PROFESSIONAL RESPONSIBILITY

Pretext Telephone Calls

Executive Summary. You have asked for an opinion addressing whether Air Force Rule of Professional Conduct (AFRPC) 4.2, *Communication with Person Represented by Counsel*, prohibits an Air Force attorney from advising on or concurring with a criminal investigator's placement of a pretext telephone call (or consensual wire intercept) when the subject of the call is represented by counsel. Subject to the below discussion, we conclude that an Air Force attorney's advice on or concurrence with an investigator's use of a pretext phone call to a represented subject of an investigation is "authorized by law" under Rule 4.2, provided the activity occurs prior to the preferral of charges and the investigators are not acting as the "alter ego" of the attorney.

Facts. An AFOSI Field Investigation Squadron requested approval for the use of a pretext telephone call in an investigation of alleged sexual misconduct by a basic military training instructor at Base X. The proposed operation involved having a consenting witness contact the subject by telephone while OSI agents intercepted and recorded the conversation. The subject was previously interviewed by OSI agents and advised of his Article 31(b) rights. He requested and obtained counsel. Requests for pretext phone calls require concurrence from both the servicing base legal office and AFOSI/JA. In this case, initially the base legal office and others concluded that the proposed intercept was legally sufficient. However, prior to execution of the operation, the base legal office revoked their concurrence with the operation and expressed their concern that the pretext call would violate AFRPC 4.2.

Law. The following guidance is relevant to this analysis:

> AFRPC 4.2 states, "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."
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> AFRPC 5.3 reads:
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> > With respect to a paralegal or other nonlawyer employed or retained by, associated with or supervised by a lawyer:
> > …
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> > > (c) a lawyer shall be responsible for conduct of such a person that would be a violation of these rules if engaged in by a lawyer if:
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> > > > (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conducted involved; or

> (2) [Modified] the lawyer has direct supervisory authority over the person, knows of the conduct at a time when its consequences can be avoided or mitigated, but fails to take reasonable remedial action.

AFRPC 8.4 reads:

> It is unprofessional conduct for a lawyer to:
> (a) violate or attempt to violate these rules, knowingly assist or induce another to do so, or do so through the acts of another; …

Most courts have found that "communication with represented criminal suspects as part of noncustodial investigations, before formal proceedings are initiated, does not violate the anticontact rule."[1] Such cases typically involve covert contact by an informant with varying degrees of attorney involvement. Some courts have declined to impose a categorical rule which draws a line at the initiation of formal proceedings, following a case by case approach that considers the nature of the government lawyer's conduct.[2]

ABA Formal Opinion 95-396, *Communications with Represented Persons*, recognized that, "an additional category of circumstances that appear to be fairly treated as 'authorized by law' are those where courts have held that certain criminal investigative activities prior to arrest or the filing of formal charges such as the use of undercover agents or informers not acting as the prosecutor's 'alter ego' are not prohibited by the Rule."[3]

Analysis. Military courts have not addressed the issue presented.[4] However, a number of other courts have considered the application of Rule 4.2 (or similar rule) in relation to criminal investigations. The cases are instructive in considering whether Rule 4.2 permits a consensual wire intercept of a represented subject that is the target of an investigation.

Brief History. The application of Rule 4.2 to federal prosecutors in criminal investigations has a controversial past. In response to the decision in *U.S. v. Hammad*,[5] which found that a U.S. prosecutor violated the relevant anticontact provision in a preindictment covert investigation setting, the Department of Justice (DOJ) issued guidance indicating federal prosecutors could not

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[1] Ellen J. Bennett et al., *Annotated Model Rules of Professional Conduct*, at 418 (7th ed. 2011).
[2] *See United States v. Hammad*, 858 F.2d 834 (2d. Cir. 1988).
[3] ABA Committee on Ethics and Professional Responsibility, Formal Op. 95-396 (1995).
[4] In dicta, the Court of Appeals for the Armed Forces has identified the potential ethical implications of interviewing suspects who are represented by counsel. *See United States v. Finch*, 118, n.12 (C.A.A.F. 2006).
[5] *Hammad*, *supra* note 2.

