Ex Parte Prosecutorial Contact with Your Corporate Client

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The controversy surrounding prosecutorial contact with represented parties in nowhere more heated than in the realm of white collar criminal defense. When the government is investigating a corporation or its principals, prosecutors routinely attempt to contact employees, managers and officers in order to gather information in support of a search warrant or a complaint. Where the corporation is represented by counsel, prosecutors face an ethical issues as to the propriety of contacts with corporate personnel outside the presence of corporate counsel. As a result, the Department of Justice has tried in recent years to exempt prosecutors from ABA and state ethics rules prohibiting direct contact by an attorney with a party whom the attorney knows is represented. When those efforts fail to sway the courts, as they have in every jurisdiction in which they were tried, prosecutors have argued, sometimes successfully, for narrow interpretations of the ethical rules.

This article will address some of the issues that arise in white collar cases concerning prosecutorial contact with a represented client. First, we will review the ABA and California ethical rules governing contact with represented parties. Second, we will discuss the most recent developments in the Department of Justice's efforts to exempt federal prosecutors from the ethical rules in this area. Third, we will look at whether the prohibition against prosecutorial contact of represented parties applies to pre-indictment as well as post-indictment contacts. Fourth, we will discuss which employees within a corporation fall within the protection of the rule where the corporation is the "represented party". Finally, we will look at some of the remedies that are available for violation of the rule.

ETHICAL RULES COVERING PROSECUTORIAL CONTACT WITH REPRESENTED PARTIES

The ABA Model Rule of Professional Conduct, the California Rules of Professional Conduct, and the ethical canons of every state bar prohibit attorneys from contacting a party whom the attorney knows to be represented on the subject matter of the representation.[1]

The ABA Model Rule of Professional Conduct 4.2 states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer know to be represented by another lawyer in the matter unless the lawyer has the consent of the other lawyer or is authorized to do so.

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[1]Green, *A Prosecutor's Communications with Defendants: What are the Limits?,* 24 Crim. L. Bull. 283, 284 (1988).

California Rule of Professional Conduct 2-100 states, in pertinent part:

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has consent of the other lawyer.

DOJ EFFORTS TO EXEMPT PROSECUTORS FROM THE "NO CONTACT" RULE

The Thornburgh Memorandum

On June 8, 1988, then-Attorney General Richard Thornburgh issued a memorandum to all federal prosecutors on the applicability to them of the ABA's rule, and all state and local ethical rule, governing contact with represented parties. The memorandum opined that federal prosecutors were exempt from the rules because federal prosecutors were limited only the Constitution and federal statutes in carrying out their duties.

The release of the Thornburgh Memorandum sparked a firestorm of controversy. In the first reported case in which a federal prosecutor used the Thornburgh Memorandum to justify a violation of the no-contact rule, United States District Judge Marilyn Hall Patel of the Northern District of California firmly rejected the government's position and held the Assistant United States Attorneys (AUSAs) were bound by state rules of ethics vis-a-vis witness contacts. *United States v. Lopez*, 765 F. Supp. 1433 (N.D.Cal. 1991), vacated, 989 F.2d 1032 (9 Cir.), amended and superseded, 4 F.3d 1455 (9 Cir. 1993). On appeal from Judge Patel's decision, the Ninth Circuit affirmed her ruling that *ex parte* contacts between an AUSA and a represented defendant violate the prohibitions of California Rule of Professional Conduct 2-100.

The facts in *Lopez* were as follow: Lopez a criminal defendant represented by counsel contacted the assigned AUSA is his case through an attorney for a co-defendant. Lopez wished to discuss the possibility of cooperating with the AUSA but did not wish his own attorney to know about the discussions, due to his attorney's standard policy against negotiating cooperation deals. Before he met with Lopez, the AUSA brought Lopez before a magistrate judge. The magistate judge cautioned Lopez about the dangers of self-representation, informed him that he could have other counsel and cautioned him that the co-defendant's could not represent him. Lopez nonetheless insisted on meeting with the AUSA. He then met with the AUSA, along with the co-defendant and his lawyer.

