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Extending the Guiding Lefthand of Counsel: The Minnesota Supreme Court Provides Protection against Uncounseled Waivers of the Right to Counsel During Interrogations

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Abstract
It is the thesis of this Article that the cases on which the Minnesota Supreme Court in *Lefthand* relied and the policy concerns that motivated the court suggest that the rule of *Lefthand* should apply to any suspect who has asserted her right to counsel, regardless of whether that suspect is in custody, formally charged, or formally represented by counsel. If the court's ruling in *Lefthand* is carried to its logical scope, law enforcement officers and prosecutors in Minnesota may find that very early in the criminal justice process they are precluded from obtaining waivers of the right to counsel from suspects in order to obtain a statement, unless the suspect's attorney is present or has been notified prior to any interrogation.

This Article first briefly reviews the current law regarding right to counsel under the Fifth and Sixth Amendments to the United States Constitution. It demonstrates that in the factual setting of the *Lefthand* case and similar cases, these federal rights are not violated when the police obtain a waiver of the right to counsel from the suspect without counsel being present or having been notified, and subsequent statements are admissible under federal law.

This Article then examines the right to counsel provided suspects under Minnesota state law. In particular, the Article focuses on the *Lefthand* case and the cases to which the *Lefthand* court referred as giving "notice of our 'strong[] disapprov[al]' of the practice engaged in by the government. The Article argues that these cases, especially when read in the context of the Minnesota Supreme Court's history of "jealously guard[ing]" the right to counsel, require the court to apply the right recognized in *Lefthand* to all suspects who have asserted their right to counsel, regardless of whether they are within the narrow fact situation at issue in *Lefthand.s* As demonstrated below, such a rule is necessary to protect adequately the right to counsel so highly valued by the Minnesota Supreme Court.

Keywords
Right to counsel, Police questioning--Minnesota

Disciplines
Criminal Law

EXTENDING THE GUIDING *LEFTHAND* OF COUNSEL: THE MINNESOTA SUPREME COURT PROVIDES PROTECTION AGAINST UNCOUNSELED WAIVERS OF THE RIGHT TO COUNSEL DURING INTERROGATIONS

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I. INTRODUCTION

Attempting to obtain a statement from a suspect can be a precarious endeavor for law enforcement agents. In particular, an agent must be aware of and respect the two rights to counsel enjoyed by the suspect under the United States Constitution: the Fifth Amendment right to counsel and the Sixth Amendment right to counsel. These rights overlap significantly, but are by no means concurrent. For each right, the officer faces different rules as to when the right attaches, the need to inform the suspect of the right, the government conduct prohibited once the right has attached, the effect of an assertion of the right by the defendant, and the requirements for a valid waiver of the right. The risks posed by the complex and confusing rules under the federal constitution can be exacerbated by additional protections state courts impose under state constitutions and state ethical rules.

In *State v. Lefthand*,[1] the Minnesota Supreme Court, relying on the suspect's right to counsel under the state and federal constitution, as well as state rules of professional conduct, exercised its supervisory power to rule that statements obtained during in-custody interrogations of formally accused suspects represented by counsel are subject to exclusion at trial, despite a waiver by the suspect, unless counsel is present at the interrogation or has been notified of the interrogation.[2] Because the suspect in *Lefthand* not only waived his right to counsel, but also initiated the interrogation by the police, the Minnesota Supreme Court's ruling is a significant expansion of the rights

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1. 488 N.W.2d 799 (Minn. 1992).
2. *Id.* at 801-02.

enjoyed by the defendant under the federal constitution.[3] Moreover, the court's reliance on the state rules of professional conduct and on cases in which statements were obtained from suspects who either had not been formally charged or were not in custody suggests that the court's rule extends beyond the narrow holding of the *Lefthand* case.

It is the thesis of this Article that the cases on which the Minnesota Supreme Court in *Lefthand* relied and the policy concerns that motivated the court suggest that the rule of *Lefthand* should apply to any suspect who has asserted her right to counsel, regardless of whether that suspect is in custody, formally charged, or formally represented by counsel. If the court's ruling in *Lefthand* is carried to its logical scope, law enforcement officers and prosecutors in Minnesota may find that very early in the criminal justice process they are precluded from obtaining waivers of the right to counsel from suspects in order to obtain a statement, unless the suspect's attorney is present or has been notified prior to any interrogation.

This Article first briefly reviews the current law regarding right to counsel under the Fifth and Sixth Amendments to the United States Constitution.[4] It demonstrates that in the factual setting of the *Lefthand* case and similar cases, these federal rights are not violated when the police obtain a waiver of the right to counsel from the suspect without counsel being present or having been notified, and subsequent statements are admissible under federal law.

This Article then examines the right to counsel provided suspects under Minnesota state law.[5] In particular, the Article focuses on the *Lefthand* case and the cases to which the *Lefthand* court referred as giving "notice of our 'strong[] disapprov[al]'" of the practice engaged in by the government.[6] The Article argues that these cases, especially when read in the context of the Minnesota Supreme Court's history of "jealously guard[ing]" the right to counsel,[7] require the court to apply the right recognized in *Lefthand* to all suspects who have asserted their right to counsel, regardless of whether they are within

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3. The court justified providing protections beyond the requirements of federal law, stating, "[e]ven the United States Supreme Court has acknowledged states are free to adopt 'different requirements for the conduct of its employees and officials as a matter of state law.'" *Id.* at 802 n.7 (quoting Moran v. Burbine, 475 U.S. 412, 428 (1986)).

4. *See infra* notes 12-40 and accompanying text.

5. *See infra* notes 41-69 and accompanying text.

6. 488 N.W.2d at 801 (quoting State v. Renfrew, 159 N.W.2d 111, 113 (Minn. 1968)).

7. *Id.* at 801 & n.5.

the narrow fact situation at issue in *Lefthand*.[8] As demonstrated below, such a rule is necessary to protect adequately the right to counsel so highly valued by the Minnesota Supreme Court.[9]

The rule of *Lefthand* was imposed by the court, at least in part, to effectuate the policies underlying Minnesota Rule of Professional Conduct 4.2, which prohibits communications between a lawyer and "a party the lawyer knows to be represented by another lawyer."[10] Unlike the right to counsel under the Fifth and Sixth Amendments, the protections of Rule 4.2 are not limited to situations in which a person is formally accused or is in custody. Instead, the rule is triggered when a party is simply represented by an attorney. Similarly, because the government controls when a suspect is "in custody" or is "formally charged," a rule that triggers the protection of *Lefthand* at the point a suspect is represented by counsel is necessary in order to prevent the *Lefthand* rule from being circumvented at will by the government.[11] Further, the *Lefthand* rule should not depend on the suspect being formally represented by counsel, a fact that may depend on the fortuity of successfully contacting and retaining an attorney with one phone call. Instead, the protections of *Lefthand* should be triggered whenever a suspect from whom the government seeks an incriminating statement indicates a desire for the assistance of counsel in making the decision whether to cooperate. Although such a rule potentially advances the "attachment" of the right to counsel to a point earlier than the facts of *Lefthand*, such a rule is necessary to provide consistent protection for suspects from whom the government is seeking cooperation.

II. The Federal Right to Counsel Under the Fifth and Sixth Amendments

The United States Supreme Court long has recognized the importance of counsel in the interrogation context. In several early decisions based on due process, the Court relied on the fact that suspects were prevented from consulting with an attorney to overturn

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8. *See infra* notes 70-133 and accompanying text.

9. *See infra* notes 134-47 and accompanying text.

10. Minn. R. Prof. Conduct 4.2 (1993); *Lefthand*, 488 N.W.2d at 801 n.6.

11. *See* United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988); United States v. Jamail, 546 F.2d 646, 656 (E.D.N.Y. 1982), *rev'd on other grounds*, 707 F.2d 638 (2d Cir. 1983); Wayne R. LaFave, Criminal Procedure § 6.5 at 313 (2d ed. 1992). *But see* Marc A. Schwartz, *Prosecutorial Investigations and DR 7-104(A)(1)*, 89 Colum. L. Rev. 940, 954 n.97 (1989).

convictions obtained with involuntary confessions.[12] In later confession cases, the Court recognized a right to counsel during interrogation grounded in the Sixth Amendment.[13] When the Court decided *Miranda v. Arizona*[14] and established a right to counsel based on the Fifth Amendment, however, the due process and Sixth Amendment cases moved to the background.[15] But recent cases have made clear that the Fifth and Sixth Amendment rights to counsel are both significant. As Professor Dressler states: "It is necessary to treat the Fifth Amendment and Sixth Amendment versions of the right to counsel separately. They attach at different times . . . , under different circumstances, and for somewhat different reasons."[16]

A. Fifth Amendment Right to Counsel

Although the Fifth Amendment does not expressly provide a right to counsel, in *Miranda v. Arizona*[17] the United States Supreme Court recognized that the right to have counsel present during custodial interrogations was "indispensable to the protection of the Fifth Amendment privilege" against compelled testimony.[18] The Court thus created what is known as the Fifth Amendment or *Miranda* right to counsel.[19] Prior to custodial interrogation, the suspect must be informed of the right to representation by counsel and the right to have an attorney present during any questioning. The suspect may waive the right, but if a suspect at any time invokes this right "the interrogation must cease until an attorney is present."[20] Without an attorney, the suspect may be questioned only if the suspect "initiates further communication, exchanges, or conversations with the police."[21]

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12. CHARLES H. WHITEBREAD, CRIMINAL PROCEDURE 372 (1992).

13. Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964).

14. 384 U.S. 436 (1966).

15. *See* WHITEBREAD, *supra* note 12, at 378; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 314 (1991).

16. DRESSLER, *supra* note 15, at 265.

17. 384 U.S. 436 (1966).

18. *Id.* at 469.

19. *Id.* at 470. *See also*, DRESSLER, *supra* note 15, at 265.

20. *Miranda*, 384 U.S. at 474.

21. Edwards v. Arizona, 451 U.S. 477 (1981). The *Miranda* decision itself stated only that once a suspect asserts her right to counsel the interrogation must cease until an attorney is present. The opinion did not indicate whether or under what circumstances interrogation could continue without an attorney's presence. In *Edwards*, the court clarified the procedure

This rule applies to questioning about unrelated crimes[22] and remains in force even after the suspect has consulted with an attorney.[23] However, once the suspect initiates communication with the police, she is free again to waive the Fifth Amendment right to counsel.[24] The *Miranda* rule only applies to custodial interrogation. Therefore, it does not prohibit interrogation of suspects not in custody or communication with a suspect in custody that does not amount to interrogation, even if it results in incriminating statements.[25] The rule further does not apply to questioning by undercover

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to be followed when a suspect asserts the right to counsel. In that case, police officers returned to interrogate the suspect despite his statement a day earlier that he "'want[ed] an attorney before making a deal.'" *Id.* at 479 (quoting the defendant). Although the defendant alleged that his jailer told him "he had" to talk to the officers, it was undisputed that the officers reread him his *Miranda* rights and he agreed to talk. The Supreme Court rejected the state court's conclusion that defendant's subsequent statement was admissible because the statement was voluntary. The Court established a per se rule to deal with situations where the defendant asserts the right to counsel during interrogations, stating:

> We further hold that an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Id. at 484-85. A different rule, requiring that police "scrupulously honor" a defendant's assertion of her rights, but not setting forth a bright line rule, applies if the defendant asserts her right to remain silent, rather than her right to counsel, during custodial interrogation. *See Michigan v. Mosley*, 423 U.S. 96 (1975).

22. Arizona v. Roberson, 486 U.S. 675 (1981).

23. Minnick v. Mississippi, 498 U.S. 146 (1990). In *Minnick*, the defendant was being held in California on a Mississippi warrant for suspicion of murder. During interrogation by F.B.I. agents, defendant asserted his right to counsel. Over the next day or two, the defendant consulted with appointed counsel two or three times. Subsequently, a deputy sheriff from Mississippi arrived to question the defendant. Defendant was readvised of his rights and made a statement. The United States Supreme Court suppressed the statement made to the deputy sheriff on the authority of *Edwards v. Arizona*. *See supra* note 21. The Court stated that "*Edwards* is 'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.' . . . The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." *Minnick*, 498 U.S. at 150, 151. Therefore, the Court refused to have the protection of *Edwards* "terminate[] once counsel has consulted with the suspect." *Id.* at 151. Instead, the Court held that absent initiation by the defendant, only the actual presence of counsel at the interrogation would suffice to provide adequate assurances that defendant's rights were being honored. *Id.* at 152-53.

24. Oregon v. Bradshaw, 462 U.S. 1039 (1983). In *Bradshaw*, a plurality of the Court held that the defendant's statement "Well, what is going to happen to me now?" following an assertion of his right to counsel "evinced a willingness and a desire for a generalized discussion about the investigation" sufficient to allow the police to seek a waiver and conduct an interrogation following a lie detector test the following day. *Id.* at 1045-47.

25. Rhode Island v. Innis, 446 U.S. 291 (1980). In *Innis*, the suspect agreed to reveal the location of the murder weapon following a conversation between officers in the front seat of the patrol car in which he was sitting concerning the possibility of the weapon coming into

officers, even if the suspect is in custody.[26]

B. Sixth Amendment Right to Counsel

As mentioned above, although the right to the presence of counsel during interrogations under the Sixth Amendment was recognized very early by the Supreme Court,[27] the right faded to the background after the *Miranda* decision.[28] A decade after *Miranda* the court reaffirmed the independent significance of the Sixth Amendment right to counsel in *Brewer v. Williams*.[29] In *Brewer*, the Supreme Court held that statements made by a police officer while transporting a suspect between two cities violated the Sixth Amendment because it amounted to a deliberate attempt to elicit information from the defendant after his Sixth Amendment right to counsel had attached.[30] The case reinvigorated the Sixth Amendment right to counsel in the interrogation context because the Court expressly chose not to decide the case based on *Miranda* despite its apparent applicability.[31] Subsequent cases made clear that although the Sixth Amendment right may overlap the Fifth Amendment right, the rights are grounded on different analytical bases and demand separate rules.[32]

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the hands of some children from a nearby school for handicapped children. *Id.* at 294-95. Although defendant had asserted his right to counsel prior to being placed in the squad car, the Supreme Court ruled that his *Miranda* rights had not been violated because the discussion by the police did not amount to interrogation. *Id.* at 302. The Court defined interrogation as either express questioning or its "functional equivalent," defining that to mean "words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response." *Id.* The Court ruled that the conversation by the police officers did not amount to interrogation under the announced test. *Id.* at 303.

26. Illinois v. Perkins, 496 U.S. 292 (1990). In *Perkins*, the defendant made incriminating statements while in prison to an undercover agent posing as a cellmate. *Id.* at 295. The Court held that

> [c]onversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*. The essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate. Coercion is determined from the perspective of the suspect. . . . Questioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will, but where a suspect does not know that he is conversing with a government agent, these pressures do not exist.

Id. at 296-97.

27. *See supra* notes 12-15 and accompanying text.

28. *See* WHITEBREAD, *supra* note 12, at 378.

29. 430 U.S. 387 (1977).

30. *Id.* The right had attached because the defendant had been arraigned by a judge before being transported.

31. *Id.* at 397. *See* Yale Kamisar, Brewer v. Williams, Massiah, *and* Miranda: *What is 'Interrogation'? When Does It Matter?*, 67 GEO. L.J. 1, 3-4 & n.25, 24-33 (1978).

32. *See Perkins*, 496 U.S. at 299; *Innis*, 446 U.S. at 300 n.4.

The Sixth Amendment right to counsel attaches only when the criminal justice process has advanced from investigatory to accusatory. It is triggered "by any event which indicates that the government has committed itself to prosecute, 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'"[33] Prior to such an event, the right simply is inapplicable.[34] This is true even if the suspect has retained counsel.[35] When the right does attach, it attaches only for the crime to which the triggering event (i.e. formal charge, indictment, etc.) relates.[36]

Once the right to counsel has attached for a particular crime, the government is prevented from "deliberately eliciting" information from the defendant unless a waiver is obtained or counsel is present. Unlike the Fifth Amendment right, this prohibition applies even when the defendant is not in custody and applies to undercover or otherwise surreptitious activities that amount to "deliberate elicitation."[37]

The Sixth Amendment right can be waived in the absence of counsel, and it is in the area of waiver that the rules governing the Sixth Amendment right to counsel most closely resemble those governing the Fifth Amendment right. After the Sixth Amendment right to counsel has attached, but before the defendant has actually requested counsel, police may seek a waiver of the right from the suspect in the absence of counsel. The waiver must be knowing, intelligent, and voluntary, but the typical *Miranda* warnings and waiver will suffice.[38] Once counsel has been requested, a rule analogous to the rule of *Edwards* in the Fifth Amendment context applies. The government may not deliberately seek to elicit information from the suspect, or even seek a waiver of the right to counsel, unless the defendant initiates further communications, exchanges, or conversations with the government.[39] The same rule likely applies where the defendant has hired or has been appointed a lawyer, even absent a specific request for counsel by the defendant.[40]

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33. WHITEBREAD, *supra* note 12, at 413 (quoting Kirby v. Illinois, 406 U.S. 682 (1972)).
34. Maine v. Moulten, 474 U.S. 159 (1985); Kirby v. Illinois, 406 U.S. 682 (1972).
35. Moran v. Burbine, 475 U.S. 412 (1986); WHITEBREAD, *supra* note 12, at 414.
36. *Moulten*, 474 U.S. 159.
37. *See Moulten*, 474 U.S. 159; United States v. Henry, 447 U.S. 264 (1980); Massiah v. United States, 377 U.S. 201 (1964).
38. Patterson v. Illinois, 474 U.S. 159 (1985).
39. Michigan v. Jackson, 475 U.S. 625 (1986).
40. DRESSLER, *supra* note 15, at 327; WHITEBREAD, *supra* note 12, at 417.