be disciplined by states for such contacts in the course of authorized law enforcement activity.[6] The *Hammad* case will be discussed further below. This DOJ guidance was later codified into department regulations, authorizing government attorney contact prior to charge, arrest or indictment.[7] Courts subsequently ruled that the DOJ regulations did not make such contacts "authorized by law" and that federal prosecutors were accountable to state ethics rules.[8] In 1998, Congress got involved, passing the Citizens Protection Act (McDade Amendment), which subjects federal prosecutors to state ethic rules.[9] The DOJ subsequently changed its guidance to conform to the McDade Amendment.[10] By its terms, the McDade Amendment does not specifically apply to Air Force attorneys.[11] However, Air Force attorneys are accountable to both the AFRPCs and state rules. As such, the determinations by civilian courts regarding the issue presented are critical in shaping Air Force guidance on this issue.

Most courts have concluded that preindictment, non-custodial, covert communications by an informant with a criminal suspect do not violate Rule 4.2. In determining whether a violation of Rule 4.2 occurred, courts look at the context surrounding the contact. For example, in *U.S. v. Ryans*,[12] the Tenth Circuit considered the government's use of an informant to initiate and record conversations with a suspect prior to indictment, but after the individual had retained counsel. Department of Justice prosecutors (primarily but not exclusively through an investigator) instructed the informant to contact the suspect and engage in conversation on certain topics.[13] The Court found that the word "party" in DR 7-104(A)(1) (Rule 4.2's predecessor) indicated the rule contemplated an adversarial relationship between litigants. The Court emphasized the rule was to protect defendants from being "tricked" into giving their cases away due to opposing counsels' artful questions.[14] The Court concluded the rule was not intended to "preclude undercover investigations of unindicted suspects merely because they have retained counsel."[15]

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[6] Richard Thornburgh, U.S. Department of Justice Memorandum, *Communications with Persons Represented by Counsel* (June 6, 1989).

[7] *See* 28 C.F.R. 77 (1994).

[8] *See United States ex rel. O'Keefe v. McDonnell Douglas Corp*., 132 F.3d 1252 (8th Cir. 1998); *In re Howes*, 940 P.2d 159 (N.M. 1997); *In re Doe*, 801 F.Supp. 478 (D.N.M. 1992); *United States v. Ferrara*, 54 F.3d 825 (D.C. Cir. 1995).

[9] 28 U.S.C. 530B (1998).

[10] *See* 28 C.F.R. 77.1 indicating purpose of the regulation is to implement 28 U.S.C. 530B; *See also* 28 C.F.R. 77.4(f) prohibiting an attorney from directing an investigative agent under their supervision to engage in conduct that would violate the attorney's obligations under 28 U.S.C. 530B, but indicating that an attorney who in good faith provides advice or guidance upon an agent's request should not be deemed to violate the rules.

[11] *See* 28 U.S.C. 530B(c); *See also* 28 C.F.R. 77.2(a).

[12] *United States v. Ryans*, 903 F.2d 731 (10th. Cir. 1990).

[13] *Id.* at 733.

[14] *Id*. at 739.

[15] *Id*. In reaching its decision the Court cited similar decisions in other circuits; *see also United States v. Sutton*, 801 F.2d 1346 (D.C. Cir. 1986); *United States v. Fitterer*, 710 F.2d 1328 (8th Cir. 1983); *United States v. Lemonakis*, 485 F.2d 941 (D.C. Cir. 1973). More recently the 10th Circuit considered the matter in *United States v. Mullins*, 613 F.3d 1273 (10th Cir. 2010)(Citing

