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Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 95-05

Approved January 26, 1996

Issue. What is the relationship between Rule of Professional Conduct 4.2 and a 1994 U.S. Department of Justice regulation purporting to authorize certain *ex parte* contacts with persons known to be represented by counsel?

Introduction. On August 4, 1994, the United States Department of Justice (the "Department") promulgated a regulation titled "Communications With Represented Persons" (the "Regulation"). (fn1) The Regulation authorizes Department attorneys during criminal and certain civil investigations to communicate with persons the attorney knows is represented in the matter by legal counsel without the prior authorization of the person's counsel. Rule 4.2 of the Model Rules of Professional Conduct (fn2) does not generally permit *ex parte* contacts of this type. However, the Department contends that the Regulation constitutes "law" that permits these *ex parte* contacts under the "authorized by law" exception to the general rule. Even if the regulation is not a "law" under Rule 4.2, the Department intends that the Regulation preempt and supersede Rule 4.2.

The Committee has been asked (1) to analyze the scope of the term "party" in Rule 4.2 in connection with the Regulation and (2) to consider prosecutors' *ex parte* communications under Rule 4.2 assuming that the Regulation is not "law" for purposes of the Rule. It is, therefore, beyond the scope of this opinion to address (a) whether the Regulation is, as a matter of law, a valid, authorized and duly promulgated substantive regulation or (b) whether the Regulation, if valid, authorized and duly promulgated, preempts and supersedes the Utah Rules of Professional Conduct under the Supremacy Clause of the U.S. Constitution.

Issue No. 1: The Regulation precludes *ex parte* contacts by Department of Justice lawyers with individuals who are targets of federal investigations only when the person is a "represented party," i.e., a person who has been arrested or charged or is a defendant in a civil enforcement proceeding

and is represented by counsel for the matter. Does the class of such "represented parties" coincide with the definition of "party" in Rule 4.2 of the Utah Rules of Professional Conduct?

Opinion: No. The word "party" in Rule 4.2 of the Utah Rules of Professional Conduct means a "party to a matter" for which legal representation has been obtained, not the more limited "party to a legal proceeding." Subject to the exceptions stated in the rule, Rule 4.2 intends to restrict unauthorized *ex parte* contracts with any person who is represented by counsel concerning the matter in question, whether or not the person is a party to a formal legal proceeding. Therefore, Rule 4.2 restrictions are intended to apply to "represented persons," with whom the Regulation would permit certain *ex parte* contacts.

Issue No. 2: Assuming that the Regulation does not constitute a "law" for purposes of Rule 4.2, under what conditions may a government lawyer make *ex parte* contact with persons known to be represented by counsel?

Opinion: Under certain specific factual circumstances, a government lawyer may make *ex parte* contacts with persons represented by counsel.

ANALYSIS

Background: Rule 4.2 of the Utah Rules of Professional Conduct provides as follows:

Communications with Person Represented by Counsel.

In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so.

In 1988, Rule 4.2 replaced DR 7-104(A)(1) of the Utah Code of Professional Responsibility, (fn3) which similarly had provided as follows:

Communications with One of Adverse Interest.

(A) During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The corresponding Ethical Consideration EB 7-18 provided in part as follows:

The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person.

The language in DR 7-104(A)(1) did not clearly reveal whether it applied only to adversarial relationships between litigants. (fn4) The heading of DR 7-104(A)(1) uses the phrase "Adverse Interest," and the rule itself uses the word "party" along with the phrases "subject of the representation" and "in that matter." The word "party" often refers to a participant in a legal proceeding. (fn5) Thus, because DR 7-104(A)(1) uses the word "party," it arguably applies only to adverse litigants in a legal proceeding. In contrast, DR 7-104(A)(2), concerning communications with "a person who is not represented by a lawyer," uses the word "person." (fn6)

Several courts have interpreted DR 7-104(A)(1) to apply only after the formal initiation of adversarial proceedings. For example, these courts have held that, in criminal proceedings, prosecutors are not restricted by DR 7-104(A)(1) during investigations prior to any charge, arrest or indictment, even if the person contacted is a target of the criminal investigation. (fn7)

Other courts, however, have held that, although DR 7-104(A)(1) requires adversity between parties, it does not require participation in a formal legal proceeding. These courts have thus applied DR 7-104(A)(1) to prosecutor contacts with represented persons prior to charge, arrest or indictment. In *United States v. Hammad*, (fn8) for example, the Second Circuit Court of Appeals held that pre-indictment contacts with represented persons that are the target of an investigation were within the ambit of DR 7-104(A)(1). Ultimately, however, the court found that certain investigative contacts were "authorized by law" and permitted by DR 7-104(A)(1).