The Ninth Circuit affirmed Judge Patel's holding that the AUSA's actions violated his duties under Rule 2-100 of the Rules of Professional Conduct. The Court strongly rejected the government's argument that Rule 2-100 was not intended to apply to prosecutors pursuing criminal investigations:

[t]he Sixth Amendment guarantee would be rendered fustian of one if its "critical components," a lawyer-client "relationship characterized by trust and confidence," could be circumvented by the prosecutor under the guise of pursuing the criminal investigation. *Lopez* at 1461 (citing *United States v. Chavez*, 902 F.2d. 259, 266 (4th Cir. 1990) (quoting *Morris v. Slappy*, 461 U.S. 1, 21 (1983) (Brennan J., concurring)).

The Modified Thornburgh Memorandum

In the face of heavy criticism from the bench and the bar, the Department of Justice modified its position somewhat and, on August 4, 1994, Attorney General Janet Reno published new guidelines for prosecutorial contact with represented parties. (The new guidelines are found at 28 C.F.R. Part 77.) The new regulation differs from the Thornburgh Memorandum in three respects. First, where the Thornburgh Memorandum authorized federal prosecutors to contact any individual while conducting an investigation or prosecution, the new regulation states that prosecutors may not negotiate plea bargains, settlement agreements or immunity agreements without the consent of the party's attorney. Second, the Thornburgh Memorandum authorized unrestricted prosecutorial contact with represented parties both pre-indictment **and** post-indictment, while the new regulation place some limitations on post-indictment or post-arrest contact with a represented party. Third, under the new regulation, unlike the Thornburgh Memorandum, prosecutors may not contact a "current employee on a corporation with retained counsel if that employee is a high-level employee known to be participating as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter."[2]

Despite these changes, the thrust of the government's position has remained the same: Federal prosecutors are not bound by state and local ethical rules on contacting represented parties.

To date, no court has accepted the principles outlined in the new regulations. In fact, in *O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1257 (10 Cir. 1998) the Eighth Circuit explicitly rejected the government's position, holding that the Attorney General had no authority to issue "anything resembling" a policy exempting prosecutors from state or local ethics rules. The policy is still on the books, however, and the Department of Justice still stands behind it.

Recent Developments

Having encountered substantial resistance to its efforts to exempt prosecutors from the no-contact rule, the DOJ is now trying to achieve the same goal through other means. Working

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[2]For details on these differences, see "Memorandum from the Deputy Attorney General on the Final Rule Governing Contacts with Represented Persons," reprinted in 55 Crim.L.Rep. (BNA) 2291, 2294 (Aug. 4 1994)

with a subcommittee of the Conference of Chief Justices, the Department of Justice has proposed a modification to ABA Model Rule 4.2 that would explicitly exclude any government lawyers, state of federal, who are engaged in civil or criminal law enforcement, from operation of the ethical rule. Under the proposal, a government lawyer could communicate with a represented person at any time before he is arrested, charged in a criminal case, named as a defendant in a civil law enforcement proceeding. A government lawyer could also communicate with represented person, post-arrest or charge, if the communication is made in the court of investigating "additional, different, or ongoing criminal activity or other unlawful conduct," made to protect against a risk of death or bodily harm, made at the time of arrest if the person waives the right to counsel, or is initiated by the represented person who signs a written waiver of counsel for the communication.[3]

As a result of the opposition to this proposal, the Conference of Chief Justices has decided not to actively support DOJ's proposal at this time.

The DOJ is also working with the ABA's Standing Committee on Ethics to attempt to persuade the ABA to change Model Rule 4.2, presumably in the same manner that the DOJ urged the Conference of Chief Justices.

The DOJ's efforts to override the no-contact rule have met with resistance in the U.S. Congress. Language contained in the currently pending House of Representatives appropriations bill for the commerce, Justice and State departments would overrule the DOJ guidelines and would underscore the prevailing judicial view that government attorneys are bound by the same ethics provisions as all other attorneys.[4]

Pre-Indictment Contact With Represented Parties

While there is little dispute among the federal circuit courts that ethical prohibitions against contacting represented parties apply post-indictment,[5] it is less clear that the no-contact

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[3]The proposed change to Model Rule 4.2 and commentary on it is reprinted at 62 *Criminal Law Reporter* 2043 (Jan. 14, 1998).

