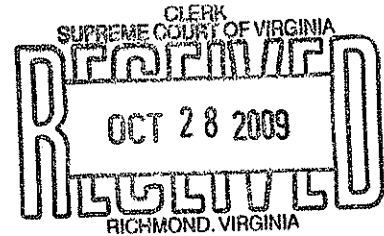


VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND



IN THE MATTER OF
SUPREME COURT RULES PART 6, § II,
RULE OF PROFESSIONAL CONDUCT 4.2

PETITION OF THE VIRGINIA STATE BAR

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PETITION

TO THE HONORABLE CHIEF JUSTICE AND THE JUSTICES OF THE
SUPREME COURT OF VIRGINIA:

NOW COMES the Virginia State Bar, by its president and executive director, pursuant to Part 6, § IV, Paragraph 10(g) of the Rules of this Court, and requests review and approval of amendments to Rule of Professional Conduct 4.2, Part 6, § II, Rules of Virginia Supreme Court, as set forth below. The proposed amendments were approved unanimously by the Council of the Virginia State Bar on October 16, 2009 (Record, Page 1).

I. Overview of the Issues

The Virginia State Bar's Task Force on 4.2 Contacts in Law Enforcement Settings ("Task Force")¹ proposes an

¹ The Honorable Robert J. Humphreys, Judge, Virginia Court of Appeals, chair; Professor Ronald J. Bacigal, University of Richmond, T.C. Williams School of Law;

amendment to Comment [5] of Rule 4.2 to address the situation in which a defendant who is in custody, formally charged and represented by counsel, waives his rights under *Miranda v. Arizona* and wants to give a statement to a law enforcement officer without his counsel present. Provided certain requirements are met, current judicial precedent permits a police officer to obtain a statement from a represented defendant who has waived his right to have counsel present during the interview. This statement may be given by a defendant without advice of counsel even after the defendant has

Richard C. Baker; Joel R. Branscom, Commonwealth Attorney, Botetourt County; James O. Broccoletti, Norfolk; Robert L. Bushnell, Commonwealth Attorney, Henry County; Linda D. Curtis, Commonwealth Attorney, City of Hampton; John S. Davis, Assistant U.S. Attorney and Chief of the Criminal Division, Eastern District of Virginia; Nina J. Ginsberg, Alexandria; Michael N. Herring, Commonwealth Attorney, City of Richmond; James M. Hingeley, Jr., Public Defender, City of Charlottesville; Michael HuYoung, Richmond; Rodney G. Leffler, Fairfax; Professor James E. Moliterno, Washington & Lee University School of Law; Kimberley S. White, Commonwealth Attorney, County of Halifax; Manuel A. Capsalis, Immediate Past President, Virginia State Bar, Arlington; Helen F. Fahey, Arlington; Jon D. Huddleston, President, Virginia State Bar, Leesburg; Edward L. Davis, Bar Counsel; Leslie A.T. Haley, Assistant Ethics Counsel; and James M. McCauley, Ethics

been appointed or secured counsel. *Montejo v. Louisiana*, No. 07-1529, ___U.S.___, 129 S. Ct. 2079, 173 L. Ed.2d 955 (5/26/2009).

If the law enforcement officer seeks legal advice from a Commonwealth's Attorney regarding whether the officer may lawfully obtain a statement from the defendant under these circumstances, the Commonwealth's Attorney should be permitted to advise the police officer without fear of being subject to professional discipline for violating Rule 4.2.

Rule 4.2 prohibits a lawyer from communicating with a person the lawyer knows to be represented by counsel unless the counsel for the represented person consents or the communication is authorized by law. Rule 8.4(a) states that a lawyer cannot violate a Rule through the agency or actions of another. If the Commonwealth's Attorney "knows"² a defendant is represented by counsel, a reading of the current rules leads to the conclusion that

Counsel.

² The term "knows" as used in the Virginia Rules of Professional Conduct denotes "actual" knowledge. Va. S. Ct. R., pt. 6 § II, Virginia Rules of Professional

the Commonwealth's Attorney cannot ethically advise law enforcement officers to proceed with the custodial interview without notice to or consent from the defendant's lawyer.

The proposed amendment to Rule 4.2, Comment [5] clarifies that the CA can advise the law enforcement officer regarding the legality of an interrogation or other investigative conduct. The proposed amendment to Comment [5] does not authorize the Commonwealth's Attorney to "script" or "mastermind" the police's interrogation of the represented defendant.

The Task Force also recommended and Council unanimously approved an amendment to the first sentence in Comment [5] to Rule 4.2, striking the language "in pre-indictment, non-custodial circumstances" and inserting the language "prior to the attachment of the right to counsel." This language recognizes that adversarial proceedings may commence and a defendant may have a right to counsel and be represented by counsel. This correction conforms with the United States Supreme

Conduct. ("Terminology").

