

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

UNITED STATES OF AMERICA, :

:

Plaintiff, :

:

Civil Action No.

v. :

:

STATE OF MISSISSIPPI, :

:

Defendant. :

:

**UNITED STATE'S MOTION FOR CLARIFICATION OF MISSISSIPPI RULE 4.2 OF  
THE RULES OF PROFESSIONAL CONDUCT IN THIS MATTER**

The United States respectfully moves the Court for entry of an Order clarifying the application of Mississippi Rule of Professional Conduct 4.2 (“Rule 4.2”) to the United States’ *ex parte* communications with staff of the Mississippi Community Mental Health Centers (“CMHCs”).

1. In response to the United States’ outreach to stakeholders, the State of Mississippi has asserted that Rule 4.2 prohibits the United States from communicating *ex parte* with managerial staff of the CMHCs.
2. Rule 4.2 protects the attorney client relationship—a relationship that does not exist between the CMHCs and the State.
3. In order to facilitate ongoing communications with stakeholders during the implementation of the Court’s remedial order, the United States seeks an order confirming that Rule 4.2 does not preclude the United States’ *ex parte* communications with CMHCs.

4. For support, the United States attaches the exhibits listed below and files a Memorandum in Support of this Motion:

Exhibit A – Email from Patrick Holkins to CMHC Association

Exhibit B – Letter from Patrick Holkins to Jim Shelton

Exhibit C – Transcript of September 2, 2021 Hearing Pages 32-35

Respectfully submitted,

Date: February 27, 2022

**FOR THE UNITED STATES  
PLAINTIFF:**

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Southern District of Mississippi

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/s/ Viviana Bonilla López  
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**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

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**From:** [Holkins, Patrick \(CRT\)](#)  
**To:** [Phaedre Cole](#)  
**Cc:** [Fox, Deena \(CRT\)](#); [Malks, Sarah \(CRT\)](#); [Mortensen, Susan \(CRT\)](#)  
**Subject:** RE: [EXTERNAL] RE: Outreach concerning implementation of Court order in U.S. v. MS  
**Date:** Thursday, November 4, 2021 8:46:00 AM

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Phaedre,

Thanks very much for your response and your assistance with coordinating this meeting. Unfortunately, our team is not available on the 10th, but we appreciate the offer. Hopefully one of the times we suggested will work for the group. If not, we can send more options.

Additionally, if any of the CMHCs that would like to participate in the discussion are represented by counsel in this matter, please let us know.

We look forward to talking with you soon.

Patrick

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**From:** Phaedre Cole <[phaedrecole@region6-lifehelp.org](mailto:phaedrecole@region6-lifehelp.org)>  
**Sent:** Tuesday, November 2, 2021 3:21 PM  
**To:** Holkins, Patrick (CRT) <[Patrick.Holkins@usdoj.gov](mailto:Patrick.Holkins@usdoj.gov)>  
**Cc:** Fox, Deena (CRT) <[Deena.Fox@usdoj.gov](mailto:Deena.Fox@usdoj.gov)>; Malks, Sarah (CRT) <[Sarah.Malks@usdoj.gov](mailto:Sarah.Malks@usdoj.gov)>; Mortensen, Susan (CRT) <[Susan.Mortensen@usdoj.gov](mailto:Susan.Mortensen@usdoj.gov)>  
**Subject:** [EXTERNAL] RE: Outreach concerning implementation of Court order in U.S. v. MS

Patrick,

Good afternoon. We would absolutely welcome an opportunity to meet with and your team.

We do have a standing meeting the first Wednesday of each month from 10:00 am to noon, so our next meeting would be the 10<sup>th</sup> of this month. Would that be a possibility? We could potentially adjust the time, if needed. If that is not workable, no worries.

In the meantime, I will go ahead and forward this to the group to see how the two dates you suggested work for everyone.

Thanks for reaching out.

Thanks,  
Phaedre

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**From:** Holkins, Patrick (CRT) [<mailto:Patrick.Holkins@usdoj.gov>]  
**Sent:** Tuesday, November 2, 2021 1:34 PM  
**To:** [phaedrecole@region6-lifehelp.org](mailto:phaedrecole@region6-lifehelp.org)  
**Cc:** Fox, Deena (CRT) <[Deena.Fox@usdoj.gov](mailto:Deena.Fox@usdoj.gov)>; Malks, Sarah (CRT) <[Sarah.Malks@usdoj.gov](mailto:Sarah.Malks@usdoj.gov)>;

Mortensen, Susan (CRT) <[Susan.Mortensen@usdoj.gov](mailto:Susan.Mortensen@usdoj.gov)>

**Subject:** Outreach concerning implementation of Court order in U.S. v. MS

Ms. Cole,

I hope you are doing well.