[4]The bill was originally introduced as H.R. 232, the "Ethical Standards for Federal Prosecutors Act", 105th Cong. (introduced Jan. 7, 1997) More recently, Representatives McDade and Murtha introduced H.R. 3396, the "Citizens Protection Act of 1998," which provides that "an attorney for the government shall be subject to state laws and rules, and local federal court rules, governing attorney's duties, to the same extent and in the same manner as other attorneys in that state." It is the latter bill that has been incorporated into the House appropriations bill.

[5]*See, e.g., Lopez*, 4 F.3d at 1460 ("The prosecutor's ethical duty to refrain from contacting represented defendants entifies upon indictment for the same reasons that the Sixth Amendment right to counsel attaches."); *United States v. Ryans*, 903 F.2d 731, 739-740 (10th Cir.

rule applies **pre**-indictment. The weight of federal authority, including Ninth Circuit authority, holds that, as a general matter, the rule does not attach to criminal suspects pre-indictment. With the right set of facts, however, even the Ninth Circuit's ruling in this area can be distinguished. Furthermore, there is substantial authority supporting the applicability of the rule to represented parties who have been arrested but not yet indicted.

First the bad news. A majority of the federal circuits has held that ethical rules against contacting represented parties do not apply to government attorneys conducting pre-indictment criminal investigations. In *United States v. Balter*, 91 F.3d 427 (3d Cir. 1996), the Third Circuit ruled that the ethical rule apply only to parties represented in a "matter", and that a criminal suspect is not a party in a matter until legal proceedings are commenced by complaint or indictment. 91 F.3d at 435. The Court found that "even if a criminal suspect was a 'party,' pre-indictment investigation by prosecutors is precisely the type on contact exempted from the rule as 'authorized by law.'" *Id.* at 436. Any other arragement would, according to the Court, interfere with law enforcement operations and insulate "certain classes of suspects" from ordinary pre-indictment investigation.

Other circuits have reached similar conclusion. The D.C. Circuit, in *United States v. Sutton*, 801 F.2d 1346, 1365-66 (D.C. Cir. 1986), held that the ethical no-contact rule "was never meant to apply" to suspects before the initiation of adversary judicial criminal proceedings, e.g. indictment, information, preliminary hearing or the like. In *United States v. Ryans*, 903 F.2d 731, 739-740 (10th Cir. 1990), the Tenth Circuit agreed that the proscriptions against contacting represented parties only attached after the initiation of criminal proceedings. The Court also clarified that the adversarial process had not yet begun in that case even though the defendant had been targeted for investigation and served with a subpoena duces tecum. *See also, United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir. 1983) ("We do not believe [the no-contact rule] was intended to stymie undercover operations when the subject retains counsel.")

One circuit, the Second, has held that the no-contact rule can apply to the investigatory state of a criminal proceeding. In *United States v. Hammad*, 858 F.2d 834, (2d Cir. 1988), the Court refused to link the applicability of the ethical rule to the moment of indictment. In *Hammad*, an AUSA provided a sham grand jury subpoena to an informant and directed him to arrange and record a meeting with Taiseer Hammad, one of the targets of the government;s Medicaid fraud investigation. Taiseer Hammad had previously been barred and fined by a state department of health for Medicaid fraud and was in the midst of challenging those administrative findings. Hammad had retained counsel before the meeting with the informant. This attorney represented Hammad on all aspects of the Medicaid dispute and had previously telephoned the AUSA of his representation, although he had declined to verify the representation in writing. The Second Circuit scrutinized the AUSA's conduct against the provisions of Disciplinary Rule 7-104 (A)(1) of the American Bar Association's Model Code of Professional Responsibility,

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1990) (ethical rule does not apply "until the commencement of criminal proceedings"); *U.S. v. Sutton*, 801 F.2d 1346, 1365-66 (D.C. Cir. 1986) (same).

which is essentially coterminous with Rule 2-100. The Court held that the AUSA had violated his ethical duties by having his alter ego, the informant, hold an *ex parte* pre-indictment contact with Hammad without his counsel's permission. Observing that there was no principled basis for refusing to apply the rule of the pre-indictment phase of a criminal case, the Court forcefully noted that the timing of an indictment lies substantially within the control of the prosecutor, and that a prosecutor could, in some cases, manipulate grand jury proceedings to avoid the encumbrances of the ethical rule.[6] The Court urged "restraint in applying the rule to criminal investigations to avoid handcuffing law enforcement officers in their efforts to develop evidence."[7] The Court, however, held that, in some instances, pre-indictment prosecutorial contact with represented parties could violate the ethical rule.

