

**Nebraska Ethics Advisory Opinion for Lawyers
No. 09-03**

IF THE VICTIM IN A CRIMINAL CASE THAT A COUNTY ATTORNEY IS PROSECUTING HAS RETAINED COUNSEL TO REPRESENT HIM IN A CIVIL CASE ARISING FROM THE SAME SET OF FACTS AND INVOLVING COMMON ISSUES AND EVIDENTIARY QUESTIONS, AND THAT ATTORNEY HAS REQUESTED CONTACT WITH THE VICTIM REGARDING THOSE ASPECTS OF THE PROSECUTION BE MADE ONLY THROUGH HIM, RULE 4.2 PROHIBITS A PROSECUTOR FROM HAVING DIRECT CONTACT WITH THE VICTIM REGARDING THOSE ASPECTS OF THE CASE.

Question Presented

Does Neb. Rule of Prof. Cond. 4.2 preclude a prosecutor from having direct contact with a victim/witness in a criminal case for the purpose of requesting medical releases and waiver of the patient-physician privilege which are needed in the criminal case, where the victim/witness is represented by counsel in a civil case arising from the same set of facts?

Facts

A deputy county attorney has filed a criminal complaint against a defendant for DUI – causing serious bodily injury, a Class IIIA felony. The victim has retained an attorney to pursue a separate civil action against the defendant and/or the owner of the vehicle driven by the defendant.

The deputy county attorney has attempted to obtain the victim’s medical records regarding the incident, but has been unable to do so. The victim’s attorney has requested that the prosecutor go through him in obtaining the release of the victim’s medical records. The prosecutor has advised the attorney that he is seeking the medical records because he is required to prove serious bodily injury as an element of the criminal case, and because the criminal defense attorney has requested those records through the discovery process. The prosecutor has had several communications with the attorney, but to date none of those communications have resulted in the medical records being produced. The prosecutor has had contact with the victim to discuss the facts of the case and other issues, but has not discussed the medical records.

Applicable Rules of Professional Conduct

RULE § 3-504.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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.

Discussion

Whether a prosecutor may have direct contact with the victim in this case depends upon a determination of whether the criminal prosecution and the separate civil proceeding would be considered “the same matter” for purposes of Rule § 3-504.2 (Rule 4.2). There are no advisory opinions from the Nebraska State Bar Association Advisory Committee that address that issue, and there is surprisingly little other authority. The most comprehensive discussion of the issue appears in ABA Formal Ethics Op. 95-396(1995), which presented an extensive analysis of Rule 4.2. It began by pointing out that:

The reasons for protecting uncounselled persons against overreaching by adverse counsel, protecting the lawyer-client relationship from interference by such counsel, and protecting clients from disclosing privileged information that might harm their interests are not limited to circumstances where the represented person is a party to an adjudicative or other formal proceeding. The interests that the Rule seeks to protect are engaged when litigation is simply under consideration, even though it has not actually been instituted, and the persons who are *potentially* parties to the litigation have retained counsel with respect to the matter in dispute.

Id. at 5. (Emphasis in original)

The opinion went on to state:

If the Rule is to serve its intended purpose, it should have broad coverage, protecting not only parties to a negotiation and parties to formal adjudicative proceedings, but any person who has retained counsel in a matter and whose interests are potentially distinct from those of the client on whose behalf the communicating lawyer is acting. Such persons would include targets of criminal investigations, potential parties to civil litigation, and witnesses who have hired counsel in the matter. In sum, the Rule’s coverage should extend to any represented person who has an interest in the matter to be discussed, who is represented with respect to that interest, and who is sought to be communicated with by a lawyer representing another party.

Id. at 6. In this instance the prosecutor’s client is the State of Nebraska, and while its interests may coincide with those of the victim in many respects, they may also diverge in a variety of ways.

With respect to the specific issue of what “matters” the Rule was intended to include, the opinion explained:

Rule 4.2 makes reference to the subject matter of two representations, and requires a link between them. Thus, it provides that, “in representing a client,” a lawyer shall not communicate “about the subject of the representation” – referring to the lawyer’s representation of her client. It goes on to refer to communications with one whom the lawyer knows to be “represented in the matter” - requiring that the second representation be within the compass of the inquiring attorney’s representation. This required connection between the two representations, imparted by the phrase, “in the matter,” significantly limits the scope of the prohibition. . . .