Similarly, the Third Circuit considered the ethical propriety of the use of an informant to get taped confessions of a suspect prior to indictment but after the suspect had counsel. In *U.S. v. Balter*[16] the Third Circuit also stressed that New Jersey's Rule 4.2 used the word "party" and there was no party involved until formal proceedings had begun. The Court went on to state that even if a criminal suspect was considered a "party" under the rule and the informant contacted the suspect at the direction and under the supervision of government lawyers, such preindictment investigation by prosecutors comes within the authorized by law exception.[17] The court expressed concern about hampering legitimate law enforcement operations. In 2010, the Third Circuit considered the matter again in *U.S. v. Brown*.[18] In *Brown*, the defendant claimed that the Assistant U.S. Attorney (AUSA) on the case violated Pennsylvania Rule 4.2 by using an informant to elicit information, which was being taped. Like *Balter*, the case involved a preindictment investigation of a represented person. This time the Court did not focus on the "party" language as a suspect was considered to be a party within the meaning of the Pennsylvania rule. The Court concluded the use of the informant, even where the attorney created a fictitious letter to guide the conversation between the informant and suspect, was authorized by law.[19] The decision by courts, such as this one, not to rely on the "party" language in determining the application of Rule 4.2 is important. The text of AFRPC 4.2, like the ABA Model Rules and that of many other jurisdictions, uses the word "person" vice "party." Accordingly, the proper inquiry when considering the application of the AFRPCs is whether the conduct is authorized by law. And, as the above cases suggest, courts have generally held that preindictment, undercover contacts fall within the authorized by law exception to Rule 4.2.

The Hammad case. Talseer Hammad and Eid Hammad were being investigated for Medicaid and mail fraud. A co-conspirator agreed to cooperate in the preindictment investigation against the Hammads. The AUSA in the case directed the informant to set up and tape a meeting with the suspects. Additionally, the AUSA "issued a sham subpoena for the informant…to create a pretense that might help the informant elicit admissions from a represented subject."[20] The Hammads challenged the use of the recordings at trial, arguing, among other things, that the information was obtained in violation of ABA Model Rule 7-104(A)(1), Rule 4.2's predecessor. The Court rejected the notion that the ethics rule was coextensive with 6th Amendment protections that begin with the onset of criminal proceedings.[21] The court found that the conduct by the AUSA essentially made the informant the "alter ego" setting forth a bright line rule, indicating a case-by-case look was appropriate in reaching an enforcement."[22] The Court resisted setting forth a bright line rule, indicating a case-by-case look was appropriate in reaching an appropriate balance between "imposing adequate safeguards without crippling law

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Ryans with approval and holding that Colorado's Rule 4.2 only applies once adversarial criminal proceedings have begun).

[16] *United States v. Balter*, 91 F.3d 427 (3rd Cir. 1996).

[17] *Id*. at 436.

[18] *United States v. Brown*, 595 F.3d 498 (3rd Cir. 2010).

[19] *Id*.

[20] *See United States v. Hammad*, 858 F.2d 834, at 838 (2d. Cir. 1988).

[21] *Id*. at 837.

[22] *Id*. at 839.

enforcement."[23] However, the Court did state "the 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…"[24] A majority of courts outside the Second Circuit have declined to follow *Hammad*. Even those courts within the Second Circuit have typically distinguished the cases before them from *Hammad*, finding the prosecutor's conduct to be authorized by law. A review of cases from subordinate courts within the Second Circuit that have considered *Hammad* as well as cases that have supported *Hammad's* case by case approach outside the Circuit are important in understanding the ramifications of this case.

1) *District Court Decisions Within the Second Circuit*. Several cases have considered *Hammad's* reach. In *U.S. v. Scozzafava*, the Court found the prosecutor's conduct was authorized by law where, in the absence of misconduct similar to that in *Hammad*, the AUSA was involved in plans to wire an informant and had input into topics the informant would discuss with the target of the investigation.[25] In *U.S. v. Nouri*, the Court viewed the *Hammad* standard as essentially holding that preindictment surreptitious recording by an informant of a represented target was authorized by law, absent egregious misconduct.[26] The Court rejected the notion that the government tried to elicit privileged attorney-client communications, finding the conduct authorized by law. The Court suggested, but did not decide, that the AUSA's instruction to the informant to lie about receiving a subpoena did not rise to the level of egregious conduct in *Hammad*.[27] Similarly, in *U.S. v. Basciano*, the Court found the defendant failed to establish that the use of recordings were not the product of legitimate law enforcement activity that was authorized by law.[28] Recently, in *U.S. v. Binday*, the Court again found that taped conversations of a represented suspect and cooperating witness were authorized by law in the preindictment, noncustodial setting.[29] A review of these cases indicates that these courts narrowly read *Hammad*, distinguishing the conduct of the prosecutors.

