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The Honorable Clifford W. Taylor
The Michigan Supreme Court
G. Mennen Williams Building
P.O. Box 30052, 525 West Ottawa, 2nd Floor
Lansing, Michigan 48909

Re: Proposed Rules of Professional Conduct
(ADM File No. 2003-62)

Dear Chief Justice Taylor,

On July 2, 2004, the Court published for comment two alternative proposed Rules of Professional Conduct regarding communications with represented parties (Rule 4.2, Michigan Rules of Professional Conduct). By this letter, we strongly endorse Alternative B, which as drafted contains an express exception for law enforcement personnel in the text of the Rule itself. Our reasons are set forth below.

First, and most important, it is only the text of the Rules which is binding and authoritative. Therefore, a law enforcement exception referenced only in the comment may fail to provide clear guidance to prosecutors and law enforcement agents. With the exception appearing in the Comment in Alternative A, as opposed to being spelled out in the Rule, there might still be confusion. Law enforcement agents should be explicitly encouraged to seek advice and guidance from prosecutors. Alternative B, on the other hand, with its clear rule stated explicitly in the text, offers exactly the clear authority and guidance that is needed. Under Alternative B, law enforcement officers will no longer hesitate to confer with a prosecutor for fear of being unfairly subjected to rules pertaining to the conduct of lawyers.

Second, the language of the law enforcement exception in Alternative A may itself result in confusion. For example, paragraph 5 of the proposed Comment to Alternative A states that law enforcement communications with subjects of investigations "may" be authorized by law. Again, this leaves the prosecutor and law enforcement agent in an unfair position, for something that *may* be authorized also *may not* be authorized. Prosecutors should not be asked to jeopardize their professional standing to test the waters in this arena. As noted by the State Bar Representative Assembly, law enforcement agents should not be hamstrung by rules pertaining to lawyer conduct, and the Rules should state so clearly and definitively.

Paragraph 5 of Alternative A could also create uncertainty on the part of prosecutors. That comment states that the obligation of a prosecutor goes beyond that imposed by the Constitution, but it does not say how that obligation can be met. If it is not enough to comply with the Constitution, what is enough? Neither the proposed Rule nor the proposed comment offer any insight into this important question–therefore, prosecutors will again be placed in the unfair position of being subjected to rules with no clarity or guidance. Responsible prosecutors might be concerned that their conduct will be measured against wholly unknown and amorphous standards and thus take a less aggressive approach to representing the best interests of their client governments.

The clearer language of Alternative B is supported in federal case law. For example, in United States v. Ford,176 F.3d 376, 382 (6th Cir. 1999), the Sixth Circuit expressly stated that the protections of Rule 4.2 should extend no farther than the offense for which the defendant had been charged. ("However, we find no violation of Rule 4.2 occurred....there is significant precedent permitting law enforcement officials to contact represented defendants by means of an undercover informant to investigate allegations of criminal wrongdoings other than the offense on which the defendant has been indicted.") The court went on to note that "ethical rules should not be construed to conflict with the public's vital interest in ensuring that law enforcement officers investigate uncharged criminal activity." Id.

Similarly, the Supreme Court recognized many years ago that although the Sixth Amendment may require the suppression of evidence obtained from a

represented defendant in the trial on those charges, law enforcement still has the right and indeed the duty to collect that evidence in the course of investigating additional criminal activity. As far back as Massiah v. United States, 377 U.S. 201 (1964), the Court stated that "[w]e do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant has already been indicted." 377 U.S. at 207. The "sensible solution," according to the Court, was to permit and indeed encourage law enforcement to use all legal means to collect evidence, but to limit its use at trial on the particular charges as to which Sixth Amendment rights had attached. Maine v. Moulton, 474 U.S. 159, 179 (1985).

In recent years rules relating to contacts with represented persons have generated much confusion among parties in the federal system. Consider, for example, several scenarios that this office has faced just within the last year. In one case, a business was engaged in regulatory action against an agency relating to disputed record keeping obligations. The agents developed substantial evidence that some of the records being produced were fraudulent and wished to execute a search warrant at the business location. Ordinarily, in the course of executing a search warrant of this type, the officers ask questions of the persons present, if for no other reason than to narrow the scope of the premises searched and the amount of records subjected to seizure. In this case, however, because many years earlier an attorney had interceded in the original record-keeping dispute with regulatory counsel, prosecutors felt that the entity had perhaps become a represented party, as to which no questions could be asked during the search. Needless to say, the search was much more difficult for the agents to execute, and ironically much more intrusive than it otherwise would have been, when prosecutors reluctantly but understandably chose to follow a restrictive interpretation of Rule 4.2.

Or consider another scenario, in which doctors, lawyers and "patients" were involved in submitting fraudulent claims to insurance companies. Because the lawyer was involved, and because claims were either filed or at least contemplated, the "patients" may have been represented parties for purposes of the Rule against contacts with represented parties. Therefore, the law enforcement agents were presented with a dilemma–either refuse to accept any input or guidance from the

prosecutor leading the investigation, or accept the limitation that there could be no approach to the "patients," either overtly or covertly, to enlist their help in investigating this substantial fraud scheme.

Finally, consider the case of a drug ring, which continues to engage in drug distribution and money laundering after initial charges are filed against some members. As soon as an attorney paid for by the ringleaders contacts the prosecutor and claims representation as to all involved, all further investigative activity, including the use of cooperating co-defendants, must be evaluated in the face of prosecutors' concerns that an unclear rule places their professional standing in jeopardy. This result, although in no way required by the Constitution, nonetheless serves to significantly impede the investigation of major drug rings.

In each of these scenarios, the language of Alternative B would have permitted law enforcement to do its job properly, quickly, and fully consistent with the Constitution. In the absence of clear language, not surprisingly, many prosecutors are uncomfortable making contact decisions, knowing that their bar licenses may hang in the balance. Implementation of Alternative B would alleviate these concerns, enable prosecutors to provide clear guidance to law enforcement agents, and ensure that investigations are conducted in a manner that protects constitutional rights.

The Sixth Circuit has stated that ethical rules should not be construed to conflict with the public's vital interest in the thorough investigation of uncharged conduct–to that we would only add that ethical rules should not be written to conflict with this important responsibility either. Implementation of Alternative B best enables law enforcement to fulfill its public mission.

Very truly yours,

s/CRAIG S. MORFORD
United States Attorney

CM/DH