The Department, concerned with the Hammad decision, feared that inconsistent interpretations of the *ex parte* contact rules promulgated by state bar associations would impair prosecutorial participation in pre-indictment investigations. Thus, on June 8, 1989, U.S. Attorney General Richard Thornburgh issued a memorandum to all Department litigators dealing with the subject of "Communications with Persons Represented by Counsel." Referred to as the "Thornburgh Memorandum," it authorized federal prosecutors, "in the course of authorized law enforcement activity," to make certain unconsented *ex parte* contacts with persons who were the targets of federal investigations and who were known by the federal prosecutors to be represented by counsel in the matters

being investigated.

The Thornburgh Memorandum stated that this activity (1) would be legal authorization under the "authorized by law" exception in Rule 4.2 and (2) would, in any event, control over state and local ethical rules under the Supremacy Clause of the United States Constitution. (fn10) and in 1994 the Department officially promulgated the Regulation codified at 28 C.F.R. Pt. 77, purporting to accomplish the same result as the Thornburgh Memorandum.

Similar to the Thornburgh Memorandum, the Regulation authorizes certain lawyers employed by the Department, prior to charge, arrest or indictment, to make unconsented *ex parte* contacts with persons the attorney knows to be represented by counsel in the matter being investigated. Significantly, the Regulation distinguishes between a "represented party" and a "represented person." A person is a "represented party" only if all three of the following circumstances exist: "(1) the person has retained counsel or accepted counsel by appointment or otherwise; (2) the representation is ongoing and concerns the subject matter in question; (3) the person has been arrested or charged in a federal criminal case or is a defendant in a civil law enforcement proceeding concerning the subject matter of the representation." (fn11)

However, if the person has not yet been arrested or been charged in a federal criminal case or is not yet a defendant in a civil law enforcement proceeding, (fn12) then the person is considered a "represented person" if the first two conditions of a "represented party" are met (the person is represented by counsel concerning the subject matter in question.) The Regulation permits only limited *ex parte* contact with a "represented party" without the consent of that party's counsel. However, the Regulation permits much greater *ex parte* contact with a "represented person." (fn13) The Department intends the Regulation to identify communications that are "authorized by law" within the meaning of Rule 4.2 of the ABA Model Rules of Professional Conduct and DR 7-104(A)(1) of the ABA Model Code of Professional Responsibility. (fn14) Additionally, the Regulation purports to preempt a state's local rules that relate to *ex parte* contacts by federal government with "represented parties" or "represented persons" in criminal and civil law enforcement investigations or proceedings. (fn15)

The Utah State Bar, concerned about potential conflicts between Utah Rule of Professional Conduct 4.2 and the Regulation, appointed an ad hoc committee consisting of government and private attorneys to study the Regulation. The committee has requested the Ethics Advisory Opinion Committee to render an opinion on two issues.

Issue No. 1: Is the definition of "represented party" in §

77.3(a) of the Regulation consistent with the definition of "party" in Rule 4.2 of the Utah Rules of Professional Conduct? In other words, does Rule 4.2 apply only to *ex parte* contacts with a party in an adversary proceeding.

Unlike DR 7-104(A)(1), Rule 4.2 and its comment clearly apply to contacts with any person who is represented in the matter in question. The word "party" in Rule 4.2 cannot be interpreted to mean "party to a legal proceeding." Rule 4.2 is titled "Communication with Person Represented by Counsel." Neither the title nor the rule itself refers to adversity or adverse interests. Additionally, the comment clarifies that "This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question." (fn16) Thus, the word "party" in Rule 4.2 means a "party to the matter" that is the subject of the representation. (fn17) The "matter" need not be a formal proceeding, but may be any matter for which a person has sought legal representation.