2) *Hammad's case-by-case approach beyond the Second Circuit*. Some courts have cited *Hammad's* case-by-case approach with approval in considering preindictment contacts of represented parties. Recently, the Ninth Circuit considered whether government prosecutors violated California's anticontact provision, Rule 2-100, by arming a cooperating witness with fake documents to elicit incriminating statements from a suspect.[30] The court affirmed that *Hammad's* case-by-case approach was appropriate, but overturned the lower court's decision that the prosecutors violated Rule 2-100.[31] The court stated that the use of fake subpoena attachments "did not cause the cooperating witness…to be any more of an alter ego of the

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[23] *Id.*
[24] *Id.*
[25] *United States v. Scozzafava*, 833 F. Supp. 203 (W.D.N.Y. 1993).
[26] *United States v. Nouri*, 611 F. Supp.2d 380 (S.D.N.Y 2009).
[27] *Id.* at 388.
[28] *United States v. Basciano*, 763 F.Supp.2d 303 (E.D.N.Y. 2011).
[29] *United States v. Binday*, ___F.Supp.2d.___, 2012 WL 6135013 (S.D.N.Y.).
[30] *United States v. Carona*, 660 F.3d 360 (9th Cir. 2011).
[31] *Id. See also United States v. Talao*, 222 F.3d. 1133 (9th Cir. 2000); *United States v. Powe*, 9 F.3d 68 (9th Cir. 1993); *United States v. Kenny*, 645 F.2d 1323 (9th Cir. 1981).

prosecutor than he already was by agreeing to work with the prosecutor."[32] Ultimately, the court did not find the cooperating witness to be the alter ego of the prosecutor. The court recognized that the government could use deception in investigations to induce incriminating statements, there were no direct communications between the prosecutors and the suspect, and the "indirect communications did not resemble an interrogation."[33] In an unreported district court case, *U.S. v. Tapp*, the court cited the soundness of *Hammad's* reasoning in applying the anticontact rule to the preindictment setting.[34] After an extensive discussion on the application of Rule 4.2 to federal prosecutors, the court criticized the AUSA for the "ill-advised" conduct of scheduling an investigative target to appear and testify before a grand jury without notifying the defense counsel.[35] In *State v. Miller*, the Minnesota Supreme Court applied *Hammad's* case-by-case approach in finding a violation of Minnesota's Rule 4.2 by a local prosecutor.[36] The court found that prosecutor's role in isolating the defendant from his attorney during a police interview over the attorney's objection was sufficiently egregious to remove the prosecutor's conduct from the authorized by law exception.[37] Both *Tapp* and *Miller* are distinguishable from the majority of the cases discussed. *Tapp* involved overt, direct contact. Further, *Miller* involved overt contact and unique facts in which the defendant's attorney was denied access to his client over his objection.

Drawing the Line. As the above discussion indicates, a majority of courts have approved the involvement of prosecutors in supporting covert, investigatory contact with a represented person in a noncustodial setting before the commencement of criminal proceedings. The question that is less clear is the point at which a government attorney might cross the line in the context of advising on such an operation.

> 1) The *Hammad* case, as well as other cases, uses the "alter ego" language. Courts have been imprecise in defining what the term means. In *Hammad*, the sham subpoena crossed the line. In *Brown*, the creation of a fictitious letter by the attorney to guide the informant's discussion with the target was permissible. Similarly, in *Carona*, the use of fake subpoena attachments generated by the attorneys was deemed permissible. In *U.S. v. Heinz*, the court equated alter ego with directing the actions of the agent.[38] In *U.S. v. Lemonakis*, the court found that the AUSA's instructions to an informant did not make the informant the alter ego.[39] In *Scozzafava*, the AUSA's involvement in the planning of a surreptitious recording and providing general topics for discussion was lawful. In finding the prosecutor's conduct lawful, the court in *U.S. v. Gray*, emphasized that the prosecutor did not control the agents investigation, cause the contact, or instruct

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[32] *United States v. Carona*, at 366.
[33] *Id.*
[34] *United States v. Tapp*, 2008 WL 2371422 (S.D.Ga. 2008).
[35] *Id.*
[36] *State v. Miller*, 600 N.W.2d 457 (Minn. 1999).
[37] *Id.*
[38] *United States v. Heinz*, 983 F.2d (5th Cir. 1993).
[39] *United States v. Lemonakis*, 485 F.2d 941 (D.C. Cir. 1973).