Court's decision in *Rothgery v. Gillespie County*, No. 07-440, ___ U.S. ___, 128 S. Ct. 2578, 171 L. Ed.2d 366 (6/23/2008) (criminal defendant's initial appearance before a magistrate judge, where he learns the charge against him and his liberty is subject to restriction, marks the initiation of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.).

The proposed changes are included below in Section III, with additions underlined.

II. Publication and Comments

The Task Force approved the proposed amendment to Rule 4.2 at its meeting on July 10, 2009 and was endorsed by the Standing Committee on Legal Ethics at its meeting on July 23, 2009 (Record, Page 1). On August 24, 2009, the bar issued a press release pursuant to Part 6, § IV, Paragraph 10(c)(iii) of the Rules of this Court (Record, Page 2). An e-mail dated August 24, 2009 was sent to Section Chairs of the Virginia State Bar soliciting comment (Record, Page 4). Notice of the proposed

amendment was published in the *Virginia Lawyer Register*, Vol. 58, No. 2 at page 8 in the August, 2009 issue (Record, Page 11). Notice of the proposed amendments was also published on the bar's website at the "Proposed Rule Changes" page (Record, Page 12); and in the bar's August 2009 E-News (Record, Page 14).

The bar received three comments, all in support of the proposed amendment. C. Phillips Ferguson, Commonwealth's Attorney in Suffolk, submitted a comment dated September 2, 2009 (Record, Page 6), stating that the amendment would make clear the prosecutors would not face disciplinary action for providing accurate information to law enforcement offices concerning contacts with defendants represented by counsel. He believes the amendment is necessary so that the disciplinary rules will not conflict with existing law.

Neil S. Vener, President of the Virginia Association of Commonwealth's Attorneys, submitted a comment dated September 3, 2009 (Record, Page 7) on behalf of the Association and makes the a critical point that the proposed amendment does not authorize the prosecutor to

dictate the manner or content of the interview. The amendment does no more than allow the prosecutor to advise the investigator that the interview can legally and constitutionally occur.

Roderick B. Williams, County Attorney and Chair of the Ethics Committee for the Local Government Attorneys of Virginia, Inc. submitted a comment dated September 21, 2009 (Record, Page 9) and advises that the LGA Ethics Committee concurs that the proposed amendment correctly clarifies the meaning of the rule and, therefore, supports its adoption.

III. Proposed Rule Change

RULE 4.2 Communication With Persons 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 by law to do so.

COMMENT

[5] In circumstances where applicable judicial precedent has approved investigative contacts prior to attachment of the right to counsel in pre-indictment, non-custodial circumstances, and they are not prohibited by any

provision of the United States Constitution or the Virginia Constitution, they should be considered to be authorized by law within the meaning of the Rule. Similarly, communications in civil matters may be considered authorized by law if they have been approved by judicial precedent. This Rule does not prohibit a lawyer from providing advice regarding the legality of an interrogation or the legality of other investigative conduct.

IV. CONCLUSION

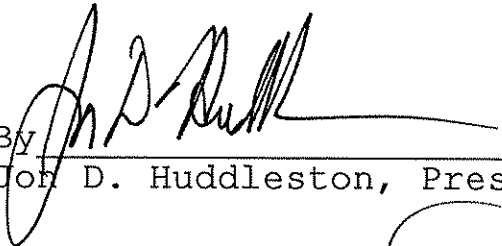
The Supreme Court is authorized to regulate the practice of law in the Commonwealth of Virginia and to prescribe a code of ethics governing the professional conduct of attorneys. Va. Code §§ 54.1-3909, 3910.

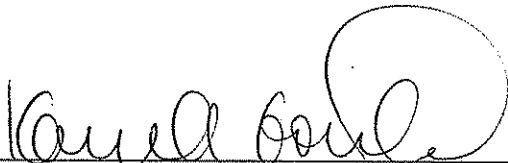
Pursuant to this statutory authority, the Court has promulgated rules and regulations relating to the organization and government of the Virginia State Bar. Va. S. Ct. R., Pt. 6, § IV. Paragraph 10 of these rules sets forth the process by which legal ethics advisory opinions and rules of professional conduct are promulgated and implemented. The amendments to Rule 4.2 were developed and approved in compliance with the requirements of Paragraph 10.

THEREFORE, the bar requests that the Court approve

the proposed amendments to Rule of Professional Conduct 4.2, Part 6, § II of the Rules of the Virginia Supreme Court for the reasons stated above.

Respectfully submitted,
VIRGINIA STATE BAR


By _____
John D. Huddleston, President


By _____
Karen A. Gould, Executive Director

Dated this 27th day of October, 2009.