The Ninth Circuit has not been as bold as the Second Circuit. In *United States v. Lopez*, 4 F.3d 1455 (9th Cir. 1993), the Court left open the question of whether the no-contact rule attaches to defendants pre-indictment, holding that a prosecutor's duties under Rule 2-100 began "at the latest upon the moment of indictment." 4 F.3d at 1461. In a footnote, the *Lopez* Court cited *Hammad* while noting the division in the circuits on the issue of the propriety of pre-indictment contacts.[8] However, in *United State v. Powe* 4 F.3d 68, 69 (9th Cir. 1993), the Court state that "the duty to avoid ex parte contacts does not apply to pre-indictment non-custodial conversations with a suspect." Although the Ninth Circuit in *Powe* ostensibly announced a rule of general application allowing ex parte communications in the pre-indictment setting, there is a good argument that the holding is confined to the propriety of the pre-indictment contacts which occur **undercover**.[9]

In *Powe*, the government attorney had agreed that he would not talk with the represented party outside the presence of counsel, i.e., that there would be no **overt** contacts. The Ninth

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[6] *Id*. at 839.

[7] *Id.* at 838.

[8] *Id*., 1460, n.2

[9] Indeed, the *Powe* Court expressly declined to "decide the reach of [*United States v. Kenny*], [645 F.2d 1323 (9th Cir. 1981)]." 9 F.3d at 69. In *Kenny*, the Ninth Circuit emphasized the factual context in which it declined to apply the ethical bar against *ex parte* communications: a non-custodial environment, prior to charge, arrest or indictment; 645 F.2d at 1339. The Court implied that there may very well be instances when pre-indictment *ex parte* contacts violate the rule. The Court stated that the case before it simply provided "no opportunity . . . to say **just when the ethical line might be crossed**." Id. (emphasis added). Interestingly, the Ninth Circuit in *Lopez* did not treat *Kenny* as barring further analysis of the application of the ethical bar generally in pre-indictment settings. Although it noted the holding in *Kenny*, the *Lopez* Court **expressly left this question open**. *Lopez*, 4 F.3d at 1460 and n.2. After *Lopez*, the *Powe* Court considered, **but on the facts** denied a request not to apply *Kenny* on grounds that a prosecutor had breached a promise to make all contacts through the defendants's attorney.

Circuit held that this promise did not extend to undercover contacts, the subject-matter of the decision. Thus, holding is *dictum* insofar as it purports to state a general rule authorizing pre-indictment and **overt** contacts.

Strategies for Attacking Government Contacts Pre-Indictment

Powe and *Kenny*, the case upon which it relies, appear to be based on the rationale that it is only once the government has committed itself to prosecute that the parties' adverse positions have solidified. Similarly, courts that have discussed the matter more fully have held that the ethical rule should apply only after that initiation of adversary proceedings, because it is at that point that represented persons most need the presence of their counsel. *See, e.g.*, *Sutton*, 801 F.2d at 1365-66; *Ryans*, 903 F.3d at 740 (no contact rule applies once adversarial process has begun and suspect is "faced with the prosecutorial forces of organized society."). The proper questions then becomes: When does the adversary process actually begin? If the facts of a given case indicate that the adversary process has actually commenced before an indictment has been handed down, then the no-contact rule should apply pre-indictment. Once the government crosses the "constitutionally significant divide from fact-finder to adversary," *Roberts v. State of Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995), the rationale for enforcing the no-contact rule should be seen to apply. A fundamental starting point in urging the court to determine the applicability of the rule pre-indictment is to demonstrate facts that de-link the case at hand from the reasons historically cited in favor of limiting application of the rule of the post-indictment phase.