I'm one of the attorneys at the U.S. Department of Justice working on our *United States v. Mississippi* matter, concerning the unnecessary institutionalization of adults with serious mental illness in Mississippi's State Hospitals. The Court has issued a final remedial order, requiring the State to take specific steps to address violations of the Americans with Disabilities Act that the Court identified in September 2019. The Court also appointed a Monitor, Dr. Michael Hogan, to assist with assessing the State's compliance.

At this critical juncture point, our team is reengaging with key stakeholders in Mississippi with the goal of promoting awareness about the State's obligations under the order and about the implementation process generally. We are also interested in hearing directly from stakeholders regarding their experiences providing and receiving adult mental health services in the state.

We would greatly appreciate the opportunity to meet, via Zoom, with you and other members of the Mississippi Association of Community Mental Health Centers. We would propose meeting at one of the following times this month:

**Nov. 16:** noon-1pm OR 2-3pm central

**Nov. 18:** noon-1pm central

Could you let us know whether your members would be interested in participating in this discussion and, if so, whether any of these times would work? We can suggest additional times if needed.

Thanks very much,

Patrick

Patrick Holkins  
Trial Attorney  
Special Litigation Section, Civil Rights Division  
U.S. Department of Justice  
202-598-3076



Special Litigation Section – 4CON  
950 Pennsylvania Ave, NW  
Washington DC 20530

November 17, 2021

**VIA ELECTRONIC MAIL**

James W. Shelson, Esq.  
Phelps Dunbar LLP  
4270 I-55 North  
Jackson, MS 39211-6391  
[Jim.Shelson@phelpsdunbar.com](mailto:Jim.Shelson@phelpsdunbar.com)

Dear Mr. Shelson,

In our conversation earlier this week, you asserted that the United States is prohibited from communicating with managerial staff of the community mental health centers (CMHCs) in Mississippi under Rule 4.2 of the Mississippi Rules of Professional Conduct. Nothing in the text of the Rule, the Parties' course of conduct in this case, or in the existing order on the application of Rule 4.2 to this case supports that view.

**Mississippi Rule 4.2**

Rule 4.2 prohibits communications “with a *party* the lawyer *knows to be represented* by another lawyer in the matter.” The Rule applies only when the inquiring attorney knows that the person in question is represented in the matter to be discussed. See 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.”). The CMHCs are not “known to be represented” by a lawyer from the State in this matter.

During the discovery phase of this case, most CMHCs retained private counsel. We worked through that private counsel—not the attorneys for the State—to arrange production of records and depositions. We also sought consent from the identified private counsel to communicate with staff of those entities and for visits to CMHCs around the State. More recently, when we initiated communications with the CMHCs after the Court issued a remedial order, we asked that they let us know if they are currently represented in the matter to ensure that we could seek consent as appropriate. No CMHC identified counsel.

Furthermore, the Rule applies to communications with a party. The Parties in this matter are the State of Mississippi (“the State”) and the United States. Each of the CMHCs is a private non-profit regional entity and none is a party to this litigation. For that very reason, during discovery the United States had to serve each CMHC with a Rule 45 subpoena in order to access records, rather than making a request for production on a party.

While Rule 4.2 limits communication with some employees of a party where the party is an organization, it does not limit communication with anyone other than the parties. The comment to the Rule merely explains which employees of a party that is an organization are off limits.<sup>1</sup> The comment does not expand the limitation beyond the parties themselves.

#### The Parties' Course of Conduct

During more than five years of litigation, the State has never asserted that it represents the CMHCs, until now. 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. ECF Nos. 62-2, 62-3 (“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. ECF No. 62-5 (“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. As noted above, the State did not represent the CMHCs at depositions of managerial staff or produce documents for CMHCs. Instead, the CMHCs’ own counsel consented to the CMHCs’ communications with the United States and worked with the United States to respond to discovery requests that were served on the CMHCs.