III. THE RIGHT TO COUNSEL UNDER MINNESOTA STATE LAW: *State v. Lefthand*

Prior to *Lefthand*, Minnesota law pertaining to the right to counsel during interrogations generally paralleled federal law. Although the Minnesota Supreme Court had extended the right to counsel beyond the federal protections to provide suspects the right to consult with an attorney prior to deciding whether to submit to blood alcohol testing,[41] no similar expansion beyond the federal protections had taken place in the area of obtaining statements from suspects.[42] The court on occasion expressed disapproval of interrogations of suspects who had already retained counsel, but had never suppressed a statement that was the fruit of such interrogation on grounds independent of the federal constitution.[43] Thus, prior to

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41. Freidman v. Comm'r of Pub. Safety, 473 N.W.2d 828 (Minn. 1991). The court held that because chemical testing is a critical stage in DWI proceedings, the right to counsel attaches. The United States Supreme Court had rejected such a position, South Dakota v. Neville, 459 U.S. 553 (1983), and in fact, long ago rejected the "critical stage" test for applicability of right to counsel in favor of the "trial-like confrontation" test. United States v. Ash, 388 U.S. 263 (1967); *see* WHITEBREAD, *supra* note 12, at 846-47. Moreover, under federal law, even if the suspect is subjected to a "trial-like confrontation," the Sixth Amendment is not applicable unless the confrontation takes place after the initiation of adversary proceedings, Kirby v. Illinois, 406 U.S. 682 (1972); *see* WHITEBREAD, *supra* note 12, at 849.

42. Minnesota law also provides greater protection for the right of indigents to representation at trial. *See Lefthand*, 488 N.W.2d at 801 & n.5.

43. The court had expressed its disapproval in at least four cases. In State v. Renfrew, 159 N.W.2d 111 (Minn. 1968), the defendant had consulted with counsel, but later initiated communication with the police and waived his right to counsel. Although the court ruled that the procedure was lawful under federal law (the *Miranda* decision was released on the very day defendant's suppression motion was denied), the court went on to state: "Even where a defendant voluntarily and intelligently waives his constitutional rights, we strongly disapprove of in-custody interrogations if defendant is represented by counsel and counsel has not had an opportunity to be present at the questioning." *Id.* at 113. Nevertheless, the court went on to rule, "However, we cannot say that under the circumstances of this case the trial court was not justified in receiving the confession." *Id.* The circumstances to which the court was referring seemed to be its belief that defendant confessed due to pressure from his mother and not the police. The court ruled that "[s]ince . . . the record supports a finding that the confession was given voluntarily and with an understanding of defendant's constitutional rights, we hold that it was properly received in evidence." *Id.* In State v. Fossen, 255 N.W.2d 357 (Minn. 1977), the court again expressed disapproval of "the interrogation of an accused in the absence of already retained counsel." *Id.* at 362. The court, however, suppressed the statement due to violations of defendant's *Miranda* rights and declined to adopt a rule that "statements of an accused who has retained counsel, made in the absence of counsel, are per se inadmissible." *Id.* In State v. Giddings, 290 N.W.2d 595 (Minn. 1980), the court suppressed defendant's confession because the state failed to prove a knowing and intelligent waiver of defendant's Sixth Amendment right to counsel, which had attached when he appeared in court and had counsel appointed. Although the lack of counsel's presence was a factor in the court's

Lefthand, government officials in Minnesota likely felt confident that honoring defendants' rights under the Fifth and Sixth Amendments of the United States Constitution was the only prerequisite to gaining an admissible confession.[44] *State v. Lefthand* expressly changed that presumption with regard to "in-custody interrogation[s] of a formally accused person who is represented by counsel," and arguably has set the stage for an even broader application of the right to counsel under Minnesota law.[45]

In *State v. Lefthand*,[46] the defendant was in custody awaiting trial on two murder charges.[47] He had appeared in court and the public defender's office had been appointed to represent him. A specific attorney in the public defender's office was defending Mr. Lefthand, a fact of which the police were aware.[48] In response to a request by Mr. Lefthand, the officers investigating his case went to his cell and took a statement from him. They did so only after contacting the prosecuting attorney and being "advised they could go ahead and do it."[49] Mr. Lefthand initiated the encounter and expressly waived his right to counsel prior to the interrogation.[50]

In the Supreme Court, the attorneys for Mr. Lefthand argued that his statement should be excluded because Mr. Lefthand's right to counsel had attached and had not been validly waived. In the defense view, the fact that the police had interrogated the defendant

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decision that the waiver was improper, and the court again expressed its disapproval of "both custodial and noncustodial interrogation of defendants who are represented by counsel," the court again refused to adopt a per se rule of inadmissibility for statements so obtained. *Id.* at 597 & n.3. *See also* State v. Ture, 353 N.W.2d 502, 511 (Minn. 1984) (expressing disapproval of "custodial and noncustodial interrogations of accused represented by counsel who is not present," but refusing to adopt a per se rule barring admissibility of statements where the suspect is represented in a different matter).

44. This certainly was the view of the prosecutor in the *Lefthand* case. The government's brief states: "In their brief, the State Public Defender's Office . . . suggests that there was some kind of duty on the part of the officers . . . to contact [defendant's] lawyer before honoring [defendant's] request to come to the jail and talk with him. There is absolutely no authority . . . that requires this kind of conduct on the part of the police or th[e] prosecutor. Quite to the contrary, the United States Supreme Court has made it absolutely clear in the decision of *Moran v Burbine*, . . . that the Sixth Amendment right belongs to the accused, and not the accused's lawyer." Respondent's Brief at 29, *Lefthand* (No. C2-91-1937).

45. *See infra* notes 69-145 and accompanying text.

46. 488 N.W.2d 799 (Minn. 1992).

47. *Id.* at 800.

48. *Id.*

49. Respondent's Brief at 31-32, *Lefthand* (No. C2-91-1937).

50. Respondent's Brief at 28-29, *Lefthand* (No. C2-91-1937).

"behind his lawyer's back" precluded a finding that the waiver was "voluntary, knowing, and intelligent."[51] The defense also argued that because the prosecutor condoned the interrogation of the defendant in the absence of counsel, the prosecutor violated Minnesota Rule of Professional Conduct 4.2, which prohibits a lawyer from communicating with a party the lawyer knows is represented by counsel.[52] The defense contended that a violation of Rule 4.2 in a criminal case justified utilization of the exclusionary rule.[53]

The government responded to the argument that the defendant's Sixth Amendment rights had been violated by relying on the federal rule that "not only does an accused have a right to counsel, but they have also a right to waive that right."[54] In the government's view, United States Supreme Court precedents controlled the case. Under the federal rule, a suspect can waive her Sixth Amendment right to counsel even after the right has attached and been asserted, provided the suspect initiates the conversation with the government that leads to the waiver.[55] Thus, according to the government, because Mr. Lefthand initiated the conversation and knowingly and voluntarily waived his right to counsel, the statement was admissible.[56]

The government also took great issue with the ethical violation alleged by the defense, asserting that "[t]here is no merit to this malicious and extremely serious attack . . . ."[57] The government argued that no precedent existed to support the defense allegation.[58] The government took the position that under federal case law, the officers were "authorized by law" to interrogate the defendant and thus were permitted by the terms of the Rule to talk to the defendant.[59]

In a very brief opinion, the Minnesota Supreme Court disagreed with virtually every contention made by the government.[60] The court

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51. Appellant's Brief at 29, *Lefthand* (No. C2-91-1937).

52. MINN. R. PROF. CONDUCT 4.2 (1993); Respondent's Brief at 30, *Lefthand* (No. C2-91-1937).

53. Appellant's Brief at 30-32, *Lefthand* (No. C2-91-1937).

54. Respondent's Brief at 25, *Lefthand* (No. C2-91-1937).

55. Michigan v. Jackson, 475 U.S. 625 (1986). *See* discussion at *supra* notes 38-40 and accompanying text.

56. Respondent's Brief at 30-31, *Lefthand* (No. C2-91-1937).

57. Respondent's Brief at 32, *Lefthand* (No. C2-91-1937).

58. This assertion by the government overstated the case. Although no case had clearly found a violation of Rule 4.2 in the fact situation presented by the *Lefthand* case, ample case law existed for the proposition that the rule applied to prosecutors. *See Lefthand*, 488 N.W.2d at 806 n.6.