The first reason advanced by some courts for limiting the rule to the post-indictment phase is the need to prevent criminal suspects, particularly organized crime families, from insulating themselves from investigation simply by retaining counsel. The *Hammad* Court resolced this concern by ruling that where the attorney represents the client on the **subject-matter of the criminal investigation**, the specter of government investigation being stymied by permanent "house counsel" is not raised.[10] In addition, the lawyer in *Hammad* had contacted the AUSA directly to advise him of his representation and to attempt to arrive at a global settlement for his clients. If these facts pertain to a particular case, it is not a case where the government's investigatory abilities would be stymied by a "consigliere" whose purpose was to act as a shield against all inquiry.

A second reason for limiting the rule to the post-indictment phase is that, pre-indictment, the "subject matter" of the representation, concerning which the code bars communication, is lass certain and, thus, less susceptible to the damage of "artful" legal questions,[11] or that it is only at indictment that the government has committed itself to prosecute and the adverse positions of

[10] 858 F.2d at 839.

[11] *Lopez*, at 1460, citing *United States v. Lemonakis*, 485 F.2d 941, 956 (D.C. Cir. 1973), *cert denied*, 415 U.S. 989 (1974)

government and defense have solidified.[12] Theses concerns over the scope of the subject-matter, or the solidification of the antagonistic positions of government and defense, may well be absent from many cases. The Second Circuit in *Hammad* counseled that these determinations should be made on a case-by-case basis.[13] Accordingly, if, in a particular case, the attorney representing the client of the subject-matter in questions has had discussions with the AUSA about that subject matter, where grand jury subpoenas have issues seeking information on this same subject matter, where the client has been identified by government investigatory memoranda as not merely as "suspect" but an "offender" on this subject matter, where perhaps the client has been questioned on the subject matter by governmental investigative agencies in his lawyer's presence, or where the government simultaneously is prosecuting a parallel civile action on the same subject matter, or a combination such circumstances, a good case can be made that the subject matter was concrete and the parties adverse at the time of the AUSA's contact with the client.[14]

The one pre-indictment situation in which many courts agree that the prohibition on contacting represented parties does apply is when the defendant is in custody. *See e.g., United States v. Ryans*, 903 F.2d 731, 736 (10th Cir. 1990) (no contact-rule can apply to pre-indictment custodial communications with represented persons); *United States v. Killian*, 639 F.2d 206, 210 (5th Cir. 1981) (government agents taking defendants from jail for questioning pre-indictment "highly improper and unethical"); *United States v. Durham*, 475 F.2d 208, 211 (7th Cir. 1973) (custodial, pre-indictment interview of defendant in absence of counsel "raise[s] ethical questions."); *People v. Sharp*, 150 Cal.App. 3d 13 (1983) (communication with represented party post-arrest and pre-indictment violates ethical rule).

While the Ninth Circuit has not yet rules on the question, it has indicated that the prohibition on contacting represented parties would apply to persons who are in custody. In *Kenny*, the Court found there was no violation in a pre-indictment contact, but it made a point to "emphasize the factual setting . . .: a non-custodial environment, prior to Kenny's charge, arrest,

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[12] *Lopez*, at 1460, citing *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion).

[13]858 F.2d at 840.

[14]In an unpublished order in the case of United States v. Talao, et al. Docket No. 97-0217 VRW (aug. 14, 1998), District Judge Vaughn R. Walker held in response to Mary McNamara's motion, that Rule 2-100 did apply in the pre-indictment setting where the government was simultaneously prosecuting a *qui tam* action and several other investigations against the defendants at the time of the pre-indictment contacts, the contacts were not undercover and the government, by virtue of these other proceedings and convening a grand jury investigation, has assumed an adversarial role vis-a-vis the defendants. The Court stated: "To argue that the government's adversarial position had not solidified prior to the criminal indictment understates the reality of the complex situation." Order at 14-15. The government has moved to reconsider Judge Walker's ruling and argument was has on that motion of September 29, 1998.

or indictment ."[15] Similarly, in *Powe*, the Ninth Circuit stated that "the duty to avoid *ex parte* contacts does not apply to pre-indictment, noncustodial conversations with a subject."[16]

Who is "Represented Party" within a Corporation

California Rule of Professional Conduct 2-100(B) provides that, for purposed of the rule, a "party" includes:

(1) An officer, director or managing agent of a corporation or association, and a partner or managing agent of a partnership; or