This interpretation is consistent with the purposes behind Rule 4.2. (fn18) Rule 4.2 was enacted to "prevent lawyers from taking advantage of uncounseled lay persons and to preserve the integrity of the lawyer-client relationship." (fn19) (fn20) Thus, any protection under Rule 4.2 should be applied to a person as soon as an attorney-client relationship is formed and not upon the filing of a complaint, charge or indictment or other commencement of a legal proceeding. (fn21) If Rule 4.2 applied only to litigants to a formal legal proceeding, transactional lawyers would, for example, be free to undermine the attorney-client relationship and use *ex parte* contact to form and document legal agreements. (fn22)

This interpretation of Rule 4.2 is supported by the leading commentators on the subject. Professor Wolfram has stated:

Although the matter is not entirely clear under the Code, probably DR 7-104(A)(1) and, clearly, MR 4.2 prohibit contact with any represented person, including those whose interests are apparently not adverse to the interests of an existing client of the lawyer. Any attempt to distinguish between adverse and nonadverse parties might invite attempts to obtain uncounseled concessions from a represented but uncounseled party at a time before the differing interests of the party become fully apparent. (fn23)

Finally, in partial response to this confusion over "party" v. "person," the American Bar Association has recently amended Model Rule 4.2 to change the term "party" to "person." (fn24)

Summary. Because Rule 4.2 addresses *ex parte* contacts with any represented person in the matter in question, the Regulation is not consistent with Rule 4.2. Thus, setting aside the issue of the authorized-by-law exception, a

prosecutor would violate the Utah Rules of Professional Conduct if he made an *ex parte* contact, or caused another to make an *ex parte* contact, (fn25) with a person the prosecutor knew was represented by counsel in the matter being investigated unless the prosecutor obtained the consent of that person's lawyer.

Issue No. 2: Assuming that the Regulation does not constitute a "law" for purposes of Rule 4.2, under what conditions may a government lawyer make *ex parte* contact with persons known to be represented by counsel?

The Regulation purports to authorize contacts that Utah's Rule 4.2 would limit or forbid. Regulation Section 77.7, Represented Persons: Investigations, provides:

Except as otherwise provided in this part, an attorney for the government may communicate, or cause another to communicate with the represented person while in the process of conducting an investigation, including, but not limited to, an undercover investigation. (fn26)

The clear language of Rule 4.2 forbids a lawyer to communicate with a represented person on the subject matter of that representation. The Regulation's purpose-to exempt Department of Justice lawyers from the ethical constraints of Rule 4.2 that all other attorneys remain bound to follow, including state and local prosecutors-has caused its share of controversy. The American Bar Association, in part prompted by the issuance of the Regulation by the Department of Justice, recently issued Formal Opinion 95-396, (fn27) which addresses 10 separate issues on this subject, many of which detail the extent to which *ex parte* contacts can be made by a Department of Justice lawyer under Rule 4.2. (fn28)

In a criminal law setting, the stakes may be higher but the rules are the same. (fn29) Because these rules affect law enforcement techniques, it has been suggested, with occasional success, that different answers are appropriate in the criminal law setting-particularly in the investigatory stages of a matter. (fn30)

Not all *ex parte* contacts by government lawyers of represented persons are forbidden under Rule 4.2.:

a. *Ex Parte* Contacts on a Different Subject Matter. A lawyer is not barred from communicating with a represented person on topics that are not the subject of the representation. (fn31)

b. *Ex Parte* Contacts Absent Knowledge. Absent knowledge of representation or the reasonable inference of knowledge of representation, the lawyer is not barred from communicating with a represented person. (fn32)

c. *Ex Parte* Contacts After Representation is Terminated. If

the represented person declares that a representation is terminated or that he intends to terminate the representation, substantive discussion of the subject of the representation may occur after the lawyer obtains reasonable assurance that the representation has been in fact terminated. (fn33)

d. *Ex Parte* Contacts of Corporate Employees. In a corporate setting, the lawyer is limited in communicating with employees who have managerial responsibility in a corporation or other organization that is represented with respect to a particular matter, but this bar does not apply to other employees in the organization that have no authority to bind the organization. (fn34)