59. Respondent's Brief at 31-32, *Lefthand* (No. C2-91-1937).

60. The portion of the opinion dealing with the issue of defendant's interrogation is only one page in length.

first noted that "[b]oth the federal and state constitutions guarantee anyone who is charged with a criminal offense the right to the assistance of counsel in his defense."[61] The court emphasized that the right had been "jealously guarded" in Minnesota, suggesting the state protection may be even greater than the federal protection. The court agreed with the government that the United States Supreme Court permits defendants to waive the right to counsel, but declared, "waiver is not the problem here."[62]

The court then cited *State v. Renfrew*[63] for the proposition that the court "long ago" had given notice of its strong disapproval of in-custody interrogations if the defendant is represented by counsel and counsel has not had an opportunity to be present at the questioning. The court cited *State v. Giddings*[64] and *State v. Fossen*[65] for the proposition that the court had reiterated its disapproval of the practice "in the strongest of terms."[66] In response to the government's contention that these cases were "mere dicta," the court stated that it was "incomprehensible that the attorney-client relationship in the context of a criminal proceeding would be so cavalierly disregarded."[67] The court added a footnote at this point to emphasize its "dismay" at the State's belief that Minnesota Rule of Professional Conduct 4.2 did not apply to prosecutors in this context.[68] The court then stated its holding in the case before it:

> As the highest court of this state, we are independently responsible for safeguarding the rights of our citizens. Accordingly, lest there be any doubt, in the exercise of our supervisory power to insure the fair administration of justice in this and future cases, we decide that in-custody interrogation of a formally accused person who is represented by counsel should not proceed prior to notification of counsel or the presence of counsel. Statements obtained without notice to or the presence of counsel are subject to exclusion at trial.[69]

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61. *Lefthand*, 488 N.W.2d at 801 (footnotes omitted).
62. *Id.*
63. 159 N.W.2d 111 (Minn. 1968).
64. 290 N.W.2d 595 (Minn. 1980).
65. 255 N.W.2d 357 (Minn. 1977).
66. *Lefthand*, 488 N.W.2d at 801.
67. *Id.*
68. *Id.* at 801 n.6.
69. *Id.* at 801-02 (footnotes omitted).

IV. The Right to Counsel in Minnesota After *Lefthand*

In *Lefthand*, the Minnesota Supreme Court clarified the protections provided by state law to suspects in the precise position in which Mr. Lefthand found himself: formally accused individuals represented by counsel and facing custodial interrogation by law enforcement officials. In doing so, the court extended to suspects in Mr. Lefthand's situation protection beyond that available under the Fifth and Sixth Amendments of the federal constitution. However, by grounding these new protections in the court's supervisory power, the court created uncertainty regarding the applicability of this protection to individuals in situations different from Mr. Lefthand's. The court expressed concern for Mr. Lefthand's right to counsel under both the Sixth Amendment to the United States Constitution and Article 1 section 6 of the Minnesota Constitution, as well as concern that a violation of the professional rules of ethics had occurred. The court's opinion also contains references to concerns normally addressed through Fifth Amendment protections. Because the policies underlying each of these rights and the abuses they are designed to protect against vary, the scope of the protection the court sought to provide is ambiguous. The concerns expressed by the court require a rule that transgresses the protections provided by the Fifth and Sixth Amendments. In fact, the concerns expressed suggest the need for protection beyond the narrow confines of the rule the court expressed in its holding. That the court intended broader protection than the narrow rule of the case is indicated by the fact that although the court stated its holding extremely narrowly, it cited cases for support that extend beyond that narrow holding. Thus, the opinion raises uncertainty regarding the rights of suspects in future cases that do not meet all the apparent prerequisites of the new rule. Despite the court's narrow holding, many of these cases seemingly should be governed by the new rule because they fall within the scope of the cases cited by the court in *Lefthand* and the apparent policy reasons that motivated the ruling in the case.

The references in *Lefthand* to formally accused individuals suggests a Sixth Amendment basis for the decision. The federal Sixth Amendment right to counsel is designed to prevent the government from circumventing the adversarial system envisioned by that amendment. The right attaches once the process has advanced from investigatory to prosecutorial. That is, when the government indicates its decision to prosecute through formal charge, arraignment, indictment, or some other formal judicial proceeding. This right does not

depend on an actual attorney-client relationship. Once judicial proceedings have been initiated, the suspect enjoys the Sixth Amendment right to counsel even if no counsel has been hired or appointed. Prior to judicial proceedings, even an actual attorney-client relationship is ineffective in triggering the protections of the Amendment.[70] In addition, at least in the federal system, the right is viewed as the client's right, not the attorney's. It can not be asserted by the attorney, and even after the client has asserted the right, the client is free to waive the right unilaterally.[71]

Thus, if the Sixth Amendment right to counsel formed the basis of the *Lefthand* decision, it would signal a rejection by the Minnesota Court of the United States Supreme Court's Sixth Amendment precedents which accept waivers of the right to counsel by clients in the absence of counsel as knowing and voluntary. It is likely that the court did intend to provide protection beyond the federal Sixth Amendment right. The court cited both the federal and state provisions guaranteeing the right to counsel and emphasized that the right to counsel has been "jealously guarded" in Minnesota.[72] The court also cited instances where the court had expanded the right beyond the federal right and specifically noted its authority to do so. At least one commentator has criticized the United States Supreme Court for accepting waivers in the absence of counsel after the defendant has been formally charged,[73] and skepticism that waivers in the absence of counsel were knowing and voluntary has motivated, in

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70. *See supra* notes 33-36 and accompanying text.

71. In *Brewer v. Williams*, the Supreme Court found that a defendant who had been arraigned and had retained counsel had not waived his right to counsel, but explicitly stated that it was not promulgating a blanket rule preventing such a waiver without notice to counsel. 430 U.S. 387 (1977). The Court stated, "nor do we [hold] that under the circumstances of this case [defendant] *could not*, without notice to counsel, have waived his rights [to counsel] under the Sixth and Fourteenth Amendments." *Id.* at 405-06. In *Patterson v. Illinois*, the Supreme Court upheld a waiver of the right to counsel following *Miranda* warnings by a defendant who had been indicted. 487 U.S. 285 (1988). The majority declined to adopt a rule requiring the presence of counsel as advocated by the three dissenting justices. *Id.* The Court did state that "once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." *Id.* at 290 n.3. However, the Court did not specify these safeguards and commentators have not interpreted this statement to mean the presence of counsel would be required for a valid waiver. *See* WHITEBREAD, *supra* note 12, at 417; DRESSLER, *supra* note 15, at 327; LAFAVE, *supra* note 11, at 308.

72. *Lefthand*, 488 N.W.2d at 801.

73. *See* WHITEBREAD, *supra* note 12, at 417.

part, the Minnesota Supreme Court's expressions of disapproval of such waivers.[74] Such skepticism apparently played a role in the *Lefthand* decision itself. The court noted that the waiver and interrogation in question occurred "at the time [Lefthand's] competency was in question."[75]

It certainly is possible that the Minnesota Supreme Court was utilizing the state constitution to expand the protections of the federal right to counsel under the Sixth Amendment. However, under federal law, if the right has attached and has not been waived, it prevents all attempts to elicit deliberately information from the defendant, not only those attempts that are coercive, such as custodial interrogation. Thus, if the *Lefthand* court was basing its decision on an expanded Sixth Amendment right to counsel it would explain the limitation to formally accused individuals, but would be inconsistent with the limitation to suspects in custody.

The reference to custody in the *Lefthand* holding is more suggestive of the policies underlying the Fifth Amendment right to counsel than the policies underlying the Sixth Amendment right to counsel. The Fifth Amendment right was recognized in *Miranda* as necessary to protect the suspect's right against compelled testimony in inherently coercive situations such as custodial interrogations. Because this right is grounded in the Fifth Amendment, it is not dependent on the initiation of the adversarial process with which the Sixth Amendment is concerned. If the policies underlying the Fifth Amendment right to counsel were the concern of the Minnesota Court, however, the limitation to formally accused individuals (a Sixth Amendment concern) should not be controlling. Moreover, the United States Supreme Court has indicated its strong belief that the Fifth Amendment right to counsel is the suspect's, not the attorney's, and has willingly accepted waivers of the right by clients in absence of counsel.[76] Thus, if the *Lefthand* decision was based on the Fifth Amendment right to counsel, the court once again would be expanding the federal right. Unlike the Sixth Amendment, however, it is unlikely that the *Lefthand* court sought to expand the Fifth Amendment rulings of the United States Supreme Court. Despite the apparent concern over the voluntariness of Mr. Lefthand's waiver and

74. *See* Giddings v. State, 290 N.W.2d 595, 597-98 (Minn. 1980); State v. Hull, 269 N.W.2d 905, 909 (Minn. 1978).

75. *Lefthand*, 488 N.W.2d at 801.

