New Developments in Ex Parte Prosecutorial Contact Law

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In the November 1998 issue of Forum,[1] we reviewed the law on the controversial topic of the application to prosecutors of state ethical rules prohibiting ex parte contact with represented parties. In that article, we discussed the governing rules, [2] efforts by the United States Department of Justice to exempt federal prosecutors from those rules (including a proposed congressional measure), case law, including the seminal Ninth Circuit case of United States v. Lopez, 4 F.3d 1455 (9th Cir.1993) on whether the ethical rules reached pre-indictment contact by prosecutors and, in the corporate context, which employees were deemed to come within the definition of "represented party" as used in the ethical rules. In general we noted that while every state bar had promulgated rules prohibiting attorneys from contacting a party whom the attorney knows to be represented on the subject-matter of the representation, a majority of federal circuits (with the notable exception of the Second Circuit) had exempted prosecutors conducting pre-indictment investigations from the reach of the rules. We suggested that, given appropriate fact patterns, existing case law could be used to persuade courts to apply the rule in the pre-indictment context.

In the two years since that article appeared, two important developments have occurred that have changed and extended the law in favor of the position we suggested in our article. First, Congress rejected the Department of Justice-sponsored measure to exempt federal

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[1] Mary McNamara and Edward W. Swanson, Ex Part Prosecutorial Contact with your Corporate Client, FORUM 1998, Vol. 25, No. 4, page 44.

[2] The applicable rule in California is Rule 2-100 of the California Rules of Professional Conduct. In pertinent part, Rule 2-100 provides:

> (A) While representing a client, a member [of the State Bar] 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 the consent of the other lawyer.
> (B) For purposes of this 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 an 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.
> (C) This rule shall not prohibit:
> . . .
> (3) Communications otherwise authorized by law.

prosecutors from the reach of the rules and instead enacted the McDade Amendment, a provision which requires federal prosecutors to abide by the same ethical standards as every other lawyer. Second, in the recent case of United States v. Talao, 222 F.3d 1133 (9th Cir. 2000) which one of the authors argued, [3] the Ninth Circuit expressly followed the Second Circuit and applied the rule to prosecutors' conduct in the pre-indictment, non-custodial setting. In this article, we explore the implications of these new developments.

The McDade Amendment

Effective April 19, 1999 it is the law of the land that government attorneys "shall be subject to State laws and rules and local Federal court rules, governing attorneys in each state where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C. § 530B. This new provision, known as the McDade amendment after its sponsor, is part of The Ethical Standards for Federal Prosecutors Act of 1997.[4]

The McDade amendment is unconditional in its application. Accordingly, it appears to nullify Department of Justice policies which purport to treat government attorneys as not subject to state bar rules "to the same extent and in the same manner as other attorneys." [5] It is unclear how courts will apply McDade to the body of pre-existing federal case law which purports to treat prosecutors differently, especially in the pre-indictment, non-custodial context. Arguably, the McDade Amendment nullifies any judicial or administrative interpretation of a state bar rule that purports to grant exemptions or waivers from ethical standards to government attorneys. [6]

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[3] Mary McNamara represented lead defendant Virgilio Talao and both briefed and argued the case.

[4] The McDade amendment was fiercely opposed by the Department of Justice. Recognizing its far-reaching implications, Senator Orrin Hatch sponsored an alternative bill containing numerous exemptions for government attorneys. That bill failed to pass.

[5] In fact, the amendment provides that "[t]he Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section." 28 U.S.C. § 530B(b).

[6] Local Rules of the United States District Courts generally make the Rules of Professional Conduct of the State Bar binding on all lawyers permitted to practice before them. See, e.g., Rule 11-3 of the Local Rules of the Northern District of California

> **11-3. Standards of Professional Conduct.**
>
> **(a) Duties and Responsibilities.** Every member of the bar of this court and any attorney permitted to practice in this court under Civil L.R. 11-2 shall:
>
> (1) Be familiar with and comply with the standards of professional conduct required of members of the States Bar of California.
>
> . . .

