Opinion # 216: Prosecutor’s Communications with an Alleged Crime Victim Who is Represented by Counsel

Question:
When does Maine Rule of Professional Conduct 4.2, Communication With Person Represented by Counsel and Limited Representations, permit a prosecutor to communicate with an alleged crime victim (ACV) if the prosecutor is aware that the ACV is represented by counsel in relation to the event or conduct that is the subject of potential or pending criminal charges in the absence of consent by that lawyer?

Brief Answer:
Under Maine Rule of Professional Conduct 4.2, a prosecutor may not communicate with an ACV whom the prosecutor knows to be represented by counsel regarding the criminal matter or a closely related civil matter arising from the same incident or conduct without the consent of the ACV’s lawyer, except as such communication is expressly authorized by law or court order.

Discussion:
In this Opinion, the Commission addresses the extent to which Rule 4.2 applies to a prosecutor’s communications with an individual who is an identified victim or complainant in a criminal matter if such individual is represented by counsel. Rule 4.2(a) sets forth the core requirement of the “no contact” rule:

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. Specific limitations on communications by a prosecutor are contained in (c).

Rule 4.2(a) applies to all attorneys, including those who prosecute criminal matters through county district attorneys’ offices or the Office of the Attorney General; a prosecutor’s “client” is the State of Maine. ¹ “The subject of the representation” in a criminal law context refers to the incident or conduct at issue in the charges or investigation.

As noted in the first comment to MRPC 4.2, the limitation on attorney communications with represented persons

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 client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

¹ See generally ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 95-396 (addressing the application of Model Rule 4.2 in criminal matters).
Rule 4.2, Comment [1]. In addition, the Maine Reporter’s Note observes that, “in recognizing the importance of the preservation of the lawyer-client relationship, [Rule 4.2] is designed to protect clients against overreaching by other lawyers, and to reduce the likelihood that clients will disclose confidential or damaging information without the advice of their counsel.” Rule 4.2 Reporter’s Note.

These descriptions of the rationale and importance of the rule apply to the scenario addressed in this Opinion. An ACV’s participation in a criminal matter can have consequences in closely related civil litigation (e.g., a personal injury or protection from abuse case), particularly when they make statements about the incident and provide information about any resulting injuries. The ACV’s lawyer can advise the ACV regarding the best routes to preserve their position in the litigation. Where a criminal proceeding may have implications for the client’s position in civil litigation, they should have the same protection against overreaching by other counsel as well as the advice of their own counsel regarding disclosures made.

Even if an ACV has not initiated or contemplated civil litigation regarding the underlying events or conduct, an ACV may nonetheless seek the assistance of counsel during the criminal proceedings to receive advice and representation regarding their rights in those proceedings, such as in relation to plea negotiations, obtaining restitution, and testifying in court. An ACV may have concerns about how to protect private information or even the possibility of becoming a target of a criminal investigation themselves.

It cannot be assumed that a prosecutor’s and ACV’s interests are aligned. A prosecutor has no specific duty to act in the interests of an ACV generally or with respect to any parallel civil proceeding. Rather, their duty is to act in the interest of public safety and to advance the goals and objectives of their office in the context of a criminal matter. While a prosecutor may have concern for the welfare of an ACV and may not engage in conduct that may present harm to the ACV, their public duty is substantially different from that of the ACV’s civil litigation attorney.

Accordingly, Rule 4.2 generally prohibits a prosecutor from communicating with an ACV who is represented by counsel in the criminal matter or in a closely related civil action absent the consent of the ACV’s attorney. A civil action is “closely related” to the extent that it arises from

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2 See Nebraska Ethics Advisory Opinion for Lawyers No. 09-03 (2009).

the same event or incident and involves common issues of fact such that the proceedings could have relevance to the determination of liability or damages in the other proceedings.  

The prohibition on communications with a represented person only “applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed.” Rule 4.2, Comment [8]. This means that the limitations on communications with an ACV apply only when the prosecutor has actual knowledge that an ACV is represented in a related action. In the context discussed in this Opinion, it is highly unlikely that a prosecutor would have such awareness unless it is specifically brought to their attention. For this reason, it is incumbent upon the ACV’s attorney to make the fact of such representation known to the prosecutor as soon as possible, and particularly if the attorney wishes all communications to the ACV to be directed through them.  

Rule 4.2(a) does permit communication with represented persons where there is legal authority to do so. To preserve the rule’s key protections, such exception is limited to express grants of authority to make specific communications with others. One example of a prosecutor’s communications expressly authorized by law is the grand jury process, through which a

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4 Other jurisdictions have similarly defined the relationship between criminal and civil proceedings narrowly in the context of applying Rule 4.2. The Nebraska Lawyers’ Advisory Committee concluded that Rule 4.2 limits a prosecutor’s communications with a victim in a criminal case who “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.” Nebraska Ethics Advisory Opinion for Lawyers No. 09-03 at 2723 (2009). The Nebraska opinion further explains that such limitations on a prosecutor’s communications apply where the criminal and civil matters “clearly arise from the same set of facts and involve at least some common issues” and “the evidence the prosecutor seeks for the criminal prosecution will likewise no doubt be relevant in the associated civil litigation.” Id. See also ABA Formal Opinion 95-396 at 2 (noting that Rule 4.2’s requirements apply only where the represented person’s “representation [are] within the compass of the inquiring lawyer's representation,” meaning that there must be a “connection between the two representations”).

5 Rule 4.2 prosecutor may not “make a communication prohibited by this Rule through the acts of another.” 4.2 cmt 4. Thus, a prosecutor may not communicate with a represented ACV through non-attorney employees of a county attorney’s office, such as a victim witness advocate. Similarly, if such employees are made aware of an ACV’s representation by counsel in the criminal proceedings or a related matter, they should inform the prosecutor of such fact to ensure that Rule 4.2 is followed.