By prohibiting communication about the subject matter of the representation, the Rule contemplates that the matter is defined and specific, such that the communicating lawyer can be placed on notice of the subject of representation. Thus, if the representation is focused on a given matter, such as one involving past conduct, and the communicating lawyer is aware of this representation, she may not communicate with the represented person absent consent of the representing lawyer. . . .

[I]n order for the prohibition to apply, the subject matter of the representation needs to have crystallized between the client and the lawyer.

Id. at 11.

The opinion provided two hypothetical situations to illustrate the manner in which Rule 4.2 is intended to operate in a criminal setting. The first of those is as follows:

[S]uppose that co-defendants Able and Baker are charged with a crime, and Lawyer representing Defendant Able wishes to communicate with Defendant Baker because she has reason to believe that he may be able to exculpate her client. If Lawyer knows that Defendant Baker is represented in that matter, she may not engage in any communications with Baker, without the consent of Baker’s lawyer.

Id. at 4.

On the other hand:

If a person is represented by counsel on a particular matter, that representation does not bar communication on other unrelated matters. For example, suppose a lawyer represents Defendant on a charge involving crime A. Under Rule 4.2 another lawyer may not, pursuant to a representation, either as prosecutor or as counsel for a co-defendant involving crime A, communicate with Defendant about that crime without leave of Defendant's lawyer. However, if the communicating lawyer represents a client with respect to a separate and distinct crime B and wishes to contact Defendant regarding that crime, the representation by counsel in crime A does not bar communications about crime B. Similarly, the fact that Defendant had been indicted on crime A would not prevent the prosecutor from communicating with Defendant directly or through investigative agents, regarding crime B.

Id. at 11.

In a footnote, the opinion advised: "As a practical matter, in the course of contact with a person represented by counsel in another matter, the communicating attorney would be well advised to take care not to elicit comments or attempt to communicate about crime A. However, Rule 4.2 does not preclude discussions of crime B." Id.

A position very similar to that stated above was adopted by the Nebraska Supreme Court in State v. Russell, 194 Neb. 64, 230 N.W.2d 196 (1975). In that case, a juvenile was represented by a public defender in three pending assault cases when he was arrested and interrogated in connection with a murder. Statements he made during the course of that interrogation were used against him at trial, which resulted in a conviction. On appeal he argued that because the public defender was representing him on the other charges at the time of the interrogation regarding the murder, the prosecutor and police were barred by DR 7-104 (the predecessor of Rule 4.2), from communicating with him about the murder without the public defender's consent. In rejecting that argument the court stated:

It seems obvious that general duties imposed on a public defender by statute do not automatically make him counsel for any individual in a criminal proceeding until appointment to represent a specific individual in a particular criminal proceeding has been made by a judicial officer. It is equally clear that the appointment of counsel in a specific criminal or juvenile proceeding does not operate as a continuing or automatic appointment to act as counsel in any other separate criminal or juvenile proceeding which may thereafter be

commenced against the same defendant. The provisions of DR 7-104 relied upon by the defendant only prohibit lawyers from communication with a party known to be represented by a lawyer *in that matter*. That rule does not prohibit communication by a county attorney with a defendant in a criminal case simply because that defendant is known to be represented by counsel in some other matter. The defendant's contentions with respect to representation by counsel are entirely unsupported.

Id. at 72, 230 N.W.2d at 202. (Emphasis in original.)

A conclusion consistent with that interpretation of Rule 4.2 was reached in State ex rel. Oklahoma Bar Assoc. v. Harper, 995 P2nd 1143 (2000). There, a disciplinary complaint was filed against the attorney for an insurance carrier. The carrier's insured, her boyfriend, and their child were all injured in a motor vehicle accident, and an attorney made claims on behalf of each of them against the carrier. The claim on behalf of the insured was made under the medical payments and uninsured motorist provisions of the policy. The claims on behalf of both the boyfriend and the child were made under both the medical payments and personal injury provisions of the policy, and alleged negligence on the part of the insured, who was purportedly driving the vehicle. The carrier settled the medical payments claim with the insured, who subsequently contacted the carrier regarding the status of the child's claim. At that time the insured informed the carrier that neither she nor the child continued to be represented by the attorney who had originally filed the claims, and that, contrary to a prior statement she had given, she had not been driving the vehicle when the accident occurred. The carrier contacted its attorney, who obtained a sworn statement from the insured. The attorney representing the boyfriend filed a complaint alleging a violation of Rule 4.2 based upon the fact that the uninsured motorist claim that he had filed on behalf of the insured had not yet been resolved at the time the attorney for the carrier obtained the sworn statement from the insured. The court rejected that claim and found no violation of Rule 4.2. Among the bases for that finding was the fact that the statement obtained from the insured by the carrier's attorney dealt only with the boyfriend's personal injury claim and not the uninsured motorist claim. Thus, in spite of the fact that the two claims arose from the same incident, the court held that they were not the same matters for purposes of Rule 4.2.