It also appears fair to suggest that McDade disposes of another thorny issue in this area -- the question of the appropriate remedy for breach of the ex parte contact rule. Prosecutors have argued, largely successfully, that suppression or dismissal are not appropriate remedies for a violation of the rule. [7] The underlying assumption driving that argument however was that, for reasons of the need not to undermine criminal investigations, the government in criminal cases should not be treated like a private party when it is found to have violated the rule. Differential treatment of government lawyers is what McDade was specifically designed to stamp out however. Consequently, the way appears open to revivifying stronger remedial measures for violations of the rule so as to enforce the rule against prosecutors "to the same extent and in the same manner as other attorneys."

With respect to the remedy of suppression, we note that exclusion of the fruits of an ex parte contact is a remedy that civil courts have not hesitated to use. For example, the Ninth Circuit in Lewis v. Telephone Employers Credit Union, 87 F.3d 1537 (9th Cir. 1996) excluded the fruits of an *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, plaintiffs' 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 the 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 1559. [8]

Civil L.R. 11-3(a)(1).

Criminal Local Rule 2-1 provides that "[t]he provisions of the Civil Local Rules of the court shall apply to criminal actions and proceedings, except where they may be inconsistent with these criminal actions and proceedings, the Federal Rules of Criminal Procedure or provisions of law specifically applicable to criminal cases. Crim. L.R. 2-1.

[7] It should be noted, however, that in the pre-McDade decision of Lopez, 4 F.3d at 1463-64, the Ninth Circuit expressly recognized that *the ultimate sanction of dismissal* of an otherwise valid indictment is an appropriate means of policing ethical misconduct by prosecutors via the court's supervisory powers.

[8] The Court overturned the district court's exclusion of the expert as not sufficiently tailored to the violation:

> The district court's sanction in this case was not "carefully fashioned." It denied [plaintiffs] the opportunity to call [the police officer] as either an expert or percipient witness, rather than tailoring its sanction to deprive the plaintiffs of information or exhibits wrongly acquired during the second interview of [defendant].

Id.

Similarly, in Campbell Industries v. M/V Gemini, 619 F.2d 24 (9th Cir. 1980), the Ninth Circuit approved exclusion of 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. While the district court did not analyze the issue under Rule 2-100, it held that the ex parte 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.

Campbell and Lewis are civil cases involving ex parte contacts by private lawyers which trial courts sanctioned by restoring the injured party to the *status quo ante*. In light of the McDade Amendment, these cases suggest equal, not lesser treatment of ex parte contacts when they occur at the hands of government lawyers. [9]

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[9] If anything, it could be argued, greater care should be taken in addressing remedies in criminal cases to ensure that abuses do not occur. As Judge Marilyn Hall Patel of the Northern District of California noted in the district court opinion in the Lopez case:

> 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 of the American Bar Association), overruled on other grounds, United States v. Lopez, 4 F.3d 1455 (9th Cir. 1993).

The Talao Decision

Until August of this year, the only federal circuit which had unambiguously applied the rule barring ex parte contacts to prosecutors in the pre-indictment setting was the Second Circuit in United States v. Hammad, 858 F.2d 834 (2nd Cir. 1988). [10] In Hammad, the court applied Disciplinary Rule 7-104(A)(1) of the ABA Model Code of Professional Responsibility to an AUSA's pre-indictment ex parte contact with a represented party via an informant. On August 23, 2000 the Ninth Circuit explicitly joined the Second Circuit, stating that "[w]e find the Second Circuit's approach to be the proper one." United States v. Talao, 222 F.3d 1133 at 1139 (9th Cir. 2000).

The facts in Hammad were as follows: An AUSA provided a sham grand jury subpoena to an informant and directed him to arrange and record a meeting with Taisser Hammad, one of the targets of the government's Medicaid fraud investigation. Taisser Hammad had previously been barred and fined by a state department of health for Medicaid fraud and was in the midst of parallel proceedings to challenge the 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 to advise the AUSA of his representation, although he had declined to verify the representation in writing. 858 F.2d at 835-

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[10] The Supreme Court of Minnesota also recently adopted Hammad in applying the ban on ex parte contact in the pre-indictment setting. In State v. Miller, 600 N.W. 457 (1999) the Minnesota Supreme Court, sitting en banc, held that in permitting state investigators to conduct a pre-indictment interview with a corporate manager over the objection of corporate counsel, state prosecutors had violated the no contact rule and committed such an interference with the attorney-client relationship that suppression of the manager's statement was the only appropriate remedy.