76. *See* Moran v. Burbine, 475 U.S. 412 (1986) (accepting waiver of right to counsel by suspect despite attorney's phone call to police and attempts to prevent interrogation in her absence).

confession, the court did not cite the Fifth Amendment in its decision. Moreover, the cases cited by the court suggest that despite the narrow holding of the case, the *Lefthand* rule is not limited to suspects in custody. For example, in *Lefthand* the court cited *Giddings v. State*[77] as a case in which it had "reiterated [its] disapproval of the practice [of interrogating suspects in the absence of counsel] 'in the strongest of terms.'"[78] Yet despite the *Lefthand* court's reference to "in-custody interrogations" in its ultimate holding, the defendant in *Giddings* was not in custody when the interrogation in that case occurred.[79] In addition, in *Giddings* and a later case, the Minnesota Supreme Court expressly stated its disapproval of "*both* custodial *and* noncustodial interrogation of defendants who are represented by counsel."[80] Similarly, the cases cited by the *Lefthand* court also suggest that the limitation to formally accused individuals in the holding of *Lefthand* was not meant to be controlling in future cases. These cases suggest instead that representation by counsel is the event that should trigger the protections of the *Lefthand* holding.

In *Lefthand*, the court cited *State v. Fossen*[81] for the same proposition for which it had cited *Giddings*, that the court had reiterated its strong disapproval of interrogation of suspects in the absence of counsel.[82] But again, despite the court's reference to "formally accused" in its holding in *Lefthand*,[83] the suspect in *Fossen* had not been formally accused. Suspicion had focused on the defendant, he had been arrested and booked, and he had spoken to retained counsel, but apparently he had not been formally accused through a complaint, indictment, or an appearance before a judge.[84] Although the actual basis for the *Fossen* court's exclusion of the defendant's statement was a violation of the defendant's Fifth Amendment right to counsel by failing to give adequate *Miranda* warnings, the court stated that its opinion was "buttressed by the fact that no attempt was made by any law enforcement officer to

77. 290 N.W.2d 595 (Minn. 1980).

78. 488 N.W.2d at 801.

79. 290 N.W.2d at 596.

80. *Giddings*, 290 N.W.2d at 597 n.3 (emphasis added); State v. Ture, 353 N.W.2d 502, 511 (Minn. 1984). Footnote three in *Giddings* is the precise footnote cited by the *Lefthand* court to support its holding. *Lefthand*, 488 N.W.2d at 801.

81. 255 N.W.2d 357 (Minn. 1977).

82. 488 N.W.2d at 801.

83. *Id.* at 801-02.

84. *Fossen*, 255 N.W.2d at 359-60.

insure that defendant's counsel was notified of the interrogation and afforded the opportunity to be present."[85]

Another case, *State v. Hull*,[86] although not cited by the court in *Lefthand*, supports the proposition that the rule of *Lefthand* extends beyond the narrow holding of the case. In *Hull*, the defendant was arrested for murder on the same day the crime had occurred.[87] From jail the next day, he contacted an attorney who was currently representing him on a child custody matter. The attorney visited the defendant at the jail but accomplished little because, according to the attorney, the defendant was "disheveled and wide-eyed" and seemed to be "experiencing very severe withdrawal symptoms" during their conversation. As a result, defendant's statements "made no sense at all to [the attorney]."[88] The attorney determined that it would be more productive to meet with the defendant later "when he simmered down and made some sense."[89] Before leaving the jail, the attorney told the defendant he would represent him on the matter and advised him not to speak to anyone. The attorney also requested of the sheriff that no one speak to the defendant until the attorney met with him a second time.[90]

Later the same day, investigators from the county where the murder had occurred arrived at the jail, obtained a waiver of defendant's *Miranda* rights, and questioned the defendant for twenty to thirty minutes. The interrogation ended when the detectives left to make arrangements to transport the defendant back to the county where the murder occurred. At this point, the defendant attempted to contact his attorney by phone, but was unable to do so. On the plane ride back to the county where the crime occurred, defendant initiated conversations about the crime with the investigators and answered questions.[91] On arrival at the jail in the county of the crime, defendant received a teletype from his attorney advising him not to talk and promising a visit the next day.[92] Nevertheless, the

85. *Id.* at 362.
86. 269 N.W.2d 905 (Minn. 1984).
87. *Id.* at 907.
88. *Id.*
89. *Id.*
90. *Hull*, 269 N.W.2d at 907.
91. Each time the defendant made overtures to the investigators concerning the murder, the investigators reminded him that he had no obligation to speak but did not readvise him of his complete *Miranda* warnings. Eventually the investigators began to ask specific questions. *Id.* at 908.
92. The attorney's plane had been forced down by bad weather. *Id.*

defendant indicated a willingness to continue talking, signed a waiver statement on the teletype, and answered additional questions.[93]

Defendant later argued that the admission of the statements taken after he had retained counsel and counsel had specifically requested the police not to question him "was constitutionally impermissible."[94] Although the defendant had not been "formally accused," the Minnesota Supreme Court acknowledged that the defendant's contention was supported by two previous decisions, *Renfrew* and *Fossen*. The court stated that under the circumstances of the case, "the presence of retained counsel is extremely important for the intelligent waiver of a constitutional right and for the continued exercise of the right to legal representation."[95] The court acknowledged that the investigators "were in diligent pursuit of the perpetrator of a heinous crime," but stated it "could only express unqualified approval of their actions had the officers afforded defense counsel a reasonable opportunity to be present for the waiver of defendant's rights."[96] The court avoided deciding whether to approve the officers' actions by holding the admission of defendant's statement to be harmless error.[97]

Although the *Hull* court failed to decide the issue later raised in *Lefthand*, the court's discussion indicates that formal accusation is not crucial to gaining the protection later provided in *Lefthand*. The common denominator in *Hull* and the cases cited in *Lefthand* is that the defendant was represented by counsel at the time of the interrogation. Read together, these cases indicate representation by counsel, rather than custody or formal accusation, is crucial to the application of the *Lefthand* rule. The *Lefthand* court's reliance on Minnesota Rule of Professional Conduct 4.2 and its expression of concern for the attorney-client relationship, rather than the abstract constitutional right to counsel, further support the conclusion that the *Lefthand* rule is activated at the point counsel is retained rather than at the point of custody or formal accusation.

Although the court in *Lefthand* referred to the defendant's right to assistance of counsel under the federal and state constitutions, it grounded its holding squarely in the court's "supervisory power to

93. *Id.*
94. *Hull*, 269 N.W.2d at 908.
95. *Id.* at 909.
96. *Id.*
97. *Id.* at 909-10.

insure the fair administration of justice."[98] The use of the court's supervisory power is only necessary if the court based its decision on something other than the express constitutional or statutory protections provided to criminal suspects, such as state rules of professional responsibility.[99] The court emphasized the importance of Minnesota Rule of Professional Conduct 4.2 to the controversy when it expressed dismay at the government's assertion that prosecutors were beyond the reach of Rule 4.2.[100] The court further noted "the majority of jurisdictions presented with the issue have held that communicating with defendants who are represented by counsel violates the applicable rules of professional conduct."[101] The court's emphasis on Rule 4.2 supports activating the protections of its holding on the retention of counsel. A violation of Rule 4.2 requires communication with "a party the lawyer knows *to be represented* by another lawyer *in the matter*."[102] The mere attachment of a constitutional right to counsel in the abstract would not trigger the rule.[103] The centrality of representation by counsel is further evidenced by the court's justification of the rule's impact on law enforcement with the statement, "We are mindful this requirement may cause some delay in the interrogation process; but the importance of the *attorney-client relationship* makes it necessary."[104]

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98. *Lefthand*, 488 N.W.2d at 801.

99. The source of the supervisory power utilized by the court is not clear from the decision. There is no express, statutory or constitutional provision providing the court with such power. In previous cases in the criminal justice area, the court has referred to its *inherent* supervisory power. *See* State v. Hepfel, 279 N.W.2d 342, 345 (Minn. 1979) (expressly stating that the court is not acting on a constitutional basis but on the basis of its inherent supervisory power); McDonnell v. Comm'r of Pub. Safety, 460 N.W.2d 363, 368 (Minn. Ct. App. 1990) (discussing Supreme Court use of supervisory power rather than "a broader state constitutional analysis" to expand right to counsel); Ramsey Co. Pub. Defender v. Fleming, 294 N.W.2d 275, 278 (Minn. 1980) (referring to "our inherent supervisory power"); State *ex rel.* Doe v. St. Mary's Hosp., 295 N.W.2d 356 (Minn. 1980) (same). For cases discussing the scope of such power and reasons for using the power, *see* In re Gillard, 271 N.W.2d 785, 806 n.6 (1978); State v. McKee, Lexis 631 (Minn. Ct. App. 1993); State v. Caldwell, 322 N.W.2d 574, 596 (Minn. 1982); State v. Carriere, 290 N.W.2d 618, 620 (Minn. 1980).

100. *Lefthand*, 488 N.W.2d at 801 n.6.

101. *Id.*

102. MINN. R. PROF. CONDUCT 4.2 (1993) provides: "In representing a client, a lawyer shall not communicate 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."

