

MRPC 4.2
Communication with Party Represented by Counsel

STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 16, 2005

MRPC 4.2 should incorporate:

- (a) Alternative A, describing the law enforcement exception in only the Comments.
- (b) Alternative B, incorporating the law enforcement exception in the Rule itself.

Synopsis

The SBM Standing Committee on Ethics recommended that the Supreme Court amend this Rule to prohibit communications with a represented “person” rather than a represented “party”. On November 23, 2003, the Representative Assembly recommended that the Supreme Court not amend the Rule. Alternatively, if the Court amended the Rule, the Assembly recommended that the Rule provide for a law enforcement exception to the prohibition on communications with a represented “person”, recognizing that U.S. and Michigan constitutional provisions govern such contacts. The Supreme Court does not propose the amended language proposed by the Ethics Committee. Nonetheless, the Court proposes to provide clarification regarding the law enforcement exception either in Comments 5 and 10 to the Rule (Alternative A) or in the Rule itself with a reference to the exception in Comment 2, regarding the scope of the Rule (Alternative B).

Supreme Court Version

Alternative (A):

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 by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment

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[2] This Rule applies to communications with any party who is represented by counsel concerning the matter to which the communication relates.

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[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing government entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

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[10] By virtue of its exemption of communications authorized by law, this Rule permits a prosecutor or a government lawyer engaged in a criminal or civil law enforcement investigation to communicate with, or direct investigative agents to communicate with, a represented person prior to the represented person being arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding against the represented person. A civil law enforcement investigation is one conducted under the government's police or regulatory power to enforce the law. Once a represented person has been arrested, indicted, charged, or named as a defendant in a criminal or civil law enforcement proceeding, however, prosecutors and government lawyers must comply with this Rule. A represented person's waiver of the constitutional right to counsel does not exempt the prosecutor from the duty to comply with this Rule.

Alternative (B): (This is a redline version of Alternative A, striking out deleted language and underlining added language.)

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 by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. This Rule does not apply to otherwise lawful investigative actions of lawyers employed by the government who are engaged in investigating and/or prosecuting violations of civil or criminal law.

Comment

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[2] Unless the law enforcement exception is applicable, this Rule applies to communications with any party who is represented by counsel concerning the matter to which the communication relates.

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[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the

government. Communications authorized by law may also include investigative activities of lawyers representing government entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. ~~When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.~~

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