Long*, 449 F.2d 288 (8th Cir. 1971); *Callahan v. U.S.*, 371 F.2d 658 (9th Cir. 1967); *Gregory v. U.S.*, 369 F.2d 185 (D.C. Circuit. 1996); *U.S., v. Ash*, 413 U.S. 300 (1973).

interpreted Rule 3.4(f) to prohibit instructions and requests to non-client treating physicians to have no communications with opposing counsel or only while a lawyer is present.<sup>56</sup> This position was highlighted in a Washington state case where the court allowed defense counsel in a medical malpractice suit to interview non-party witnesses such as nurses and other personnel.<sup>57</sup>

In criminal proceedings, jurisdictions have long recognized that witnesses are neither the property of the government nor the defendant<sup>58</sup> and that both sides should have equal opportunity to interview them.<sup>59</sup> A defendant's need for access to witnesses and evidence is significant and outweighs the right of the government to maintain secrecy. Additionally, instruction by the prosecutor for witnesses to refuse *ex parte* communications may be inappropriate.<sup>60</sup> The United States Department of Justice also considers a corporation's instructions to employees which limit the information available in an investigation as obstructing justice.<sup>61</sup> That said, witnesses have a right to refuse to talk to any party and can condition cooperation on the presence of a lawyer.<sup>62</sup>

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<sup>56</sup> See DC State Bar, Ethics Advisory Opinion 360 (2011).

<sup>57</sup> *Wright v. Grp. Health Hosp.*, 103 Wash. 2d 192, 197–98 (1984) (holding that communications with hospital employees without counsel present was permitted since the employees were not managers and could not bind the corporation. See also, e.g., *Youngs v. PeaceHealth*, 179 Wash. 2d 645, 653 (2014) (permitting defense counsel to contact the plaintiff's non-party treating physician).

<sup>58</sup> See *United States v. Scott*, 518 F.2d 261, 268 (6th Cir. 1975); *Callahan v. United States*, 371 F.2d 658, 660 (9th Cir. 1967); *Gregory v. United States*, 369 F.2d 185, 188 (1966); *United States v. White*, 454 F.2d 435, 438–439, 1971 (7th Cir. 1971); *State v. Singleton*, 853 S.W.2d 490, 493 (Tenn. 1993).

<sup>59</sup> *Callahan*, 371 F.2d at 660; *Gregory*, 369 F.2d at 188.

<sup>60</sup> *Id.*

<sup>61</sup> See U.S. DEP'T OF JUSTICE, 9-28.000 - PRINCIPLES OF FEDERAL PROSECUTION OF BUSINESS ORGANIZATIONS (2015), <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations> (providing examples of the types of conduct a corporation may engage in which could impede an investigation including instructing employees to conceal relevant facts).

<sup>62</sup> *United States v. Long*, 449 F.2d 288, 295–296 (8th Cir. 1971).

**B. Because facility staff is not represented by the OAG under MRPC 4.2, the OAG has violated MRPC 3.4, Fairness to Opposing Party and Counsel, by barring PDO access to facility staff.**

As has been demonstrated, the doctors and other mental health professionals, although state employees, are not represented by the OAG under MRPC Rule 4.2. Therefore, under Rule 3.4's prohibition against directing non-represented parties to not speak with opposing counsel, the OAG's instructions barring PDO contact with staff was improper. Based on the cases above, while the OAG is permitted to instruct *clients* that they are *not required to speak to* opposing counsel (which is not at issue herein), the OAG cannot instruct *non-clients* who are *witnesses* that they are not to speak with defense counsel.

**III. ALTERNATIVELY, EVEN IF RULE 4.2 DID APPLY TO ALLOW THE OAG TO BAR ACCESS BY THE PDO TO THE FACILITY STAFF, AN EXCEPTION SHOULD BE APPLIED UNDER RULE 4.2(a) TO PROMOTE FAIRNESS AND EFFICIENCY.**

In the alternative, even if doctors and other mental health professionals who are state employees of the state-run mental health facility are represented by the OAG under MRPC 4.2, allowing the OAG to bar *ex parte* access to the PDO, the PDO should still be allowed to conduct *ex parte* witness interviews with staff under MRPC 4.2(a):

(a) Except as provided in paragraph (c), in representing a client, a lawyer shall not communicate about the subject of the representation with a person who the lawyer knows is represented in the matter by another lawyer unless the lawyer has the consent of the other lawyer or is authorized by law or court order to do so.

