

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

UNITED STATES OF AMERICA, :
:
Plaintiff, :
: Civil Action No.
v. : 3:16-CV-00622-CWR-FKB
:
STATE OF MISSISSIPPI, :
:
Defendant. :
:

**UNITED STATES' MEMORANDUM IN SUPPORT OF MOTION FOR
CLARIFICATION OF MISSISSIPPI RULE 4.2 OF THE RULES OF PROFESSIONAL
CONDUCT IN THIS MATTER**

The United States seeks clarification from the Court on the application of Mississippi Rule of Professional Conduct 4.2 (“Rule 4.2”) to its *ex parte* communications with staff of Mississippi’s Community Mental Health Centers (“CMHCs”) in the pending case. Though it does not represent any of the CMHCs in this matter, the State now seeks to limit communications between the United States and these key stakeholders through an untenable interpretation of Rule 4.2. The State of Mississippi claims, without basis, that Rule 4.2 prohibits the United States from communicating *ex parte* with managerial staff of the CMHCs.

Rule 4.2 bars a lawyer from “communicat[ing] 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.” Miss. R. Prof’l Conduct 4.2. The purpose of the Rule is to “protect[] a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.” Model Rules of Pro. Conduct r. 4.2 cmt.

1 (Am. Bar. Ass'n 1983). As discussed below, the State has no authority to preclude the United States' *ex parte* communications with CMHCs. The Rule protects the attorney client relationship—a relationship that does not exist between the CMHCs and the State. The United States respectfully requests this Court confirm that the State cannot limit its *ex parte* communications with CMHC staff.

I. FACTUAL BACKGROUND

On November 2, 2021, counsel for the United States emailed the Mississippi Association of Community Mental Health Centers (“CMHC Association”) to coordinate a meeting with its members. *See Ex. A* (Email from Patrick Holkins to CMHC Association). During their correspondence, counsel asked the CMHC Association whether any CMHC was currently represented in the matter, so that the United States could seek consent for communications with those member CMHCs through counsel. *See Id.*

On November 12, 2021, counsel for the State of Mississippi objected to the meeting, claiming that the United States is prohibited from communicating with managerial staff of the CMHCs under Rule 4.2. On November 17, 2021, counsel for the United States sent a letter to counsel for the State of Mississippi explaining that Rule 4.2 does not permit the State to limit communications between United States and the CMHCs. *See Ex. B* (Letter from Patrick Holkins to Jim Shelson). The State of Mississippi did not respond to the letter.

In December 2021, the United States contacted each CMHC to determine whether it is currently represented in the matter, and if so, by whom. None of the CMHCs claimed to be represented by attorneys for the State of Mississippi. Some CMHCs indicated they are not represented in the matter and others identified current counsel, with whom the United States will coordinate going forward.

On December 13, 2021, counsel for the United States contacted counsel for the State of Mississippi to determine if the State's position had changed. On February 24, 2022, counsel for the United States conferred with counsel for the State of Mississippi regarding this motion. The parties were unable to reach a resolution.

II. ARGUMENT

A. Because the CMHCs Are Not Represented by the State of Mississippi, The State Cannot Limit Communications between the United States and the CMHCs.

Rule 4.2 only limits communication when the communicating attorney knows that the person in question is represented in the matter to be discussed. *See* Miss. R. Prof'l Conduct 4.2; Miss R. Prof'l Conduct Terminology ("‘Knowingly,’ ‘Known,’ or ‘Knows’ denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."). Each of the CMHCs is an independent regional entity and none is a party to this litigation. The CMHCs are not “known to be represented” by an attorney for the State of Mississippi in this matter.

To the contrary, some CMHCs are unrepresented, while others are represented by private counsel. During the discovery phase of this case, most CMHCs indicated that they were represented by private counsel for purposes of discovery; others indicated that they were not represented by counsel in this matter. As applicable, the United States worked through that private counsel—not the attorneys for the State—to arrange production of records and depositions. The United States also sought consent from the identified private counsel to communicate with staff of represented entities and to coordinate visits to CMHCs around the State. When the United States initiated communications with the CMHC Association in November 2021, counsel for the United States asked that the CMHCs indicate if they are currently represented in the matter. *See* Ex. A. As described above, the United States made

individual inquiries to determine which CMHCs are represented, and by whom. None of the CMHCs is represented by attorneys for the State of Mississippi.