Based on this substantial course of conduct spanning the length of the litigation, the United States told the Court, during the September 2, 2021 hearing on the role of the Monitor, that we do not object to the presence of counsel “in communications between the United States and State employees.” Tr. at 32:21-23. At the same time “we certainly don’t think that it would be appropriate to require presence of counsel [for the State]” in communications between the United States and “the broader community of individuals who are impacted by the Court’s order.” Tr. 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].” Tr. at 35:3-11.

#### Previous Order on Rule 4.2

The existing order on Rule 4.2’s application to this case concerns whether the United States needs consent to communicate with “employees of the State of Mississippi.” ECF No. 128 at 1. The Court appropriately applied Rule 4.2 to the Parties in this matter—the United States and the State of Mississippi. For that reason, the ruling determined “(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)

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<sup>1</sup> “In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.” Mississippi Rules of Professional Conduct 4.2 Comment.

the application of Rule 4.2 to *former employees of the State of Mississippi.*” *Id.* (emphasis added). Any suggestion that the order limits the United States’ ability to speak with the staff of regional mental health agencies is baseless.

We will, of course, continue to seek consent for communications about this case with current employees of the State whose work relates to this matter, consistent with the Court’s order regarding Rule 4.2. The United States will also continue its longstanding practice of engaging with other important stakeholders in the State—including CMHC staff—during the implementation of the remedial order.

If the State would like to discuss this matter further, please let us know.

Sincerely,

*/s/ Patrick Holkins*

Patrick Holkins  
Trial Attorney  
Special Litigation Section  
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U.S. Department of Justice  
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IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
NORTHERN DIVISION

UNITED STATES OF AMERICA PLAINTIFF  
VERSUS CAUSE NO. 3:16-CV-622-CWR-FKB  
STATE OF MISSISSIPPI DEFENDANT

**TRANSCRIPT OF HEARING**

BEFORE THE HONORABLE JUDGE CARLTON W. REEVES  
UNITED STATES DISTRICT COURT JUDGE  
SEPTEMBER 2, 2021  
JACKSON, MISSISSIPPI

APPEARANCES:

FOR THE GOVERNMENT: DEENA FOX, ESQUIRE  
PATRICK HOLKINS, ESQUIRE  
MITZI DEASE PAIGE, ESQUIRE

FOR THE DEFENDANT: JAMES SHELSON, ESQUIRE  
NASH GILMORE, ESQUIRE  
DOUGLAS MIRACLE, ESQUIRE  
MARY JO WOODS, ESQUIRE

REPORTED BY: TAMIKA T. BARTEE, B.C.R., RPR, CCR #1782

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1 broad enough to say that the state is not barred from talking to  
2 individuals to find out to sort of assess whether or not the  
3 state -- or the United States -- should not be able to go out and  
4 talk to individuals, groups, advocates and all to make sure that  
5 the state is in compliance with the overarching order and/or that  
6 the monitor ought to be able to talk to these individuals, groups  
7 and others who might be receiving services or somehow involved in  
8 this process of a -- of evaluating what the state is doing. Maybe  
9 that question is appropriate to the United States. How broad is  
10 Paragraph 19, Ms. Fox? Is that limited to state employees and  
11 people who are tied to the state, which might trigger the notion  
12 of *ex parte* communications, or is it broadly to include persons  
13 who actually receive the services? That question was to you, Ms.  
14 Fox.

15 MS. FOX: Yes, sir, Your Honor. The goal of that was,  
16 yes, to include the ability for the United States and the monitor  
17 to communicate not just with state employees, but also with the  
18 broader community of individuals who are impacted by the Court's  
19 order. And we certainly don't think that it would be appropriate  
20 to require presence of counsel again in those communications,  
21 though if the state wanted to include counsel in communications  
22 between the United States and state employees or between the  
23 monitor and state employees, we would, of course, not object to  
24 that.