agents on what questions to ask.[40] In *People v. White*, an Illinois appellate court concluded that "mere knowledge" of the operation by the prosecutor was insufficient.[41] The court stressed that the concern in the ethics rule is that the defendant "will be subjected to the prosecutor's superior legal skill and acumen."[42] In essence, the line is crossed when the prosecutor "instructs the informant how to elicit incriminating statements by telling him what to say or ask."[43]

2) The 1995 ABA Opinion invokes the alter ego standard in determining when a lawyer can be held accountable for an investigator's conduct. The opinion looks to Rules 5.3 and 8.4 in defining this standard.[44]

> a) AFRPC 5.3 governs lawyer responsibilities concerning nonlawyers "employed or retained by, associated with, or supervised by a lawyer…"[45] The rule indicates the lawyer is responsible for a nonlawyer's conduct that violates professional responsibility rules if the lawyer orders, or with knowledge ratifies, the conduct. Additionally, lawyers with direct supervisory authority over the person are responsible if the lawyer knows of the conduct and fails to take appropriate remedial action under the circumstances. AFOSI investigators are not under the direct supervisory authority of Air Force lawyers advising on a particular case. However, the lawyers can reasonably be said to be "associated with" the OSI investigators to the extent OSI looks to legal offices for case advice. With respect to pretext phone calls, the Air Force lawyer is not the approval authority for the investigative technique, but is instead advising on its legality and propriety. The legal office coordinates on the proposed operation through the AFOSI Form 52, *Request for Consensual Intercept Authorization*. In doing so, the lawyer is not directing the operation, nor is it ratifying certain conduct that already occurred. Accordingly, we do not think the conduct of AFOSI agents can ordinarily be imputed to Air Force lawyers under Rule 5.3 in this context. However, we recognize the degree of attorney involvement in a particular operation may vary across the different legal offices in the Air Force. In some instances, such involvement could rise to a level in which the agent is viewed as an attorney's alter ego. This is further addressed below.

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[40] *United States v. Gray*, 825 F. Supp 63 (D. Vt. 1993).
[41] *People v. White*, 209 Ill.App.3d 844 (Ill.App. 5th Dist. 1991).
[42] *Id.* at 875.
[43] *Id.* at 873.
[44] ABA Formal Op., *supra* note 3.
[45] Air Force Rule of Professional Conduct 5.3.

b) AFRPC 8.4(a) makes it unprofessional conduct for a lawyer to attempt, knowingly assist, or induce another to violate the professional responsibility rules through the acts of another. As discussed above, Air Force lawyers advise on the appropriateness of using a pretext phone call as an investigatory tool. The Air Force lawyers are not directing the operation, but rather advising on the use of a legitimate investigatory practice. Seeking the advice of an attorney on the use of a legitimate law enforcement technique should not turn an otherwise lawful practice into an unethical one because such advice was sought. As such, the advice provided by Air Force lawyers on the legal sufficiency of a proposed pretext phone call does not constitute a violation of AFRPC 8.4(a). An additional question that is often raised in this context is whether attorney involvement in such operations implicates dishonest behavior under Rule 8.4(c). Several states have considered this matter. For example, Oregon Rule 8.4(b) indicates it is not professional misconduct for lawyers to advise clients about or supervise lawful information covert activity in criminal investigations.[46] It defines "covert activity" as "an effort to obtain information on unlawful activity through the use of misrepresentations or subterfuge."[47] Florida Rule 4-8.4(c) indicates that it is not conduct involving dishonesty, fraud, deceit, and misrepresentation for a lawyer from a criminal law enforcement agency to "advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule…"[48] Similarly, Ohio Comment 2A to its Rule 8.4(c) states that the rule "does not prohibit a lawyer from supervising or advising about lawful covert activity in the investigation of criminal activity…when authorized by law."[49] In Virginia, covert activity has been interpreted to be acceptable under Rule 8.4(b) because it is not dishonesty that "reflects adversely on the lawyer's fitness to practice law."[50] Finally, Wisconsin addressed the concern in Rule 4.1, indicating that notwithstanding Rule 5.3(c)(1) and Rule 8.4, "a lawyer may advise or supervise others with respect to lawful investigative activities."[51] The text of the rule and the Wisconsin comments, which state, "[w]hen the lawyer personally participates in the deception, however, serious questions

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[46] Oregon Rules of Professional Conduct, Rule 8.4(b).