During more than five years of litigation, the State has never asserted that it represents the CMHCs or that the United States cannot communicate with CMHC staff. Early in the litigation, the United States confirmed in a letter, phone call, and follow-up e-mail its understanding that the CMHCs are not represented by the State. *See* ECF Nos. 62-2, 62-3 (Nov. 9, 2016 Email from Counsel for U.S. to Counsel for State) (“Additionally, you indicated that the Mississippi Home Corporation and the community mental health centers are not represented by the State’s Attorney General in this litigation.”). Similarly, the Parties have previously agreed that county and municipal employees are not represented by the State in this matter. *See* ECF No. 62-5 (Aug. 18, 2017 Email from Counsel for U.S. to Counsel for State) (“The State and DOJ are in agreement that for purposes of Mississippi Rule 4.2, county and municipal officials, and the Mississippi Home Corporation are not represented by you.”). The State’s conduct throughout the litigation has been consistent with this understanding. The State did not represent the CMHCs at depositions of managerial staff or produce documents for CMHCs. Instead, the CMHCs’ respective counsel consented to their communications with the United States and worked with the United States to respond to discovery requests that were served on the CMHCs. Similarly, in order to access CMHC records, the United States had to serve each CMHC with a Rule 45 subpoena, rather than making a request for production on a party. The State’s course of conduct is consistent with its acknowledgement that it does not represent the CMHCs.

The State has no basis on which to limit the United States’ communication with entities and people that it does not represent. Rule 4.2 does not afford the State the right to limit the United States’ communications with individuals other than current State employees.

B. The Court’s Existing Order on Rule 4.2 Does Not Prohibit *Ex Parte* Communications with CMHCs

During the discovery phase of this litigation, the parties sought clarification regarding the scope of Rule 4.2’s limitation on communications with certain current and former State employees. ECF Nos. 62-64. On October 12, 2018, the Court addressed: “(1) the scope of the Mississippi Attorney General’s Office’s representation of current State of Mississippi employees in this case; (2) the application of Rule 4.2 to current employees of the State of Mississippi; (3) the application of Rule 4.2 to former employees of the State of Mississippi; and (4) the United States’ disclosure requirements with regard to any *ex parte* interviews.” ECF No. 128 at 1. The Court applied Rule 4.2 to the Parties in this matter—the United States and the State of Mississippi. *See generally id.* The order did not address the United States’ *ex parte* communications with nonemployees of the State of Mississippi.¹ *Id.*

C. The Court Has Recognized the Appropriateness of the United States’ *Ex Parte* Communication with Stakeholders

During the September 2, 2021 hearing on the role of the monitor, the Court affirmed the United States’ ability to communicate with stakeholders other than State employees outside the presence of the State’s attorneys. During the hearing, the United States told the Court that it did not object to the presence of counsel “in communications between the United States and State employees.” Ex. C (Sept. 2, 2021 Transcript) at 32:21-23. The United States also stated that it “certainly [did not] think that it would be appropriate to require presence of counsel [for the

¹ CMHC staff are not State of Mississippi employees. The CMHCs are independent entities certified by the State of Mississippi to provide community-based mental health services. *See* Miss. Code Ann. §§ 41-20-1 (a). And while the State of Mississippi has a responsibility for oversight of CMHCs, this does not transform CMHC staff into state employees. *See* ECF No. 231-1 at 1 (Amended Trial Stipulations) (“DMH certifies each CMHC prior to its selection as the designated provider, promulgates operational standards for all CMHCs, conducts reviews of CMHC operations, awards grant funds to support specific community services, and requires financial and performance reporting.”).

State]” in communications between the United States and “the broader community of individuals who are impacted by the Court’s order.” *Id.* at 32:15-20. Responding to the discussion, the Court explained that “Any order would allow the monitor -- would allow DOJ and even the state of Mississippi, if it chooses, to talk and communicate with those individuals and entities [other than State employees].” *Id.* at 35:3-11. It is clear that the Court anticipated the United States would communicate with stakeholders other than State employees outside the presence of the State’s counsel.

CONCLUSION

Based on the foregoing, the United States respectfully requests this Court issue an order confirming that Rule 4.2 does not bar its *ex parte* communications with the CMHCs.

Respectfully submitted,

Date: February 27, 2022

**FOR THE UNITED STATES
PLAINTIFF:**

DARREN J. LAMARCA
Acting United States Attorney
Southern District of Mississippi

MITZI DEASE PAIGE [MS Bar 6014]
Assistant United States Attorney
1 E. Court Street, Suite 4.430
Jackson, MS 39201
Telephone: (601) 973-2840
mitzi.paige@usdoj.gov

KRISTEN CLARKE
Assistant Attorney General
Civil Rights Division

STEVEN H. ROSENBAUM
Chief
Special Litigation Section

DEENA FOX
Deputy Chief
Special Litigation Section

/s/ Viviana Bonilla López
VIVIANA BONILLA LÓPEZ
[FL Bar 1003205] [PR Bar No. 22583]
Trial Attorney
Special Litigation Section
Civil Rights Division
U.S. Department of Justice
150 M Street, NE

Washington, DC 20002
Telephone: (202) 598-5542
Viviana.Bonilla-Lopez@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2022, I electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to all counsel of record.

/s/ Viviana Bonilla López
Viviana Bonilla López