A somewhat more expansive view of Rule 4.2 was taken in D.C. Ethics Op. 263 (1996), which examined the operation of the Rule in cases involving Civil Protection Orders (CPO). The inquiry addressed in that opinion came from an attorney who represented a CPO petitioner. On behalf of his client he filed a civil motion to modify the terms of the CPO to strengthen its protections. At the same time he filed a contempt proceeding based upon alleged violations of the existing CPO. Because of the possible criminal sanctions associated with the contempt proceeding, the court appointed an attorney to represent the respondent in that case. However, the appointment did not extend to the civil modification proceeding. Thus the petitioner's attorney sought guidance as to whether Rule 4.2 would bar him from discussing the civil

modification proceeding with the respondent without the consent of the attorney who had been appointed to represent him in the contempt proceeding. The opinion concluded that it would. In reaching that conclusion the opinion began by noting that:

The term “matter” is used in several other provisions of the Rules of Professional Conduct, including Rules 1.7 and 1.9 (conflicts of interest), and Rule 1.10 (imputed disqualification). It is nowhere defined, but Comment [3] to Rule 1.7 states, with reference to when a lawyer is adverse to a client in a “matter,” that: “the concept of ‘matter’ is typically apparent in on-the-record adversary proceedings or other proceedings in which a written record of the position of parties exists.”

This Comment suggests that, at least with respect to litigation, a particular litigation is a “matter.”

Id. at 3. From there the Committee reasoned as follows:

[W]e believe that such an interpretation is the only one which makes any sense. While litigation may have many facets to it, those facets typically have at least some facts, evidence and legal principles in common. Activities or developments in one facet of a case rarely fail to have implications in others. That circumstance is well-illustrated in the inquiry before us, where the core question in a CPO modification motion and in a criminal contempt motion is the same: What, if anything, did the respondent do in violation of the CPO?

[B]ecause of the common facts in the two motions, a communication concerning the modification motion from the petitioner’s lawyer directly to the respondent would involve all of the concerns Rule 4.2 (a) addresses, such as the lawyer’s use of the advantages of the lawyer’s training and experience to secure concessions or admissions from the adverse party. Clearly, such direct contact could influence, in a way that Rule 4.2 (a) was intended to prevent, the ability of respondent’s lawyer to represent his client in the contempt motion.

Id.

A similar view has been taken by at least one local grievance committee. In Massameno v. Statewide Grievance Committee, 234 Conn. 539, 663 A2d 317(1995), an assistant state’s

attorney was assigned to prosecute a defendant for sexually assaulting his two minor children. In conducting the prosecution, the attorney interviewed the defendant's wife, who was the complaining witness, and who was represented by counsel in a separate divorce proceeding. The local grievance panel found that there was probable cause to believe that such contact violated Rule 4.2. After additional violations were found by a statewide grievance committee, the prosecutor filed a suit to enjoin imposition of sanctions on the ground that such action would violate the separation of powers provision of the state's constitution. The trial court rejected that contention, and the prosecutor appealed. The Connecticut Supreme Court affirmed the judgment of the trial court noting that because the sole basis of the prosecutor's appeal was the separation of powers issue, any issues regarding the grievance committee's interpretations and application of specific rules, including Rule 4.2, were not before it.

Likewise, a Florida court has found that Disciplinary Rule 7-104 of the Code of Professional Responsibility, (the predecessor of Rule 4.2), was violated when a prosecutor subpoenaed the defendant in a criminal case to be deposed as a witness in a separate, but potentially related criminal case against a different defendant, without notifying the attorney who represented the subpoenaed witness. In reaching its conclusion the court explained:

We concede that the case in which the deposition was taken was not the criminal case in which the [deponent] was the defendant. However, the case against [the defendant] and the charge against [the deponent] either arose out of the same criminal episode or else are so closely connected as to make testimony which is relevant in one case very likely relevant in the other.

State v. Yatman, 320 So. 2d 401, 402 (Fla. 1975).