[47] *Id.*

[48] Florida Rules of Professional Conduct, Rule 4-8.4(c).

[49] Ohio Rules of Professional Conduct, Rule 8.4(c), Comment 2A.

[50] Virginia Rules of Professional Conduct, Rule 8.4. *See also* Virginia State Bar Standing Committee on Legal Ethics Opinion 1765 (2003); Virginia State Bar Standing Committee on Legal Ethics Opinion 1738 (2000).

[51] Wisconsin SCR 20:4.1(b); *See also* Wisconsin SCR 20:5.3(c)(1) and SCR 20:8.4.

arise," indicate the line is drawn at actual participation by the attorney.[52]

3) *What conduct is permissible for an Air Force attorney advising on a pretext phone call?* As courts and ethics committees faced with similar questions have suggested, answering the issue presented involves balancing the public interest in effectively investigating crime through legitimate law enforcement techniques and preventing attorneys from overreaching into or unduly interfering with a represented party's relationship with counsel. In our opinion Air Force attorneys may advise on and answer investigator questions concerning the propriety of pretext phone calls in a given case in a noncustodial[53] setting prior to preferral of charges. As discussed above, most civilian courts made a distinction regarding the application of the anti-contact rule once the target of the investigation was indicted. Air Force practice and terminology is different than that found in civilian practice. Indictment is "a formal written accusation of a crime, made by a grand jury and presented to a court for prosecution against the accused person."[54] In military practice, at preferral the accused is presented with formal written charges.[55] While indictment and preferral, and the processes leading up to them, are not the same, we think preferral is an appropriate place to draw a similar line. In the pre-preferral setting, we think an Air Force attorney may violate AFRPC 4.2 if he or she exercises too much control over the investigation, likely making the investigator the attorney's alter ego. For example, an attorney would be exercising too much control if she provides scripted questions or otherwise instructs the investigator regarding specific questions to ask. This does not limit the attorney from discussing the facts of the case or the elements of a particular offense under investigation with the AFOSI agent. Additionally, care should be taken to ensure covert investigators or informants do not seek out attorney-client privileged communications between the target and his attorney. We think this guidance strikes the appropriate balance, permitting appropriate coordination between lawyers and law enforcement without creating a situation in which

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[52] Wisconsin SCR 20:4.1(b), Committee Comment.

[53] We recognize that Article 31(b) provides broader protection from the Fifth Amendment and does not depend on one being in custody. However, the typical pretext phone call scenario will not implicate the coercive aspect that Article 31 is intended to guard against. The pretext call is meant to elicit information in a casual setting, one in which the target does not know the government's involvement. This is not the type of situation in which an Article 31 rights advisement would be required. *See U.S. v. Rios*, 48 M.J. 261 (C.A.A.F. 1998)(discussing pretext telephone call and holding that Article 31(b) warnings are required only if: "a questioner subject to the Code was acting in an official capacity…and the person questioned perceived that the inquiry involved more than a casual conversation."). Additionally, the primary concern most courts have expressed is that such conduct does not occur after the initiation of formal criminal proceedings due to the protections of the Sixth Amendment.

[54] Black's Law Dictionary (9th ed. 2009).

[55] *See United States v. Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985)(indicating in the military the initiation of adversarial proceedings normally occurs at preferral of charges).

> lawyers can essentially ask questions of a represented party through another. We recognize in drawing this line, some jurisdictions may permit attorneys to do more in this circumstance and some could be more restrictive. This guidance reflect the Committee's considered opinion regarding the application of the AFRPCs to the question presented. Air Force attorneys are also answerable to their licensing jurisdictions. To the extent an Air Force attorney is licensed to practice or in the state where the attorney is currently practicing, the individual attorney may need to contact the relevant licensing authorities for additional guidance. Before doing so, the attorney should consult with the Air Force Professional Responsibility Administrator.

Conclusion

AFRPC 4.2 does not preclude Air Force attorneys from advising investigators on the use of pretext phone calls, provided the activity occurs prior to the preferral of charges and the attorney does not exercise such a degree of control over the investigation as to make the investigators the "alter ego" of the attorney.

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