103. *See* discussion of "attachment" of Rule 4.2 in Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact And Subpoena Rules*, 53 U. PITT. L. REV. 291, 333-41 (1992).

104. *Lefthand*, 488 N.W.2d at 802 (emphasis added).

Avoiding a constitutional basis for the new rule makes sense if the goal is to protect the attorney-client relationship rather than the "right to counsel" in the abstract. The right to counsel under Article I, section 6 of the Minnesota Constitution and under the Sixth Amendment to the federal constitution attaches independent of the actual attorney-client relationship and in some cases attaches at a very early stage in the criminal investigation process.[105] Grounding the *Lefthand* right outside the Constitution allows the court to avoid unnecessarily delaying interrogation with a requirement that counsel be present when police obtain a waiver in situations where there is no actual attorney-client relationship and where the court likely believes concerns about police behavior are adequately addressed through Fifth Amendment protections under *Miranda*.[106]

Focusing on the attorney-client relationship also allows the court to protect that relationship in situations where it is otherwise unprotected because the right to counsel under Article I, section 6 and the Sixth Amendment has not attached. For instance, if it is the relationship rather than the abstract right the court seeks to protect, application of the rule should not be thwarted in cases where a suspect has retained counsel but has not been formally charged.[107] But a rule based on the constitutional right to counsel would not apply in such a situation. The Minnesota Supreme Court's decision in *Fossen* and its citation to that case in *Lefthand* suggest the court intended to protect the attorney-client relationship even where the constitutional right to counsel had not attached.[108] The court likely also intended to provide protection to an actual attorney-client relationship beyond that which is provided under the Fifth Amendment. The protections of the Fifth Amendment are designed to assist the defendant in making the initial decision to seek the assistance of

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105. *See* Freidman v. Comm'r, 473 N.W.2d 828 (Minn. 1991) (extending the right to counsel under the state constitution to drivers from whom the police seek blood alcohol testing).

106. *See* Schwartz, *supra* note 11, at 953-54 (arguing that the Fifth Amendment provides sufficient protection to criminal defendants, thus making application of the ethical rules largely unnecessary).

107. *But see* Schwartz, *supra* note 11, at 948-53 (arguing that ethical rule should not apply to prosecutors at all, but especially not prior to indictment).

108. *See also* State v. Hull, 269 N.W.2d 905 (1978) (expressing disapproval of interrogation of suspect in the absence of counsel despite fact that suspect had not been formally charged); *see also* United States v. Jamail, 546 F. Supp 646, 654 (E.D.N.Y. 1982), *rev'd on other grounds*, 707 F.2d 638 (2d Cir. 1983) (rejecting the assertion that ethical rule applies only after commencement of criminal proceedings).

counsel, not to protect against government circumvention of an actual attorney-client relationship.[109] Thus, if, as it stated, the Minnesota Supreme Court's concern in *Lefthand* was the attorney-client relationship, the application of the *Lefthand* rule should not turn on whether a custodial interrogation, the triggering event for Fifth Amendment protections, takes place. Again, the Minnesota Court's decision in *Giddings* and its citation to that case in *Lefthand* support this reading.

Understanding that Rule 4.2 provides the basis for the *Lefthand* rule also explains what some may perceive to be the overly protective and paternalistic nature of the *Lefthand* case in its refusal to give effect to a voluntary decision of a suspect to proceed without counsel.[110] Unlike the Fifth and Sixth Amendment rights to counsel, which are the client's and therefore can be asserted only by the client and can be freely waived by the client, the protections of Rule 4.2 are for the benefit of both the client *and* the lawyer. Unlike constitutional rights, rights under the ethical rules cannot be waived without the consent of the lawyer.[111] Similarly, grounding the decision in the ethical rules provides the court with flexibility in terms of a remedy for the violation. Although precedent requires exclusion of evidence obtained in violation of the Constitution, there is no such requirement for violations of ethical rules.[112] The *Lefthand* court stated only that statements so taken were "subject to exclusion," it did not require exclusion.[113] Indications are that the court considered the *Lefthand* case a particularly egregious one that demanded the exclusionary rule as a remedy.[114] It is possible that less egregious violations may not

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109. *See* Illinois v. Patterson, 487 U.S. 285 (1988) (noting that police efforts to prevent attorney access to client do not violate Fifth Amendment, although it would constitute a violation if the Sixth Amendment had attached); Moran v. Burbine, 475 U.S. 412 (1986) (defendant's Fifth Amendment rights not violated by police officers' denial of attorney's request for access to client during interrogation).

110. Chief Justice Burger expressed these criticisms in his dissent in Brewer v. Williams, 430 U.S. 387, 417 (1977); *see also* Cramton and Udell, *supra* note 103, at 348.

111. Cramton & Udell, *supra* note 103, at 325, 341-44.

112. *See* United States v. Hammad, 858 F.2d 834, 842 (2d Cir. 1988); Schwartz, *supra* note 11, at 954-57.

113. 488 N.W.2d at 802.

114. The court stated, "Of grave concern to us here is what we can only perceive as an emerging pattern of conduct, calculated to subvert the intent of our criminal rules. . . . In this case, the prosecution allowed the in-custody interrogation of appellant without notice to or the presence of appellant's court-appointed counsel and with full knowledge that a competency examination had been ordered . . . ." *Id.*

require so severe a remedy.[115] Thus, the use of the ethical rule provides the court the flexibility to address the concerns courts and commentators have identified as not adequately addressed by constitutional protections—overreaching by prosecutors in cases where the constitutional right to counsel has not attached, skepticism concerning the validity of waivers, and the limited scope of the constitutional protections—without unnecessarily constraining law enforcement officials with bright line constitutional rules that demand exclusion of evidence as a remedy for violations.[116]

Viewing Rule 4.2 as the basis for the *Lefthand* decision does not completely clarify the court's holding and, in fact, presents significant additional issues that have been discussed by courts and commentators considering the applicability of Rule 4.2 to criminal investigations. The first issue raised is whether the Rule, arguably drafted with civil litigation in mind,[117] even applies to prosecutors in a criminal case. Several commentators have argued the rule should not apply, but most concede that courts have virtually uniformly held that prosecutors are subject to the rule.[118] The *Lefthand* court agreed, expressing its "dismay[] [at] state's counsel's belief that prosecutors are beyond the reach of our professional conduct rules, specifically Rule 4.2 . . . ."[119]

Even if the rule applies to prosecutors, however, commentators raise several arguments to exempt contact by law enforcement officials with represented suspects during the investigatory stage of criminal prosecutions. One argument is that contact with represented

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115. *See* Schwartz, *supra* note 11, at 944 (discussing state cases adopting such an approach).

116. The *Lefthand* court was correct that most courts have found Rule 4.2 to apply to prosecutors. However, few have applied the exclusionary rule or even recognized it as the appropriate remedy of violations. *See* United States v. Hammad, 846 F.2d 854 (2d Cir. 1988), *rev'g* 678 F. Supp. 397 (E.D.N.Y. 1987); Cramton and Udell, *supra* note 103, at 327-28 (exclusion generally not used as a remedy for violation of ethics rule where government conduct complies with Fifth and Sixth Amendments).

117. *See* Bruce A. Green, *A Prosecutor's Communications With Defendants: What Are the Limits?*, 24 CRIM. L. BULL. 283, 285 (1988); Schwartz, *supra* note 11, at 942, 947-48.

118. *See* Green, *supra* note 117, at 285; H. Richard Uviller, *Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1176-83 (1987); Cramton & Udell, *supra* note 103, at 326-28; Schwartz, *supra* note 11, at 941-54. For a discussion of the controversy raised by then Attorney General Thornburgh when he circulated a memorandum to all United States Attorneys taking the position that federal prosecutors were not subject to the rule, *see* Cramton & Udell, *supra* note 103, at 318-24.

119. 488 N.W.2d at 801 n.6.

suspects during a criminal investigation that is not otherwise prohibited by constitutional protections is permitted under the terms of the rule which exempt contact "authorized by law." This argument has met with little success. Even courts that eventually uphold contact with suspects by prosecutors rarely rely on this express exemption in the rule, preferring instead to find the rule inapplicable on a different basis or simply not to specify the basis for their decision.[120]

Another argument is that prior to indictment or other formal proceeding, the suspect is not a "party" as provided in the rule. At least one court has accepted this argument by analogizing to the Sixth Amendment right to counsel.[121] Such reliance on the express words of the rule is unusual. Although several other courts similarly have found the rule inapplicable to the investigatory stage of criminal prosecutions, particularly undercover operations, none of the courts have based their decisions on an express holding that prior to the commencement of criminal proceedings, suspects are not "parties" for purposes of the rule.[122] In fact, such a holding would seem contrary to the official comment to Rule 4.2 which states, "This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question."[123]

As discussed above, despite the reference to "formally accused" individuals in the *Lefthand* court's holding, a strong case can be made that the *Lefthand* rule is not limited to such individuals. The *Lefthand* court would not be alone in providing such broader protection.[124] Some courts have applied the rule to targets of grand jury investigations prior to indictment, and in *United States v. Hammad*,[125] the court held the rule applicable to a non-target apparently because the prosecutors were aware that he was represented by counsel with respect to the matter being investigated. Rather than relying on strict interpretations of the language of the rule, courts seem to make their decisions by balancing the need to protect the suspect from overreaching by the government and the need to prevent the government from circumventing the adversarial process against the need to avoid

120. *See* Cramton & Udell, *supra* note 103, at 346-49; Green, *supra* note 117, at 290-93.