The Miller court reasoned as follows:

> [W]e do not perceive that the application of [no-contact rule] MRPC 4.2 should be limited, in a criminal context, to contacts with an attorney's client after the client has been charged. Adverse counsel's contacts with an attorney's client can be disruptive and deleterious to the attorney's relationship with a client irrespective of whether the client has been charged with a crime, and the need for an attorney's counsel in an adverse interview is certainly no less before the client is charged than after. We hold that the appropriate analysis is to look at the alleged violations on a case-by-case basis, examining the totality of the circumstances of the contact to determine if it went beyond appropriate and commonly accepted investigatory activity of police to implicate issues relating to the fair administration of justice on the part of the prosecuting attorney.

Id. at 467.

36. The Second Circuit 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 to the pre-indictment phase of a criminal case, the Court forcefully stated:

> [W]e resist binding the Code's applicability to the moment of indictment. The timing of an indictment's return lies substantially within the control of the prosecutor. Therefore, were we to construe the rule as dependent upon indictment, a government attorney could manipulate grand jury proceedings to avoid its encumbrances.

Hammad, 858 F.2d at 839.

Government attorneys and several commentators dismissed the Hammad decision as aberrational. However, in Talao, the Ninth Circuit quoted the above language in holding that Rule 2-100 of the California Rules of Professional Conduct applied to a pre-indictment, non-custodial contact by a federal prosecutor with an employee of a target corporation.

The Talao case concerned parallel civil and criminal investigations of a small construction company and its officers and employees regarding, inter alia, allegedly false statements made with respect to wage underpayments to the corporation's workers in violation of federal prevailing wage laws. In addition to the parallel government investigations, the laborers who had alleged wage underpayments had filed a grievance with their union. Moreover, the Asian Law Caucus, representing the laborers, had filed a qui tam action alleging these same false statements, in which the United States would later intervene. The corporation's lawyer had approached the AUSA regarding a global settlement of the parallel government investigations. 222 F.3d at 1135.

During this time frame, the government subpoenaed the corporation's bookkeeper before the Grand Jury. The corporation's lawyer prepared the bookkeeper for her testimony and had arranged to meet her in advance of her appearance. Before the bookkeeper 's scheduled Grand Jury appearance, she went alone to the federal building in an attempt to continue the appearance because, she claimed, she did not want to be represented by the corporation's lawyer whom she believed unwittingly was being used by the owners to pressure her to give false testimony. 222 F.3d at 1135-36. Although the bookkeeper was unsuccessful in her attempt to change the date, she did meet alone with the AUSA because she arrived at the federal building before the corporation's lawyer, and was met by the agent and the AUSA. She agreed to the AUSA's request for an ex parte interview, saying that she did not want the corporation's lawyer to be present. 222 F.3d at 1136. The bookkeeper declined the AUSA's offer to arrange for court-appointed counsel to represent her in the meeting. Shortly thereafter, the corporation's lawyer arrived and demanded to be present at the interview. The bookkeeper told the AUSA that she did not want the lawyer to be present stating that she wished to tell the truth, believed she could not do so in his presence, and that her employers had been pressuring her to lie. Confronted with a situation where the employee (who was to testify about corporate matters) did not want the

corporation's lawyer, but the lawyer was demanding to be present, the AUSA sought advice from the Chief of the Criminal Division. The AUSA was told that the lawyer was wrongfully tampering with a witness and instructed the AUSA to continue the interview outside the lawyer' s presence. The AUSA did so and the bookkeeper gave further incriminating information against her employers. She then recounted this incriminating information in her Grand Jury testimony.

On a motion to dismiss for violation of Rule 2-100, United States District Judge Vaughn R. Walker of the Northern District of California applied Rule 2-100 to the circumstances of this pre-indictment contact. United States v. Talao, 1998 WL 1114043. Judge Walker first disposed of the government's argument that the bookkeeper was not a represented party within the meaning of Rule 2-100 because she was not a manager, director or officer of the corporation. The Court held that:

> The rule, however, explicitly states that whether a corporate employee is included in the definition of "party" depends on the nature of the communication at issue. See Rule 2-100(B)(2). If the communication concerns the subject matter of the representation and the employee committed an act which subjects the corporation to civil or criminal liability, the ex parte communication is improper.