(2) An association member or on employee of an association, corporation or partnership, if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

Former Employees

The discussion that accompanies Rule 2-100 states that paragraph (B) applies only to persons employed at the time of the communication, citing *Triple A Machine Shop, Inc. v. State of California*, 213 Cal. App. 3d 13 (1989). There are exceptions to this rule, however. As the Court points out the *Triple A Machine Shop*, opposing counsel can initiate ex parte contacts with unrepresented former employees, but only as long as the communication does not involve the employee's act or failure to act in connection with the matter which may bind or be imputed o the corporation, or where the communication could constitute an admission of the corporation. Accord, *Continental Insurance Co., et al., v. Superior Court*, 32 Cal. App. 4th 94 (1995).

Lower-Level Employees

Rule 2-100 expressly prohibits unauthorized ex parte contacts with employees of a corporation "if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposed of civil or criminal liability or whose statement may constitute an admission on the part of the organization." In the recent case of *United States ex rel. O'Keefe v. McDonnell Douglas Corp*., 132 F.3d 1251 (8th Cir. 1998) the Eighth Circuit rejected the government's reliance on the modified Thornburgh Memorandum codified in 28 C.F.R. Part 77 and upheld a district court's holding that the Missouri equivalent of Rule 2-100 applied to low-level employees who are involved in the wrongdoing under investigation in a *qui tam* action alleging contract fraud (see opinion of the district corut at 961 F.Supp. 1288, 1292-93). The rationale for the ruling was that

[15]645 F.2d at 1339.

[16]F.3d at 68.

low-level employee's acts or omissions in connection with the subject matter of the lawsuit could bind the corporation for purposes of litigation, or even for purposes of counseling and planning, are privileged from disclosure to the government in a grand jury setting. *United States v. Chen*, 99 F.3d 1495, 1501-02 (9th Cir. 1996). An employee's access to privileged communications between the corporation and it counsel provide an independent basis for sweeping that employee withing the protections of the rule. *See, Mills Land and Water v. Golden Wes Ref. Co.*, 186 Cal. App. 3d 116, 129 ("The question is not simply whether [the ex-president and current director} was in a position to bind Mills in some fashion. His position makes him **potentially** privy to **privileged** information about the litigation. To establish a "flexible" rule permitting *ex parte* communication absent a court order would seriously undercut the ability of corporate counsel to represent their client." *Id.* (emphasis in original).) The *Mills Land Court* clearly relied on a former corporate president's access to potentially privileged information, rather than his elevated position, in analyzing the ethical issues in that case. (Indeed, the *Mills Land* Court concluded that disqualification of an entire law firm was not warranted in view of the fact that the former president did not even know there was a lawsuit and he had had no contact with the corporation's litigation counsel - 186 Cal.App.3d. at 136.)

Thus, is a low-level employee is either an actor whose actions could be impute to the corporation for purposes of criminal or civile liability or has access to privileged communications between the corporation and its counsel and the contact concerns the subject matter of the representation, Rule 2-100 prohibits the contact.

Remedies for Violations of the Rule

Exclusion on improperly obtained evidence is a time-honored remedy for violations of Rule 2-100 in the civil arena.[17] In her opinion in the *Lopez* case, Judge Patel emphasized that

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[17] In *Campbell Industries v. M/V Gemini*, 619 F.2d 24 (9th Cir. 1980), the Ninth Circuit approved exclusion of the evidence obtained through ex parte contact as a remedy "conducive to the conduct of a fair trial." *Campbell* involved a commercial contract dispute in which a defense lawyer contacted an expert whom he had listed as a fact witness but whom the plaintiff had formally designated as an expert witness. The defense lawyer's contacts resulted in the expert's agreeing to testify for the defense. The District Court held that the contacts violated Federal Rule of Civil Procedure 26(b)(4) which requires court permission before oral discovery of experts. In imposing the "strong sanction" of exclusion of the expert from testifying at trial, the Court reasoned as follows: "A district court is vested with broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial. Within this discretion lies the power to exclude or admit expert testimony, and to exclude testimony of witnesses whose use at trial is in bad faith or would unfairly prejudice an opposing party." 619 F.2d at 27 (citations omitted). The Court noted that the remedy of exclusion "was carefully fashioned to deny [defendant] the fruits of its misconduct yet not interfere with [defendant's] right to produce other relevant expert testimony. . .Courts need not tolerate flagrant abuses of the discovery process." *Id.* Similarly, in *Lewis v. Telephone Employers Credit Union*, 87 F.3d 1537

prosecutors should be held to even higher standards than civil lawyers:

> Indeed, it can be argued that the prohibition against communication with a represented individual is even more important in the criminal context than in civil cases. A prosecutor "has more direct power over the lives, property and reputations of those in [his] jurisdiction than anyone else, in this nation . . ." In light of the prosecutor's tremendous power and the fundamental individual rights at stake in criminal prosecutions, "the character, quality, and efficiency of the whole [criminal justice] system is shaped in great measure by the manner in which the prosecutor exercises his or her broad discretionary powers." *United States v. Lopez*, 765 F.Supp 1433, 1449, quoting H.R. Rep. No. 986 (quoting Prepared Statement of William W. Taylor III, on behalf on the American Bar Association), **overruled on other grounds**, *United States v. Lopez*, 4 F.3d 1455 (9th Cir. 1993).

Despite this recognition of the importance of prosecutorial probity, the courts have been reluctant to suppress evidence for fear that suppression would interfere with the "truth-seeking" function. Nonetheless, in *Lopez*, the Ninth Circuit held that a court may even dismiss the indictment in egregious cases in order to ensure the criminal trials are conducted within the ethical standards of the profession.[18] The Second Circuit in *Hammad* explicitly recognized suppression as the appropriate remedy for the government's violation of the no-contact rule, stating "we reject the government's effort to remove suppression from the arsenal of remedies available to district judges confronted with ethical violations."[19] In the particular case before it, however, the Court declined to impose the remedy of suppression because the law had been unsettled until that case.

Other criminal courts faced with improper prosecutorial contact with a defendant have approved of the remedy of suppression of the fruits of the contact. It should be noted that while these courts have ordered suppression in the pre-indictment setting, the contacts at issues occurred **in custody, post-appointment of counsel** and **often post-complaint.** For example, in *United States v. Thomas*, 474 F.2d 110 910 Cir.), *cert denied*, 412 U.S. 932 (1973), the Tenth

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(9th Cir. 1996), the Ninth Circuit excluded the fruits of the *ex parte* contact in order to protect the innocent party's right to a fair trial. In *Lewis*, a civil RICO case stemming from a telephone scam on two elderly women, plaintiff's attorney designated the investigating police officer as an expert. At the same time, the attorney encouraged the police officer to investigate the case and to interview one of the defendants. The Ninth Circuit ruled that the police officer's contact with defendant constituted an improper ex parte communication with a represented party by plaintiffs' attorney and excluded from evidence all documents and the handwriting sample acquired by the officer in his interview of the defendant. 87 F.3d at 1557. (The Court overturned the District Court's exclusion of the expert, however, as not sufficiently tailored to the violation).

[18] *Id*. at 1463.

[19] 858 F.2d at 842.

Circuit held that suppression for all purposes, including impeachment, was the appropriate remedy. In *Thomas*, the defendant initiated the interview with a government agent. The interview took place pre-indictment and in custody, but post-complaint and appointment of counsel and appearance at the preliminary hearing. The Tenth Circuit held that is made no difference to the finding of violation whether or not the agent knew Thomas to be represented at the time of the interview: "The canon was violated when the statement was sought to be used over defendant's objection [at trial]."[20]

Similarly, in *Durham*, the Seventh Circuit held that a pre-indictment interview of a represented defendant by a government agent should have been excluded from trial. More recently, in *Killian*, the Fifth Circuit held that suppression of government agents' interview of a represented defendant would have been the appropriate remedy had the government not agreed to exclude them at trial.[21]

Notwithstanding these cases, it must be noted that suppression is not a favored remedy for prosecutorial misconduct. We have found no cases where a court had ordered suppression for violation of the rule in a non-custodial, pre-indictment setting. Many courts have stated the view that suppression is available for a constitutional violation only, and that a violation of the no-contact rule, without more, can be punished only by the limited authority that a court possesses under its supervisory powers. *See, e.g., United States v. Barnett*, 814 F.Supp. 1449, 1453

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[20]The Court held that: "[O]nce a criminal defendant has either retained an attorney or had an attorney appointed for him by the Court, any statement obtained by interview from such defendant may not be offered in evidence for any purpose unless the accused's attorney was notified of the interview which produced the statement and was given a reasonable opportunity to be present. To hold otherwise, we think, would be to overlook conduct with violated both the letter and the spirit of the canons of ethics. This is obviously not something which the defendant alone can waive. 474 F.2d at 112.