It is worth noting two areas where *ex parte* contact is generally not permitted:

a. *Ex Parte* Contacts Initiated by the Represented Person. If a person known to have been represented initiates the contact with the lawyer, the bar of Rule 4.2 is nonetheless present and it has been held that the client cannot waive it. (fn35)

b. *Ex Parte* Contacts in the Investigatory Stage of a Proceeding. *Ex parte* contact with a represented person in the investigatory stage of a case is generally forbidden even though exigent circumstances can be argued. (fn36) Rule 4.2 imposes the burden on the opposing counsel to use investigatory means other than direct contact with a represented person. However, there are a number of decisions that limit the applicability of Rule 4.2 in the preindictment, non-custodial setting. (fn37) Indeed, American Bar Association Formal Opinion 95-396 holds that, to the extent this precedent is good law, such decisional authority is "law" within the "authorized by law" exception of Rule 4.2. Nonetheless, other than decisions from the Utah judiciary on the subject, the Utah rules do not regard such rulings as "law" within the "authorized by law" exception of Rule 4.2. (fn38)

The Comment to Rule 4.2 of the Rules of Professional Conduct contains no evidence that Utah intended decisional law of the federal courts concerning DR 7-104(A)(1) or Rule 4.2 to constitute "law" within the meaning of the "authorized law" exception to Rule 4.2. (fn39) Contrast the decision in *United States v. Lopez*, (fn40) which was dictated by the comment to California Rule 2-100 that "applicable law also includes the authority of government prosecutors and investigators to conduct criminal investigations, as limited by the relevant decisional law." (fn41)

Further, a lawyer may not direct an investigative agent to communicate with a represented person in circumstances where the lawyer would be prohibited from doing so. (fn42) However, where the government lawyer is not directing the

undercover operation that involves contacts with represented individuals with respect to the matter under investigation, it has been held that the predecessor to Rule 4.2 was not violated. (fn43)

Summary. If the Regulation does not constitute "law" under the "authorized by law" exception of Rule 4.2, government lawyers may, under certain specific circumstances detailed in this Opinion, make *ex parte* contacts with represented persons without violating Rule 4.2 of the Utah Rules of Professional Conduct.

Footnotes

1. 28 C.F.R. Pt. 77 (1994).

2. Utah's Rule 4.2 is identical to Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct (1983) prior to its recent amendment. See note Error! Bookmark not defined. and accompanying text.

3. DR 7-104(A)(1) of the Utah Code of Professional Responsibility and the American Bar Association Model Code of Professional Responsibility (1969) were identical.

4. While DR 7-104(A)(1) no longer governs lawyer conduct in Utah, it is still used in jurisdictions that have not adopted the Model Rules of Professional Conduct.

5. The Utah Rules of Civil Procedure and the Utah Rules of Evidence use the word "parties" to refer to litigants in a legal proceeding. However, Black's Law Dictionary (rev. 4th ed.) defines "party" as follows: "A person concerned or having and taking part in any affair, matter, transaction, or proceedings, considered individually."

6. "During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so." Model Code of Professional Responsibility, DR 7-104(A)(1). See, e.g., *United States v. Ryan*, 903 F.2d 731, 739 (10th Cir. 1990). Rule 4.2 of the Utah Rules of Professional Conduct also uses the word "party" in the text of the rule, while Rule 4.3 uses the word "person."

7. These cases have taken the view the DR 7-104(A)(1) is coextensive with the accused's Sixth Amendment right to counsel. They have reasoned that, prior to arrest or indictment, the contours of the "subject matter of the representation" are too uncertain for protection and are less susceptible to damage. See, e.g., *Ryan*, 903 F.2d at 739; *United States v. Sutton*, 801 F.2d 1346 (D.C. Cir. 1986); *United States v. Dodds*, 711 F.2d 84 (8th Cir. 1983); *United States v. Fitterer*, 710 F.2d 1328 (8th Cir. 1983); *United*

States v. Kenny, 645 F.2d 1323 (9th Cir. 1981); *United States v. Lemonakis*, 485 F.2d 941 (D.C. Cir. 1974).

8. 858 F.2d 834, 839 (2d Cir. 1988). *See also United States v. Jamil*, 546 F. Supp. 646, 653-54 (E.D.N.Y. 1982), rev'd on other grounds, 707 F.2d 638 (2d Cir. 1983).