6 In Maine Ethics Opinion No. 93, “Requesting Release of Medical Records from Adverse Party Represented by Counsel” (Feb. 15, 1989), the Commission interpreted the “authorized by law” exception in MCPR Rule 3.6(j), the predecessor to MRPC 4.2, in the context of a workers’ compensation matter. The Commission concluded that the statute authorizes an employer’s attorney to make a request for medical records from a represented employee-claimant because it “expressly commands” that service of such request be made on the employee, which is “a clear directive that the employee, and not the employee’s lawyer, personally receive the communication.” Id. (emphasis added). See also ABA Formal Opinion 95-396 at 2 (stating that such exception is satisfied by “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”) (emphasis added).
prosecutor may subpoena and question an ACV. M.R.U. Crim. P. 17(i). As such proceedings are secret, the examination of an ACV must necessarily take place without the presence of their counsel. M.R.U. Crim. P. 6(d).

Some Maine prosecutors have taken the position that Maine’s crime victim statutes provide legal authorization to prosecutors to communicate with ACVs who are represented by counsel. However, such statutes permit only the communications described in those statutes; they do not confer broad legal authority to prosecutors to communicate with represented ACVs. Maine’s Criminal Code (Title 17-A) at Chapter 48 has several provisions addressing “Victims’ Rights,” including specific duties imposed on prosecutors to share information with ACVs. Section 1172 provides: “When practicable, the attorney for the State shall make a good faith effort to inform each victim of a crime of the following,” including a list of categories of information such as the details of a plea agreement, the right to comment on a plea agreement, the time and place of trial or sentencing, among others. 17-A M.R.S. § 1172(1). Subsection 2 of the statute describes certain pamphlets that an attorney for the state (or a “victim and witness support program”) must offer to provide to a victim. See also 15 M.R.S. § 812 (requiring attorneys for the state to comply with 17-A M.R.S. § 1172 in the context of plea bargaining); 15 M.R.S. § 6101(1) (imposing notification requirements similar to those in 17-A M.R.S. § 1172(1) for victims of domestic violence, sexual assault, and other crimes resulting in “serious physical trauma or serious financial loss”).

These statutes impose a duty on prosecutors to provide certain specific information to ACVs regarding the proceedings. To the extent that the laws permit communications with represented ACVs as an exception to Rule 4.2, such authority is limited to the categories of information set forth in the crime victims’ provisions and communications that are consistent with the purpose of the laws. The authority is not a license to have any other communication with represented ACVs. Thus, if a prosecutor is aware that an ACV is represented with respect to the incident or conduct at issue in the criminal matter, the prosecutor should seek the consent of the represented ACV’s attorney before communicating with the ACV on topics beyond the scope of the information to be provided pursuant to Maine’s crime victims’ statutes.7

The Commission notes that Rule 4.2(a) also permits an attorney to contact a represented person “if authorized to do so by ... a court order.” To the extent that a prosecutor believes they have a lawful and important basis to have communication with an ACV but is unsure whether a rule or statute provides the express authority to do so, they can seek such authority through a court order. Comment [6] to Rule 4.2 explains:

A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this

7 See Maine Ethics Opinion No. 93 (noting that “the mere fact that direct communication [for a specific purpose] is authorized by statute in no way detracts from the fundamental application of [the no-contact rule] insofar as the rule continues to require that any communication concerning the subject matter of the representation involve opposing counsel.”).
Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

Rule 4.2 Comment [6].

Finally, the Commission has also considered the potential significance of Rule 4.2(c), which, as Rule 4.2(a) states, addresses the “[s]pecific limitations on communications by a prosecutor.” That part of the rule, which is unique to Maine’s version of Rule 4.2, states:

(c) If a prosecutor knows a person is represented with respect to the matter under investigation:

(1) the prosecutor shall not communicate directly with that person absent consent of the other lawyer or a court order; and

(2) The prosecutor shall not extend, through any third person an offer to meet with the prosecutor or an offer to enter into plea negotiations with the prosecutor, or an offer of a plea agreement absent consent of the other lawyer or a court order.

Communications by the prosecutor in the form of advice or instruction to law enforcement agents about a person a prosecutor knows is represented with respect to a matter under investigation are authorized by this Rule and are governed by the substantive law.

Rule 4.2(c)(1) makes clear that the general “no contact” rule applies to prosecutors in terms of direct contact with a represented person. However, the remaining language of the subsection has little applicability to prosecutors’ communications with ACVs.

Rule 4.2(c)(2) states that a prosecutor may not use a third person to communicate with the person regarding plea negotiations; such language concerns only represented individuals who are potential targets of the investigation, rather than the complainants. The final sentence of Rule 4.2(c) addresses “advice or instruction” to law enforcement agents rather than communications with represented persons. The language clarifies that Rule 4.2 is not intended to limit the “[t]raditional investigative activities of prosecutors,” including advising law enforcement agents of applicable substantive law when agents communicate with individuals during criminal investigations. See 4.2 Reporter’s Note. Prosecutors are not, however, permitted under Rule 4.2 to initiate, direct, or be proactively involved with the contact that law enforcement officers have with any represented individuals.

Conclusion:

Maine Rule of Professional Conduct 4.2 imposes some limitations on a prosecutor’s communications with alleged crime victims. If a prosecutor is made aware that the ACV is represented by counsel regarding the criminal matter or closely related civil litigation arising from the same incident or conduct, the prosecutor must obtain the consent of the ACV’s counsel...
before communicating with the ACV unless the communication is expressly authorized by law or court order.