[21]Interestingly, in a least one case of a violation of the rule against *ex parte* contact, the government has agreed to the exclusion of any evidence derived from the contact. In *United States v. Johnson*, 818 F.Supp. 1004 (S.D. Tex 1993), a case involving pre-indictment government contact with a represented criminal target by means of a cooperating witness, the Department of Justice stipulated that if any evidence was derived, either directly or indirectly, from the taping of the target's conversations with the witness, it would not utilize such evidence at trial. *Id*. at 1008. The Department of Justice stipulation to exclude the evidence is noteworthy in light of its asserted legal position on appeal that the tapes constituted a legitimate pre-indictment investigative technique (*Id*. at 1006) and the District Court's ultimate conclusion that it would neither dismiss the indictment nor order suppression because of what it viewed as the "devastating effect such a rule would have on undercover operations." *Id*., at 1007-01, quoting *United States .v Heinz*, 983 F.2d 609, 614 (5th Cir. 1993).

(D.Alaska 1992); *United States v. McNaughton*, 848 F.Supp. 1195, 1201 (E.D.Pa. 1994).[22] Indeed, the trend seems to be punish violations of the rule by referring the offending prosecutor to the state bar for disciplinary proceedings.[23] For example, In *Lopez*, the Ninth Circuit held that absent a showing of substantial prejudice, violation of the rule should be punished by lesser sanctions such as holding the prosecutor in contempt or referral to the state bar for disciplinary proceedings.[24] For a good discussion of the available remedies for breach of the no-contact rule, *see* Morton, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal or Discipline*, 7 Geo. J. Legal Ethics 1083 (1994).

Conclusion

Counsel should be vigilant to protect their corporate and white collar clients from *ex parte* contacts by prosecutors. Where counsel is aware of a pending investigation, he or she should immediately contact the prosecutor's office and, in writing, advise the prosecutor of the fact of representation and instruct the prosecutor that *ex parte* contacts are not authorized. In addition, counsel should try to engage the prosecutor in discussing the details of the case, not only to prepare a defense or reach a resolution but to further underscore the fact that counsel's representation goes to the subject matter of the investigation for purposes of the rule. In appropriate cases, counsel should obtain the client's permission to accept service of grand jury subpoenas directed to the corporation or its officers who are asked to testify in their corporate capacity.

Where counsel learns of the investigation only after an *ex parte* contact has been made and only after the indictment of the corporation, counsel must investigate the particulars of the contact to determine of a motion to dismiss or to suppress in maintainable. The law on the ethics of ex parte prosecutorial contacts is still evolving and defense lawyers do well to examine this issue at the beginning of preparing a defense in a white collar case.

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[22] The *McNaughton* Court further noted that Congress has provided, in 18 U.S.C. § 3501(a), that where a trial judge determines that the confession was voluntarily made, it shall be admitted into evidence and that a court cannot exercise its supervisory powers to countermand this congressional mandate. *Id*. at 1204. But see *Lopez*, where the Ninth Circuit "expressly recognized the authority of the district court" to impose the harsher sanction of dismissal of the action "where government attorneys have 'wilfully deceived the court,' thereby interfering with the orderly administration of justice." 4 F.3d at 1204, citing *United States v. National Medical Enters, Inc.*, 792 F.2d 906 (9th Cir. 1986).

[23] In the Talao case, Judge Walker punished the prosecutor's violation of Rule 2-100 by referring her to the state bar for disciplinary proceedings and also by awarding an adverse jury instruction against the government. Upon filing of the government's motion requesting a stay of the referral to the state bar, Judge Walker has stayed the referral pending consideration of the government's motion to reconsider.

[24] F.3d at 1464.