9. U.S. Const. art VI, cl. 2.

10. In response to the Thornburgh Memorandum, the American Bar Association passed a resolution rejecting the Department of Justice's attempt "unilaterally to exempt its lawyers from the professional conduct rules that apply to all lawyers under applicable rules of the jurisdictions in which they practice." ABA House of Delegates Report No. 301 (approved Feb. 12-13, 1990).

11. 28 C.F.R. § 77.3(a).

12. 28 C.F.R. § 77.3(b).

13. Cf. 28 C.F.R. § 77.5 and 28 C.F.R. § 77.7. Attorney General Janet Reno added other restrictions in contacts by Justice Department attorneys with "represented persons" in the United States Attorneys' Manual §§ 9-13.200 et seq. (Aug. 25, 1994). Even with these additional restrictions, Justice Department attorneys are permitted broader unconsented *ex parte* contact with a "represented person" than with a "represented party."

14. 28 C.F.R. § 77.12.

15. *Id.*

16. Utah Rules of Professional Conduct, Rule 4.2 cmt. The Comments to the Rules "are intended as guides to interpretation." *Id.*, "Scope."

17. C.W. Wolfram, *Modern Legal Ethics* § 11.6.2, at 611 n.33 (1986). "The lawyerism party sometimes refers only to parties in litigation but evidently is here (in Rule 4.2 and DR 7-104(1)(A)) intended to refer broadly to any 'person' represented by a lawyer in the matter. Vide 'party of the first part' in ancient contracts."

18. The Rules of Professional Conduct should be interpreted with reference "to the purposes of legal representation and of the law itself."

19. Annotated Model Rules of Professional Conduct, Rule 4.2, at 424 (2d ed.). *See United States v. Lopez*, 4 F.3d 1455, 1459 (9th Cir. 1993) ("uncurbed communications with represented parties could have deleterious effects well beyond the context of the individual case, for our adversary system is premised upon functional lawyer-client relationships").

20. Legislative History of the Model Rules, Rule 4.2, at 148.

21. *Jamil*, 54 F. Supp. at 653 (application of DR 7-104(A)(1) "depends upon the existence of the attorney-client relationship, not upon the existence of a pending lawsuit").

22. Rule 4.2 applies to transactional lawyers as well as to litigators. It is noteworthy that the Regulation recognizes that, during the negotiation and documentation of agreements, unconsented *ex parte* contacts should not occur. *See* 28 C.F.R. § 77.8.

23. C.W. Wolfram, *supra* note 17, § 11.6.2, at 611 (emphasis in original). *See also* G.C. Hazzard Jr. and W.W. Hodes, *The Law of Lawyering*, § 4.2:105 at 733-34 (1993) ("[a] more realistic reading, and one more in keeping with the purpose of [Rule 4.2], would be to count as off limits any represented 'party' with whom a lawyer already has an adverse relationship of any kind"). While adversity may have been a requirement of DR 7-104(A)(1), it is not a requirement of Rule 4.2.

24.[21:1] ABA Litigation News 5 (Oct./Nov. 1995). The changes to Model Rule 4.2 also include an amendment to the comment that indicates the rule was intended to apply to government attorneys conducting investigations prior to the initiation of criminal or civil proceedings.

25. *See* Utah Rules of Professional Conduct 8.4(a).

26. 28 C.F.R. Pt. 77.7.

27. American Bar Association, Committee on Ethics and Professional Responsibility, Formal Op. 95-396 (July 24, 1995) [hereinafter "ABA Op. 95-396"].

