

LEGAL ETHICS OPINION 1895

PROSECUTOR'S
COMMUNICATION WITH
REPRESENTED VICTIM IN
CRIMINAL CASE

Question presented and short answer

This opinion request asks whether Rule 4.2 prohibits a prosecutor from contacting a victim in a criminal case when the victim is also a represented plaintiff in a civil case based on the same facts as the criminal case, and when the victim's civil lawyer represents the victim's interests in the criminal matter, with a goal of advancing the victim's interests in the civil case. The committee concludes that the answer to that question is a qualified no; some, but not all, communications by the prosecutor are authorized by law. The prosecutor's communications with a represented victim are "authorized by law" for purposes of Rule 4.2 when the communications are necessary to fulfill the prosecutor's duties under applicable law governing crime victims' rights. Communications that are not authorized by law are prohibited by Rule 4.2 and the prosecutor must not communicate directly with the victim unless the victim's lawyer consents to the communication.

Relevant authority

The following passage from LEO 1890 (approved by Supreme Court of Virginia January 6, 2021) aptly sums up the committee's position on the application of Rule 4.2 to overlapping civil and criminal matters:

The Rule limits communications with represented persons only when the person is represented "in the matter," so communication with a represented person about a different "matter" than the one in which the person is represented is permissible even if the communication involves facts that also relate to the matter in which the person is represented. For example, when a guardian *ad litem* represents a child in a civil matter, criminal prosecutors may communicate with the child in a related criminal matter in which the child is the victim, even if the communication involves subject matter related to a pending or contemplated civil proceeding involving the child. LEO 1870 (2013). A lawyer who represents a client in a civil matter may

likewise communicate with a defendant who is represented in a related criminal matter unless and until the lawyer has notice that the defendant is represented by counsel in the civil matter as well. See *also* New York State Bar Association Ethics Opinion 904 (concluding that criminal investigation and civil restitution claim are “two related matters rather than a single unitary matter” for purposes of Rule 4.2).

Crime victims in Virginia also have constitutional and statutory rights. The Constitution of Virginia, Article I, Section 8-A, provides:

That in criminal prosecutions, the victim shall be accorded fairness, dignity and respect by the officers, employees and agents of the Commonwealth and its political subdivisions and officers of the courts and, as the General Assembly may define and provide by law, may be accorded rights to reasonable and appropriate notice, information, restitution, protection, and access to a meaningful role in the criminal justice process. These rights may include, but not be limited to, the following:

1. The right to protection from further harm or reprisal through the imposition of appropriate bail and conditions of release;
2. The right to be treated with respect, dignity and fairness at all stages of the criminal justice system;
3. The right to address the circuit court at the time sentence is imposed;
4. The right to receive timely notification of judicial proceedings;
5. The right to restitution;
6. The right to be advised of release from custody or escape of the offender, whether before or after disposition; and
7. The right to confer with the prosecution.

This section does not confer upon any person a right to appeal or modify any decision in a criminal proceeding, does not abridge any other right guaranteed by the Constitution of the United States or this Constitution, and does not create any cause of action for compensation or damages against the Commonwealth or any of its political subdivisions, any officer, employee or agent of the Commonwealth or any of its political subdivisions, or any officer of the court.

There is further elaboration of crime victims' rights in the Crime Victim and Witness Rights Act, Va. Code § 19.2-11.01 *et seq.*

Analysis

When the question is limited to a scenario where the victim is represented only in the civil case, not in the criminal case, it is a straightforward conclusion from LEO 1870 that the civil and criminal cases are not the same “subject of the representation” for purposes of Rule 4.2, even if they arise from the same facts. There is no relevant distinction between the role of a GAL for a child – as LEO 1870 discusses, the GAL functionally serves as the attorney for the child in such cases – and the lawyer for an adult criminal victim/civil plaintiff.

However, the question presented in this opinion request is not as straightforward because the victim's lawyer asserts that he represents the victim in the criminal case as well. The fact that the victim is not a “party” to the criminal case does not resolve the question, because Rule 4.2 applies to any person, regardless of whether they are a party to pending litigation. See *also* Comment [9] and Committee Commentary to Rule 4.2. Counsel for a victim or other witness in a criminal case has a legitimate role to play in the criminal process, by advising the victim on what to expect, monitoring the prosecution of the case, and protecting the victim's rights including the right against self-incrimination if relevant.

On the other hand, the stated purposes of Rule 4.2, which include protecting a represented person from making uncounseled statements or admissions that could prejudice or disadvantage the represented person's case, have limited application in this situation. See Comments [8] and [9] to Rule 4.2. Further, considering the logic of the committee's position in LEO 1870, as reinforced in LEO 1890, it would be difficult to draw a line distinguishing the two situations and inconsistent with the approach in those opinions to interpret the Rules of Professional Conduct such that a prosecutor is completely barred from communicating directly with the victim of a crime that is being prosecuted.

Article I, Section 8-A of the Virginia Constitution contemplates communications between the prosecutor and the victim to timely inform the victim of hearings and proceedings, to be informed if the offender has been released from custody, and to confer with the prosecution. The committee

believes that these communications are “authorized by law” for purposes of Rule 4.2, so that the prosecutor can communicate directly with the victim as required by the law governing crime victims’ rights. A conclusion to the contrary would mean that a represented victim cannot contact the prosecutor with questions about the status of the case, since Rule 4.2 applies even when the communication is initiated by the represented party. There is no basis for distinguishing between communications initiated by the victim and initiated by the prosecutor and accordingly both should be considered authorized by law when made for the purpose of discussing information that the victim is entitled to pursuant to the laws discussed above.

This opinion does not give the prosecutor *carte blanche* authority to communicate directly with the represented victim in the criminal case, but only to communicate as necessary to discharge the prosecutor’s obligations as required by the law governing crime victims’ rights.