1998 WL 1114043, * 5. Noting that the bookkeeper had prepared the corporate payroll records and that this activity was the subject both of the ex parte communication, and of the criminal and civil proceedings, and noting further that the bookkeeper's preparation of allegedly false payroll records could be imputed to the corporation and that her statements could bind the corporation as party admissions, the court found that the bookkeeper was a represented party within the meaning of the rule. 1998 WL 1114043, * 5.

Judge Walker next addressed the government's argument that the ex parte contact did not violate Rule 2-100 because the contact occurred pre-indictment. The government had relied on the Ninth Circuit's cases of United States v. Kenny, 645 F.2d 1323 (9th Cir. 1981) (finding non-custodial, pre-indictment contact not in violation of the rule) and United States v. Powe, 9 f.3d 68 (9th Cir. 1993) (finding undercover pre-indictment contact not in violation of the rule) arguing that these cases stated a categorical rule that all pre-indictment contacts fell outside the scope of the Rule 2-100. Judge Walker disagreed, noting that unlike either Kenny or Powe, the Talao case involved a parallel civil case, the contact was not an undercover investigatory manouevre, and that unlike Kenny or Powe, the government's adversarial position vis-a-vis the Talao defendants had solidified to the point that the protections of Rule 2-100 applied. Judge Walker therefore found that Rule 2-100 applied to the pre-indictment contact between the AUSA and the bookkeeper. 1998 WL 1114043, *6-7.

Turning to the question of remedy, Judge Walker held that although he had found a violation of the rule, the violation did not amount to prosecutorial misconduct and as such could not constitute a breach of the Due Process Clause of the Fifth Amendment. Further, while acknowledging the possibility that a pre-indictment violation might, under exceptional circumstances, rise to the level of a Sixth Amendment breach, the court declined to find that this

case presented such a possible exception. 1998 WL 1114043, *7-8. The court also declined to exercise its supervisory powers to dismiss the indictment. The court held that although the contact with the bookkeeper violated the rule, there was no evidence that the violation influenced the content of the bookkeeper's testimony, which in any event was but one basis for the indictment, and a search warrant obtained in the case was based on ample other evidence. Nonetheless, the court awarded a jury instruction against the government to the effect that the jury would be "instructed to consider [the government's misconduct] when evaluating the credibility of the bookkeeper's testimony." The court also ordered a copy of the order to be served on the State Bar. 1998 WL 1114043, *9.

After a further round of briefing and an evidentiary hearing, Judge Walker vacated the referral to the State Bar, reaffirmed his earlier ruling that the government had violated Rule 2-100, reaffirmed the award of the jury instruction and declined the defense request for the lesser sanction of evidentiary suppression. The AUSA appealed the ruling and the United States filed a petition for a writ of mandamus with respect to the jury instruction and what it claimed were the dire implications to its investigative effectiveness of Judge Walker's application of Rule 2-100 in the pre-indictment context.

The Ninth Circuit consolidated the AUSA's appeal and the United States writ petition. After its review of the facts, the Court held that

> under these circumstances, involving fully defined adversarial roles, impending grand jury proceedings, and awareness on the part of the responsible government actors of [the corporation's] ongoing legal representation, Rule 2-100 governed [the AUSA's] pre-indictment, non-custodial communications with [the bookkeeper].

222 F.3d at 1138. The Court nonetheless held that Rule 2-100 did not prohibit the contact because the bookkeeper initiated contact "for the purpose of disclosing that corporate officers were attempting to suborn perjury and obstruct justice." In such circumstances, the Court held that, despite what it termed the "apparent conundrum created by [the bookkeeper's] dual role as employee/party and witness . . . [i]t would be an anomaly to allow the subornation of perjury to be cloaked by an ethical rule, particularly one manifestly concerned with the administration of justice." 222 F.3d at 1140. Accordingly, the Court declined to enforce the rule where the effect would apparently to have been to protect those who would suborn perjury by their employees. Id.