121. *See* United States v. Guerrerio, 675 F. Supp. 1430 (E.D.N.Y. 1987).

122. Green, *supra* note 117, at 293-95.

123. MINN. R. PROF. CONDUCT 4.2 (1993).

124. Green, *supra* note 117, at 295-96 (discussing cases finding such broader protection).

125. 846 F.2d 854 (2d Cir. 1988), *rev'g* 678 F. Supp. 397 (E.D.N.Y. 1987).

unduly hampering legitimate law enforcement activities. The Minnesota Supreme Court's expression of concern for the attorney-client relationship makes it unlikely that application of the rule will be prevented by an artificial line such as indictment or commencement of formal proceedings. The court is more likely to focus on the extent to which the attorney-client relationship has been established and is being circumvented, regardless of the stage of the proceeding.

Another issue raised by commentators and largely unanswered by the *Lefthand* decision is the extent to which Rule 4.2 applies to communication with represented suspects by non-attorneys. Although the Rules of Professional Conduct apply only to attorneys, Rule 8.4(a) prohibits lawyers from violating the rules "through the acts of another."[126] Just as an attorney in a civil matter may not contact a represented party through an investigator, prosecutors cannot exempt themselves from Rule 4.2 by directing police officers to conduct an interrogation. The question remains at what point is the conduct of the police officers imputed to the prosecutor. Most courts limit the application of the rule to instances where the police are acting as the "alter ego" of the prosecutor.[127] Unfortunately, courts generally do not explain what they mean by alter ego. In *Lefthand*, the only involvement of the prosecutor was being informed of the intention of the officers to interrogate the defendant and telling the officers to "go ahead and do it."[128] Absent this contact with the prosecutor, it is unclear whether Rule 4.2 would apply. Despite the likelihood that police will not contact prosecutors prior to interrogating suspects, the *Lefthand* court's holding contained no indication that involvement by a prosecutor was a prerequisite to the operation of the rule. The holding flatly prohibits "in custody interrogation of a formally accused individual" without reference to involvement by the prosecutor. Of course, if the application of the rule is limited to "formally accused" individuals, the prosecutor's office will by definition have some involvement because it will have filed the formal accusation or complaint. If, as argued above, the rule of *Lefthand* should not be limited to formally accused individuals, the applicability of Rule 4.2 to interrogations prior to formal charges and without some participation by the prosecutor is more uncertain.[129] That

126. MINN. R. PROF. CONDUCT 8.4(a) (1993).
127. Cramton & Udell, *supra* note 103, at 344; Green, *supra* note 117, at 303-05.
128. Respondent's Brief at 30-31, *Lefthand* (No. C2-91-1937).
129. The rule could apply in these situations based on the theory that prosecutors have

involvement of the prosecutor may have been crucial in *Lefthand* is suggested by the court's reference to *the prosecution* three times in its final paragraph:

> In this case, *the prosecution* allowed the in-custody interrogation of appellant without notice to or the presence of appellant's court-appointed counsel and with full knowledge that a competency examination had been ordered . . . . 'We have on occasion warned *the prosecution* in our opinions that it has used improper tactics. However, these warnings appear to have been to no avail.' Justice is a process, not simply a result. Where *the prosecution* persists in skirting our rules and disregarding our admonitions, we are left with no option but to reverse.[130]

If in fact the basis for the *Lefthand* court's decision was Rule 4.2, many questions remain. The case clearly extends suspects' protections beyond those available under the federal constitution, something many courts applying Rule 4.2 have been unwilling to do, but the precise scope of the protection is unclear. Especially regarding interrogations prior to formal charges and without the knowledge or participation of the prosecutor's office, it is not clear Rule 4.2 would apply. Although Rule 4.2 is directed at attorneys, and the court's opinion directs its ire at the "prosecution," it is hard to imagine that what the police did would have been permissible had they simply not contacted the prosecutors office. Such a limited ruling would permit prosecutors to avoid the *Lefthand* rule simply by making known to police that they should act first, ask permission later.

It is possible, of course, that the *Lefthand* rule will not be defined by the parameters of Rule 4.2. The Minnesota Supreme Court could have been exercising its supervisory power in a more general way. The court stated that it was exercising its supervisory power "to insure the fair administration of justice," not to insure compliance with rules of professional conduct. Given the court's irritation that its previous "admonitions" were disregarded, a prosecutor should be wary of making technical arguments based on the

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an affirmative duty to supervise the police with whom they work. This would be analogous to a private attorney who could not claim ignorance if an investigator in his office consistently (or even once) contacted represented parties. Nevertheless, this argument has been described as "extreme" and "has generally been rejected." *See* Green, *supra* note 117, at 300-01.

130. *Lefthand*, 488 N.W.2d at 802 (emphasis added; citations omitted).

language of Rule 4.2 to avoid the *Lefthand* rule, especially in light of the fact that the court's holding does not rely expressly on Rule 4.2 and makes no mention of a requirement of the police acting as the alter ego of the prosecution.

The above discussion suggests that the rule of the *Lefthand* case was intended to protect the attorney-client relationship as opposed to the more abstract right to counsel defendants enjoy under the Fifth and Sixth Amendments to the federal constitution and Article I, section 6 of the Minnesota Constitution. Although this seemingly supports conditioning application of the rule on the defendant actually retaining counsel and establishing the attorney-client relationship, such a limitation cuts too narrowly to protect the underlying concerns that motivated the decision.

The court in *Lefthand* expressed extreme concern for the sanctity of the attorney-client relationship and severe distress at what it perceived to be recent and consistent attempts by the government to circumvent that relationship.[131] But the retention of an attorney can be accomplished through the simple act of a phone call. Thus, under the *Lefthand* rule, an accused who is able to reach an attorney by telephone is insulated from further interrogation in the absence of her attorney. Likewise, an accused who asserts her right to consult with counsel, but is unable to reach an attorney on her initial attempt, should also be afforded protection from interrogation unless her attorney is present or notified. There is little or no reason to distinguish between a successful and an unsuccessful attempt to contact and retain an attorney following an express assertion of a defendant's right to consult with an attorney. In *State v. Hull*,[132] the Minnesota Supreme Court stated: "When a suspect is sufficiently concerned to exercise his constitutional right and obtain legal representation, the effectiveness of that right is undermined by police practices, however benign, intended to extract incriminating evidence in the absence of counsel."[133]

The same is true, of course, when a suspect is "sufficiently concerned to exercise his constitutional right" and *attempts* to obtain legal counsel. The police should not be permitted, following an unsuccessful attempt by a suspect to obtain counsel, to undermine defendant's right to counsel by utilizing "benign practices" that

131. *See* 488 N.W.2d at 801-02.
132. 269 N.W.2d 905 (1978).
133. *Id.* at 909.

would clearly be unlawful if only the phone call had been successful. The suggested rule is supported somewhat by the facts of *Giddings*. In *Giddings*, although the defendant's right to counsel had attached under the Sixth Amendment and under state law because he had appeared in court and the public defender's office had been appointed to represent him, no particular attorney was appointed and, at the time of questioning, the defendant had never spoken with an attorney.[134] Thus, the defendant was represented by counsel in only the barest of senses.[135] Nevertheless, Mr. Giddings would be entitled to the protection of the *Lefthand* holding if his case arose today. If suspects in the position of Mr. Giddings are entitled to the protection of the *Lefthand* rule, suspects who affirmatively attempt to establish an attorney-client relationship by contacting an attorney should also enjoy the protection of the rule.

Conditioning the *Lefthand* rule on the assertion of the right to counsel rather than actual representation is also supported by the rationale utilized by the court in *State v. Ture*.[136] In *Ture*, the Minnesota Supreme Court rejected a rule that prevented police from obtaining waivers in the absence of counsel from suspects represented by counsel on *unrelated* charges.[137] The court rejected the rule because whether a suspect enjoyed the protection provided would "turn[] on the fortuity that a suspect has been charged on an unrelated offense before interrogation takes place."[138] Similarly, if the rule announced in *Lefthand* is limited to suspects who actually retain counsel, the protection of the rule will "turn on the fortuity" of whether the suspect successfully completes his or her phone call or whether the attorney is immediately available.[139]

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134. 290 N.W.2d at 596.