*See also* MD R CTS J AND ATTYS Rule 16-812, MRPC 4.2. As clarified by the ABA in the comment to the Model Rules of Professional Conduct, this rule is designed to allow a court to utilize its discretion on a case-by-case basis and, when appropriate, issue orders

that allow for *ex parte* contact that would normally be prohibited under Rule 4.2.<sup>63</sup> The provision bolsters the core judicial functions of protecting fairness among parties and promoting efficiency in the judicial system.<sup>64</sup> An exception, therefore, would be allowed herein in the interest of protecting fairness and promoting efficiency.

This type of exception is not uncommon. For example, in the instance of a primarily fact-based witness, courts have ordered *ex parte* contact with represented parties. A court has held that employees of a summer camp, although prohibited from *ex parte* contact as a represented party under Rule 4.2, were allowed to be interviewed *ex parte* by the plaintiff's attorney.<sup>65</sup> The court's reasoning for the exception was to promote general fairness, equal access to witnesses, and efficiency in the proceedings, because the defendant had a monopoly on vital information required by the plaintiff.

More specific to the issue herein, many courts have determined that physicians and nurses should be considered fact-based witnesses.<sup>66</sup> When the subject matter of the controversy places the patient's medical condition at the center of the litigation, then the physician treating the patient is a fact-based witness that should be available for *ex parte* interviews by both parties.<sup>67</sup> Similarly, a court has held that nurses and nurses' assistants, when testifying solely regarding the medical condition of a patient, are "merely fact-based witnesses," and therefore, in a suit against a hospital, *ex parte* interviews with the

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<sup>63</sup> MODEL CODE OF PROF'L CONDUCT r. 4.2 cmt. 6 (AM. BAR ASS'N, 1983).

<sup>64</sup> MD CODE OF JUDICIAL CONDUCT r. 2.5 cmt. 4 (2010).

<sup>65</sup> *Schwartz v. Hood*, 2002 U.S. Dist. LEXIS 8342, at \*4-5, 2002 WL 974678. at \*1-2 (D. Mass. May 8, 2002).

<sup>66</sup> See *Weiss v. Astellas Pharma, US, Inc.*, 2007 U.S. Dist. LEXIS 53453, 2007 WL 2137782 at \*4-5 (E.D. Ky. July 23, 2007); *Caldwell v. Chauvin*, 464 S.W.3d 139, 153 (Ky. 2015).

<sup>67</sup> *Law v. Zuckerman*, 307 F. Supp. 2d 705, 708 (D. Md. 2004).

nursing staff were allowed with the plaintiff's attorney in preparation for litigation, in contrast with Rule 4.2.<sup>68</sup>

Herein, in preparation for litigation, the PDO is requesting *ex parte* access to doctors and mental health professionals. Since the central focus of the civil commitment litigation is the client's mental condition, the treatment staff members are essential and key fact-based witnesses necessary to resolve the controversy. Because the PDO is seeking information about the mental conditions of patients, and the doctors and other mental health professionals are uniquely situated to provide first-hand, fact-based testimony regarding the mental and medical condition of the PDO clients, the doctors and other mental health professionals fall under this exemption.<sup>69</sup> As Maryland courts have already held that state-funded psychiatric staff members, although paid by the state, are independent witnesses and not "partisans of the prosecution," even if the doctors and other mental health professionals employed by the facility are found to be shielded by Rule 4.2 as clients of the OAG, an exception is warranted for *ex parte* interviews to ensure fairness in the proceedings and efficiency in the courts.<sup>70</sup>

## CONCLUSION

The Model Penal Code, Rule 4.2, provides that doctors and other mental health professionals on staff at a state-run mental health facility are not represented by the state Office of the Attorney General (OAG) for the purpose of barring the Public Defender's Office (PDO) from *ex parte* contact, particularly with regard to PDO representation of clients seeking eligibility for release from civil commitment from said facility.

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<sup>68</sup> *Michaels v. Woodland*, 988 F. Supp. 468, 472 (D.N.J. 1997).

<sup>69</sup> *Id.*

<sup>70</sup> *Ellison v. State*, 104 Md. App. 655, 660, 657 A.2d 402, 405 (Md. Ct. Spec. App. 1995) (citing *Johnson v. State*, 292 Md. 405, 414, 439 A.2d 542, 548 (Md. 1982)).

Additionally, because it does not represent the staff, it is a violation of Rule 3.4(f) for the OAG to direct said staff to have no contact with the PDO.

Respectfully submitted,

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