25 THE COURT: Okay. Mr. Shelson, does the --

1 MR. SHELSON: Your Honor --

2 MR. MIRACLE: Your Honor, this is Doug Miracle, may I say  
3 something?

4 THE COURT: Yes, Mr. Miracle.

5 MR. MIRACLE: Thank you. I think that the objection we  
6 have -- and I wanted to just situate this in a larger context  
7 because I think Mr. Shelson's been expressing on a point-by-point  
8 basis what our particular objections are, but they really all go  
9 to the same point -- is the fact that the Court has adopted  
10 Dr. Hogan's plan in full, but there are things in Dr. Hogan's plan  
11 that are not currently articulated. And Mr. Shelson alluded to an  
12 implementation plan that may or may not --

13 THE COURT: Hold on, Mr. Miracle. Slow down just a little  
14 bit for the court reporter.

15 MR. MIRACLE: Sure. I'm sorry. So, what I was saying was  
16 that there are things that are in Dr. Hogan's plan that the Court  
17 has adopted that remain yet unresolved, and we're not sure exactly  
18 how the Court intends to address those things in its final order,  
19 but the conceptual problem we have -- the state has with a lot of  
20 these provisions is we're talking about them in the abstract in a  
21 number of senses, whether it's the authority, or whether it's the  
22 money, or whether it's the access. There are things that from the  
23 state's prospective, from Dr. Hogan's plan that the Court has  
24 adopted, that we simply don't know going forward what those  
25 obligations would be that the Court is going to impose, or how

1 they're going to be imposed.

2           And so, my concern on behalf of the state, is that as  
3 we're talking about these discrete provisions in DOJ's proposal,  
4 they could certainly creep into areas where Mr. Shelson's already  
5 -- I won't belabor those, that yet really haven't been resolved.  
6 And so, I would just like to say -- and he certainly is doing an  
7 excellent job articulating point-by-point, but overall we have the  
8 same concern structurally about talking about discrete provisions  
9 and whether or not we -- the state has an objection to them or  
10 not, because they really are abstract in many senses without  
11 knowing exactly what the Court believes will be the final  
12 obligations of the state under its final order, which we believe  
13 will be forthcoming. So that -- I just wanted to put that in a  
14 larger context about how we view these discrete items in DOJ's  
15 response, because they really all go to the same core problem we  
16 have in trying to understand what the state's obligations would  
17 be. So if we say we don't object to something, you know, it may  
18 be -- it may be that once we see what the obligations are, if  
19 they're as narrow as we believe they should be, then clearly, as  
20 drafted, the language in some of these provisions is way too  
21 broad. And I think Mr. Shelson's alluded to that, that there may  
22 be occasions that the state doesn't object to, but just in the  
23 abstract, we have a real structural concern about this without a  
24 final order. So that was all I wanted to add.

25           THE COURT: Thank you, Mr. Miracle. The way I see

1 Paragraphs 19 and 20, the monitor, subject to the *ex parte*  
2 communication-type things with these employees that -- that  
3 Mr. Shelson has already articulated, I do see that the monitor  
4 might need to speak to other persons, persons who might not be  
5 state employees, persons who might be individuals who are  
6 receiving the services, family members of persons who are  
7 receiving the services, advocates for people -- advocates for  
8 those who receive these services. Any order would allow the  
9 monitor -- would allow DOJ and even the state of Mississippi, if  
10 it chooses, to talk and communicate with those individuals and  
11 entities.

12 Now I think it is appropriate for us to turn our attention  
13 to Paragraph 10, which --

14 MR. SHELSON: Your Honor --

15 THE COURT: I am sorry, Mr. Shelson.

16 MR. SHELSON: I am sorry to interrupt the Court, Your  
17 Honor.

18 THE COURT: No.

19 MR. SHELSON: If I could just add one thing briefly where  
20 Ms. Fox left off. It is the state's position that if the monitor  
21 or the United States wants to enter a state facility, building, or  
22 program or service to talk to a resident or for any other purpose,  
23 that, yes, the state should have the opportunity to have its  
24 representatives present, and I think Ms. Fox stated she does not  
25 have an objection to that.

COURT REPORTER'S CERTIFICATE

3 I, Tamika T. Bartee, Certified Court Reporter, in and for  
4 the State of Mississippi, Official Court Reporter for the United  
5 States District Court, Southern District of Mississippi, do hereby  
6 certify that the above and foregoing pages contain a full, true,  
7 and correct transcript of the proceedings had in the aforesigned  
8 case at the time and place indicated, which proceedings were  
9 recorded by me to the best of my skill and ability.

10 I further certify that the transcript fees and format  
11 comply with those prescribed by the Court and Judicial Conference  
12 of the United States.

13 THIS the 22nd day of October, 2021.

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s / Tamika T. Bartee

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Tamika T. Bartee, BCR, RPR, CCR #1782  
Official Court Reporter  
United States District Court  
Tamika Bartee@mssd.uscourts.gov