135. *See infra* note 141.

136. 353 N.W.2d 502 (Minn. 1984).

137. Defense counsel was urging the court to adopt what was then the rule in New York. *See* People v. Bartolomeo, 423 N.E.2d 371 (N.Y. 1981). That rule has since also been rejected in New York. People v. Bing, 558 N.E.2d 1011 (N.Y. 1990).

138. *Ture*, 353 N.W.2d at 511.

139. The United States Supreme Court has also expressed a disinclination to have the right to counsel turn on the "fortuity" of actual representation. Moran v. Burbine, 475 U.S. 412, 430 (1986). In that case the Court refused to extend protection of the Sixth Amendment to defendant whose family had retained counsel. However, crucial to the decision was the fact that defendant himself had never asserted his right by requesting counsel. *See also* WHITEBREAD, *supra* note 12, at 417 (discussing the need to avoid inequality of treatment of suspects based on the fortuity of the suspects having actually retained counsel or having had one appointed at formal charging); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 835-37 (1989) (criticizing several arbitrary distinctions in Supreme Court decisions relating to waiver of right to counsel).

A rule that turns on such a fortuity makes little sense. Because the right that the *Lefthand* rule was designed to protect is the defendant's right to consult with counsel, the defendant should enjoy the benefit of the rule at the point she asserts that right, not at the point that a particular attorney agrees to provide the requested legal advice.[140] A contrary rule would place defendants at the mercy of the police practices the Minnesota Supreme Court has criticized in *Lefthand* and other cases if, for whatever reason, they were not immediately able to reach their attorney. This seems particularly contrary to the spirit of the *Lefthand* rule in cases in which the suspect is attempting to contact an attorney that is virtually certain to agree to represent the suspect because the attorney already represents the suspect on another matter, has represented the suspect in the past, or is a friend of the suspect or her family. Triggering the rule on actual representation rather than the assertion of the right also creates a situation in which police have an incentive not to assist a defendant who has difficulty remembering the name or phone number of an attorney, contrary to the obligation recognized by the court in *Giddings v. State*.[141] It would also lead to endless litigation

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140. Similarly, if the rule is designed to protect the lawyer in her efforts to provide effective representation, as some commentators have suggested, the lawyer should be given the chance to provide such representation when someone seeks her out for assistance. The lawyer should not be denied that opportunity because she was unavailable at precisely the time the potential client called.

141. 290 N.W.2d at 597-98. In *Giddings*, the court suppressed a statement made by the defendant after determining that the waiver obtained by the police was invalid. *Id.* In doing so, the court acknowledged that the police were aware that the defendant was represented by counsel and that the defendant did not know the name of the public defender who had been assigned to represent him. The court stated that the police "knew the name of the public defender in Duluth and how to reach his office. They could have advised Giddings how to contact him so as to ascertain the name of his appointed counsel, or they could have contacted the public defender's office themselves. They chose to do neither and now seek to rely on the written waiver of counsel executed by Giddings." *Id.* at 597. Similarly, at the point of initially obtaining counsel, police may simply give a suspect a phone but not help the suspect in any manner to contact his attorney. They may be aware that the suspect is represented by counsel on another matter, but do nothing to help the suspect locate that attorney. At the very least, the police should provide the suspect with a phone book to help him remember the name of his attorney or to contact a different attorney. Rather than cause endless litigation into questions such as these, the police should be required to honor the defendant's right to silence at least until counsel is contacted and available to be present for the interrogation. If the delay becomes too long, and the police need to interrogate the defendant, they can contact the public defender's office for substitute counsel. *See* United States v. Wade, 388 U.S. 218, 237 & n.27 (1967) (suggesting such a possibility when counsel is required for a pretrial lineup but is unavailable).

on the question of whether the attorney had in fact been retained.[142] What if the attorney requires a retainer prior to representation? What if a relative or friend of the defendant has retained an attorney at defendant's request? What if the defendant used the phone to contact a family member with instructions to retain an attorney? In this and many other situations the officers may not know when the attorney is actually retained. Even in the typical case where the defendant attempts to contact an attorney, since the officers should not be listening to defendant's phone call to an attorney, they likely will not know if the attorney has been retained. In order to "insure the fair administration of justice" in Minnesota, it is the *invocation* of the right to consult with an attorney rather than actual *retention* of an attorney that should trigger the protection of the *Lefthand* rule.

It is easy to imagine a case that would call for application of the *Lefthand* rule despite the failure of a defendant actually to have retained counsel. Consider the not atypical situation where police take an individual into custody on a probation violation or outstanding warrant in order to question the individual about an unrelated crime. Because the Sixth Amendment is crime specific,[143] the suspect's right to counsel under that Amendment will not be applicable to the crime for which police wish to question the suspect, even if the suspect has retained counsel on the matter for which he is in custody (the probation matter). If the suspect is represented on the matter for which she is in custody, she may assert her Fifth Amendment right to counsel and seek to contact that attorney for representation on the unrelated crime about which the police wish to question her. For any number of reasons, this attempt may be unsuccessful. If, after attempting unsuccessfully to contact her attorney, the suspect initiates conversation with the police, she may be subjected to police interrogation without the presence of counsel or notice to counsel. She need only provide a waiver. But had she successfully completed her phone call to her attorney, such interrogation would have been prohibited because the uncounseled waiver would have been ineffective.[144]

A suspect in such a situation should be afforded the same protection regardless of her success in actually making contact with

142. *See* United States v. Hammad, 858 F.2d 834, 836-37 (2d Cir. 1988) (government asserted DR 7-104(A)(1) was not violated because Assistant United States Attorney did not know defendant was represented by counsel at the time he sent informant to question defendant).

143. *See supra* note 36 and accompanying text.

144. *See Lefthand*, 488 N.W.2d 799; *Fossen*, 255 N.W.2d 357; *Hull*, 269 N.W.2d 905; State v. Renfrew, 159 N.W.2d 111 (Minn. 1968).

the attorney. Once the right to counsel has been invoked, the police must not be permitted to interrogate an accused until counsel has been notified and has a reasonable opportunity to be present.

Suspects cannot be stripped of the valuable protection that clearly would have been afforded to them had they been successful in reaching their attorney merely because they were unable to make contact. This important and necessary protection should not be determined by the fortuity of successfully contacting an attorney. Once an accused invokes his or her right to an attorney, no interrogation should take place until an attorney is notified and has a reasonable opportunity to be present. Such a rule will provide consistent protection to suspects and will not unduly hamper law enforcement. The rule would not apply to suspects who waive their right when initially asked. It only applies if the suspect asserts the right. Current Fifth Amendment law already requires that the interrogation cease in such a case. However, Fifth Amendment law permits the police to seek a waiver if the suspect initiates communication with them. In practice, it is hard for the suspect to avoid initiation, with the result that the police can quickly return to the task of obtaining a waiver. The rule proposed by this Article prevents such conduct and demands that the assertion of the right to counsel be taken seriously.[145] This is consistent with the approach of the Minnesota Supreme Court, which has expressed skepticism about the validity of such waivers absent the presence of counsel.

V. CONCLUSION

In *State v. Lefthand*, the Minnesota Supreme Court signaled its intention to provide protection for attorney-client relationships in criminal cases beyond that currently provided by the Fifth and Sixth Amendments to the federal constitution. The precise basis for the court's holding is unclear, but includes, at least in part, Minnesota Rule of Professional Conduct Rule 4.2. A more complete explanation of the court's rationale would have been useful in determining the scope of the new rule the court articulated, particularly because there are indications that the court intended the protections of the rule to extend beyond the narrow holding of the case.

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145. Commentators have expressed concern that current Fifth and Sixth Amendment law provides inadequate protection, particularly because of the ease of obtaining a waiver. Stuntz, *supra* note 139, at 762-69, 801-42; Cramton & Udell, *supra* note 103, at 328-33.

This Article has argued that the precedents cited by the court indicate that the rule may not be limited to individuals formally accused of a crime or to individuals in custody based on suspicion of involvement in a crime. The Article also strongly argues that the limitation in the rule to individuals represented by counsel must be read to include individuals who have requested representation by counsel. Absent such a reading, suspects in identical situations will be provided vastly different protections depending on whether their initial attempt to retain a lawyer is successful. To have the protections of the rule turn on such a "fortuity" is contrary to Minnesota Supreme Court precedent and to the court's dedication to "jealously guarding" the right to counsel in Minnesota.

Numerous questions remain concerning the scope to the *Lefthand* holding and the extent to which the court will use the exclusionary rule to enforce violations of the ruling. Whatever the eventual resolution of those questions, law enforcement officials should tread lightly when dealing with a suspect who either has retained counsel or has indicated a desire to do so, whether or not the individual is formally accused or in custody. At least for now, blind reliance on even a knowing and voluntary waiver of counsel by the client in such situations could result in the loss of valuable evidence.