With respect to what kind of circumstances will be deemed to override the rule, however, the Court went on to counsel a cautious approach:

> We strongly emphasize . . . that a witness's assertion that she is afraid of testifying in an attorney's presence does not, without more, suggest that the attorney has engaged in any ethical or legal violation. Indeed, it is not unknown for corporate employees involved in alleged wrongdoing to attempt to gain favor

> with U.S. Attorneys by claiming that corporate officials or corporate counsel directed them to act unlawfully. Clients are sometimes willing to throw lawyers to the wolves when they believe that doing so will let them avoid prosecution or a longer prison sentence. Claims of lawyer misconduct made under such circumstances should be viewed with a most critical eye.

222 F.3d at 1141. The Court also warned

> [w]e do not mean to suggest that government officials have a license to approach an employee and initiate communications whenever there is a possible conflict of interest between the employee and the corporation for whom the employee works.

Id. However, the Talao Court did not take up its previous suggestion in Lopez that before claiming an exemption from the rule, the appropriate first step is to seek a court order. See also Lopez, 4 F.3d at 1461 ("We agree that in an appropriate case, contact with a represented party could be excepted from the prohibition of Rule 2-100 *by court order*") (emphasis added). California courts have held that opposing counsel may not make unilateral determinations as to the Rule 2-100's applicability. For example, in Abeles v. State Bar, 9 Cal. 3d. 603 (1973) (in bank), the California Supreme Court held that "*[a]ny dispute as to the authority of the counsel of record to act for the party he purports to represent may be raised in the trial court. The dispute should not be resolved unilaterally by the opposing attorney.*" Id. at 610 n.7 (citations omitted) (emphasis added).

Similarly, in Mills Land & Water Co. v. Golden West Refining Co., 186 Cal. App. 3d 116 (1986), the California Court of Appeal strongly rejected the expedient of allowing opposing counsel to determine whether Rule 2-100 applied. As the court found, "preserving the efficacy of rule 7-103 requires an attorney cannot be given the responsibility of determining the rule's applicability." Mills Land, 186 Cal.App.3d at 128 n.6. The Talao Court, in contrast, noted simply that the AUSA had done the right thing in seeking clarification from her superiors as to how to proceed and in advising the bookkeeper that she had a right to be represented by an attorney and giving her an opportunity to contact substitute counsel.

While ultimately finding an exception to the rule in a case where a represented party seeks to report a claimed obstruction of justice to a prosecutor, and where the prosecutor advises the party of his or her right to separate counsel, the Talao case stands for two major propositions, both of which were strongly resisted by the government: First the rule applies in the pre-indictment, non-custodial setting where the adversarial roles are defined, where grand jury proceedings are imminent, and where the prosecutor is aware of the fact of legal representation. As the government had pointed out in its briefing, these circumstances obtain in a great number of pre-indictment investigations, thus effectively blocking all contact by a prosecutor with a represented party at any time.

Second, the Talao case makes it clear that, even in the case of an apparent conflict of interest on the part of corporate counsel, the government is barred from contacting a corporate

employee pre-indictment absent strong apparent evidence of obstruction of justice by the corporation or its officials. The fact that a conflict of interest may be apparent to the government is not by itself sufficient to pierce the protections of the rule. California courts had long ago come to this conclusion in the civil context. The seminal California Court of Appeal in Mills Land held that an attorney had violated the predecessor to Rule 2-100 by contacting the former president (and current director) of a corporate party even though the former president told the attorney that the corporation's attorney did not represent him and that the corporation's position in the litigation *conflicted with his own.* 186 Cal. App. 3d at 123-124. The Court of Appeal held that the predecessor to Rule 2-100 prohibited the attorney's contact with the former president because of his ongoing ties with the corporation. Accord, Abeles, 9 Cal. 3d. 603 (California Supreme Court, in bank, held that attorney violated ethical bar on ex parte communication with a represented party where he contacted member of partnership who told attorney that he had not authorized filing of lawsuit against attorney's client and that partnership's law firm did not represent him).

In holding that the rule not only applies pre-indictment, but that it applies even in the face of an apparent conflict of interest, the Ninth Circuit in Talao strongly reaffirmed the animating logic of its seminal decision in United States v. Lopez, that government lawyers are bound by the ethical rules adopted by the federal courts in which they practice just as are private lawyers. The Talao Court's ruling carries on the Ninth Circuit's leadership in this area and reminds government lawyers that before embarking on a course of conduct that would clearly be prohibited if undertaken by private counsel, they should pause to consider the ethical implications of their actions.