28. The questions framing this examination of the Rule are these: (1) Does Rule 4.2 apply to the conduct of lawyers in criminal as well as civil matters? (2) Does a represented "party," under the Rule, mean only a person who is a formally designated party to an adjudicative proceeding, contract or negotiation, or does it apply more broadly to any person who is represented by counsel with respect to the matter that is the subject of the communication? (3) In the context of criminal investigations, does the prohibition apply differently before arrest or the filing of formal charges than it does after those event? (4) Does the prohibition apply if the communicating lawyer does not have definite knowledge that the person with whom she wishes to communicate is represented in the matter to be discussed? (5) What is the scope of the subject matter about which communication is prohibited? (6) May a lawyer representing a corporation or other organization bar communication with all employees of the organization by declaring a blanket representation of the organization and

its employees? (7) May a lawyer communicate with a represented person absent consent of that person's lawyer if that person initiates the contact? (8) May a lawyer communicate with a person known to have been represented in the matter to be discussed who states that she has terminated or intends to terminate the representation? (9) To what extent does the prohibition on a lawyer's communicating with a represented person apply also to investigative agents acting under the direction of a lawyer? (10) What communications with represented person fall within the "authorized by law" exception of Rule 4.2?

29. *State v. Morgan*, 646 P.2d 1064 (Kan. 1982); ABA Op. 95-396 and citations at n.10.

30. *United States v. Ryans*, 903 F.2d 731 (10th Cir. 1990), cert. denied, 498 U.S. 855 (1990); *United States v. Heinz*, 983 F.2d 609 (5th Cir. 1993).

31. *People v. Hyun Soo Son*, 723 P.2d 1337 (Colo. 1986); ABA Op. 95-396.

32. ABA Op. 95-396.

33. ABA Op. 95-396.

34. ABA Formal Opinion 95-396 reaffirms the corporate employees that may not be contacted are "[p]ersons having managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." See also *Wright v. Group Health Hosp.*, 691 P.2d 564 (Wash. 1984).

35. *United States v. Lopez*, 4 F.3d 1455 (9th Cir. 1993); ABA Op. 95-396; ABA Formal Opinion 108 (1934); but see *People v. Rubanowitz*, 688 P.2d 231 (Colo. 1984), where such contact was held not to violate the anti-contact rule.

36. *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990); *United States v. Lopez*, 765 F. Supp 1433 (N.D. Cal. 1991), rev'd on other grounds, 4 F.3d 1455 (9th Cir. 1993); *Cronin v. Eighth Judicial Dist. Court*, 781 P.2d 1150 (Nov. 1989); Utah Ethics Advisory Opinion No. 18 (February 23, 1974). An attorney may not send a copy of a letter that was sent to opposing counsel to the client on the need to answer interrogatories, even where the client may be uncooperative and the lawyer unable to control the client and the purpose of the letter was solely to get facts in a case.

37. *United States v. Ryans*, 903 F.2d 731 (10th Cir. 1990); *United States v. Jamil*, 707 F.2d 638 (2d Cir. 1983).

38. Rule 103-1(h) of the Local Rules of Practice of the United States District Court for the District of Utah requires attorneys appearing before the District Court to "comply with the Rules of Practice adopted by this court, and unless otherwise provided by these rules, with the Utah Rules of Professional Conduct, as revised and amended and as interpreted by this court." Thus, for conduct within the purview of the United States District Court, it retains authority to interpret its rules and the Utah Supreme Court rules and any effect of the Regulation. This, of course, does not affect the authority of the Utah State Bar to make its own determination on the same conduct, if requested.

39. See *In re Doe*, 801 F. Supp. 478, 486 (D.N.M. 1992): "As an exception to the general rule, however, _authorized by law_ must be narrowly construed."

40. 4 F.3d 1455, 1461 (9th Cir. 1993)

41. But see *United States v. Hammad*, 858 F.2d 834, 840 (2d Cir. 1988): "[T]he use of informants by government prosecutors in a preindictment, non-custodial situation, absent the type of misconduct that occurred in this case, will generally fall within the 'authorized by law' exception to DR 7-104(A)(1) and therefore will not be subject to sanctions."

42. Utah Rules of Professional Conduct 5.3 and 8.4. The lawyer supervising the investigator is responsible for the *ex parte* contacts of represented persons. An investigator cannot ethically make contacts the lawyer is barred from making. See also ABA Op. 95-396; ABA Op. 95 (1933).

43. Utah Rules of Professional Conduct 5.3 and 8.4; *United States v. Jamil*, 707 F.2d 638, 645-46 (2d Cir. 1983) (informant held not acting as alter ego of prosecution); *United States v. Lemonakis*, 485 F.2d 941, 954-56 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974).

Rule Cited:

4.2