The Yatman decision was cited by the New York County Lawyers' Association Committee on Professional Ethics in an opinion it issued in February of 1990. In that opinion it concluded that DR 7-104 would prohibit a criminal defense attorney from interviewing a non-party witness who is represented by counsel in a separate criminal proceeding without the consent of the attorney who represented the witness. Addressing the issue of whether such an interview would constitute a communication on the subject of the representation in the same matter, the Committee reasoned as follows:

DR 7-104 (A)(1) prohibits communication with a Represented Party only if it concerns "the subject of the representation" and only if the represented person is represented "in that matter." Accordingly, some court cases and ethics opinions have held that DR 7-104 (A)(1) is not violated where the Represented Party is not represented in the matter that is the subject of the communication. However, other opinions have found that representation by an attorney in one matter constitutes general

representation, and that another lawyer may not communicate with such a Represented Person without the consent of his or her lawyer.

[I]n many cases, the subject of the communication in the [defense attorney's] matter may affect the representation by [the witness's attorney]. This is especially true in criminal cases, where disclosures made by a defendant to another lawyer without the knowledge and consent of the defendant's own lawyer may have a significant effect on the legal rights of the defendant. In such cases we believe the communication should be deemed to concern the "subject of the representation. . . ."

There will be some instances in which it is obvious that the subject matter of the proposed communication with the Represented Client is not relevant or useful in the lawyer's representation of the Represented Party. . . . The Represented Party's own lawyer, and not a stranger to his or her case, should be the one to determine whether the subject of the communication is useful or relevant to the representation of the Represented Client and whether it is in the interests of the client to communicate to third persons.

NYCLA Eth. Op. 676(89-7), 1990WL 677018 (N.Y. City Law. Assn. Comm. Prof. Eth.).

Finally, in an opinion issued in 1997, the Pennsylvania Bar Association Committee on legal ethics and professional responsibility addressed a situation very similar to the situation presented to this Committee. There, an attorney who represented a victim/witness of a crime, advised the prosecutor of his representation and requested that all contact with the client go through him. In response, the prosecutor expressed his belief that he was free to contact the witness directly, and indicated that he would consider any attempt by the attorney to interfere with such contact as an obstruction of justice. When asked for its opinion on the matter, the Committee concluded that Rule 4.2 precluded the prosecutor from contacting the witness directly. It stated:

[A] state prosecutor has to honor an attorney's request when an attorney represents a witness. Despite the public position, a prosecutor is still bound by the Rules of Professional Conduct. A prosecutor certainly has remedies if he or she believes the lawyer for the witness is unfairly preventing contact or access but the prosecutor must seek judicial relief and, unless and until that relief is given, the Rules of Professional Conduct apply equally to a prosecuting attorney as they do to a private attorney.

PA Eth. Op. 97-117, 1997 WL 816707 (Pa. Bar Assn. Comm. Leg. Eth. Prof. Resp.).

In light of the foregoing authorities, the Committee believes that Rule 4.2 would prohibit a prosecutor from directly contacting a victim/witness for the purpose of obtaining from him a release for his medical records. Although the criminal prosecution and the civil case in which the victim is represented by counsel are different cases, they clearly arise from the same set of facts and involve at least some common issues. In addition, the evidence the prosecutor seeks for the criminal prosecution will likewise no doubt be relevant in the associated civil litigation. Thus, the decision as to what medical information the victim should voluntarily release for the prosecution is one that his attorney may properly insist be made only with the attorney's counsel. Obviously, that conclusion may render the prosecutor's job more difficult and time consuming. However, it does not prevent him from effectively carrying out his prosecutorial duties. As noted in D.C. Ethics Op. 263, *supra*:

If [a] lawyer refuses to allow . . . communication with [his client] directly, then the lawyer must accept the communication from the [other] lawyer and take appropriate steps in response, such as transmitting the information to his client and acting on his client's wishes.

D.C. Ethics Op. 263 at 4.

Accordingly, if the attorney for the victim/witness insists that all communications regarding the medical records go through him, he is obligated to respond to the prosecutor's requests in a reasonable and timely manner. If efforts to work through the attorney are unsuccessful, there are still avenues available to the prosecutor to obtain the information needed for prosecution, such as a subpoena, or if necessary, a search warrant.

Conclusion

If the victim in a criminal case has retained counsel to represent him in a civil case arising from the same set of facts and involving common issues and evidentiary questions, and that attorney has requested that contact with the victim regarding those aspects of the prosecution be made only through him, Rule 4.2 prohibits the prosecutor from having direct contact with the victim regarding those aspects of the case.