State Ethics Rules Now Apply to Federal Prosecutors

By Allen Samelson and Robert Maxwell

An attorney for the Government 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.

With this seemingly simple proposition, the United States Congress has laid to rest a ten-year conflict between the U.S. Department of Justice (DOJ), on the one hand, and federal and state bar associations, on the other, about whether federal prosecutors are subject to the same rules of professional conduct that govern all private lawyers practicing in federal courts. Under new Section 530B of title 28 of the United States Code (Section 530B or the McDade Act), effective April 19, 1999, all federal government lawyers will for the first time have to comply with the rules of professional conduct for the state(s) in which they practice.

The enactment of Section 530B was the culmination of a long running controversy about the application of state ethics rules to federal prosecutors. This controversy focused primarily on state rules of professional conduct which generally prohibit an attorney from communicating directly with a person whom the lawyer knows is represented by counsel. Prior to the enactment of Section 530B, DOJ took the position that a federal prosecutor could privately question represented persons in certain situations, including communications with current employees of a corporation which the prosecutor knows is represented by counsel. Thus, DOJ's prior rules permitted federal prosecutors to initiate contact with certain corporate employees without notice to corporate counsel, even if the corporation could be held liable for the conduct of the employee, as long as no formal legal action had been taken against the employee in the matter. See former 28 C.F.R. Part 77 (1998). The former DOJ rules also permitted ex parte communications with an employee who had been made a defendant in a civil or criminal action in limited circumstances. Id., § 77.6.

The former DOJ rules expressly permitting ex parte contacts with represented parties were the object of much criticism in the private bar. Moreover, some federal and state courts found that DOJ did not have the statutory authority to pre-empt conflicting state ethics rules. See United States ex rel O'Keefe v. McDonnell Douglas Corp., 132 F. 3d 1252 (8th Cir. 1998) (discussed below); United States v. Ferrara, 847 F.Supp. 964, 969 (D.D.C. 1993), aff'd, 54 F.3d 825 (D.C. Cir. 1995). This controversy has been at least temporarily put to rest by DOJ's repeal of its former rules governing ex parte contacts, and adoption of a new Interim Rule to implement the requirements of the McDade Act. See 64 Fed. Reg. 19273 (1999). This article describes the controversy over DOJ's compliance with state ethics rules for contacts with represented parties, and analyzes the new rules governing DOJ's implementation of Section 530B.

ABA Model Rule 4.2

Rule 4.2 of the ABA Model Rules of Professional Conduct provides: In representing a client, a lawyer shall not communicate about the subject of the representation with a person 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.

Virtually all 50 states and the District of Columbia have adopted an ethical rule identical or similar to ABA Model Rule 4.2 or its predecessor. The purpose of the "no-contact" rule is to protect represented persons against overreaching by adverse counsel, safeguard the attorney-client relationship from interference, and reduce the likelihood that clients will disclose privileged or other information harmful to their interests. See ABA Formal Ethics Opinion 95-396 (1995). These interests are balanced in the rule by two exceptions: (1) when consent is given by the person's lawyer; and (2) when such contact is "authorized by law." It is mainly through the latter exception that DOJ previously attempted to justify its exemption from the no-contact prohibition.

There has been considerable tension between the various states' no-contact rules and the perceived needs of federal law enforcement officials, especially in recent years as DOJ encouraged federal prosecutors to play a larger role in investigations conducted before indictment, arrest, or the filing of a civil complaint. In the criminal context, most courts held that the ethical restriction against contacts with represented persons did not apply at the pre-indictment investigation stage before the Sixth Amendment right to counsel attaches. See, e.g., United States v. Ryans, 903 F.2d 731, 739 (10th Cir. 1990), cert. denied, 498 U.S. 855 (1990); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir. 1981), cert. denied, 452 U.S. 920 (1981). But the Second Circuit muddied this rule in United States v. Hammad, 858 F.2d 834 (2d Cir. 1988), cert. denied, 498 U.S. 871 (1990), which held that federal prosecutors violated New York's no-contact rule even though the Sixth Amendment right to counsel had not yet attached.

The Thornburgh Memo

DOJ reacted strongly to the Hammad decision. In 1989, then-Attorney General Richard Thornburgh issued a memorandum warning that the Justice Department would resist what it viewed as efforts by the criminal defense bar to achieve through local ethical rules "what cannot be achieved through the Constitution: a right to counsel at the investigative stage of a proceeding." See In re Doe, 801 F. Supp. 478, 489 (D. N.M. 1992) (attaching Thornburgh Memorandum). The "Thornburgh Memorandum" concluded by stating that: contact with a represented individual in the course of authorized law enforcement activity does not violate DR 7-104 [the predecessor to Model Rule 4.2]. The Department will resist, on Supremacy Clause grounds, local attempts to curb legitimate federal law enforcement techniques.

801 F. Supp. at 493

In response, the American Bar Association questioned the Attorney General's authority to use an internal executive branch memorandum to supply the requisite "authority of law" that would exempt federal prosecutors from state ethics rules. See ABA House of Delegates, Report No. 301, approved Feb. 12-13, 1990. Several federal courts also rejected DOJ's assertion that a federal prosecutor is not subject to discipline for violating state ethics rules. See, e.g., United States v. Lopez, 4 F.3d 1455 (9th Cir. 1993) (dismissing criminal charges because of prosecutor's ex parte communications with defendant in violation of California ethics rules); In re Doe, 801 F. Supp. 478 (D.N.M. 1992)(holding that "Thornburgh Memorandum" does not provide authority for federal prosecutor to ignore state no-contact rule). These and other similar cases spurred DOJ's efforts to adopt a formal rule governing ex parte contacts with represented parties.

DOJ Issues Regulations Conflicting With State Ethics Rules

In 1992, DOJ began what turned out to be a protracted rulemaking concerning the circumstances under which DOJ lawyers could properly communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings. Proposed rules were issued three separate times before a final rule was issued on Aug. 4, 1994. 59 Fed. Reg. 39,910, former 28 C.F.R.

Part 77 (1998).

Contrary to ABA Model Rule 4.2, the 1994 DOJ regulations generally permitted ex parte communications with represented individuals and organizations if they had not yet been named as defendants in a civil or criminal enforcement action. See former 28 C.F.R. §§ 77.3, 77.7 (1998). After an arrest, indictment, or filing of a complaint, communications with a "represented party" on the subject matter of the representation were generally prohibited. Id. § 77.5.

But the regulations also contained several broad exceptions. For example, the regulations allowed contacts with a represented party when the communication was made: (1) "pursuant to discovery procedures or judicial or administrative process," such as by grand jury testimony, an administrative summons or subpoena, or a civil investigative demand; or (2) in the course of an investigation of "additional, different or ongoing criminal activity or other unlawful conduct." Id., § 77.6 (b), (e). The regulations also contained exceptions for communications to determine if the person was in fact represented by counsel; communications initiated by the represented party (under specified circumstances); communications made after a voluntary and knowing waiver of a defendant's "Miranda" rights; and communications that were necessary to protect from threats the safety or life of any person. Id., § 77.6. Nearly all of these exceptions were inconsistent with state ethics rules governing such communications.

The 1994 DOJ regulations also established standards governing federal prosecutors' communications with employees of organizations, including corporations. These standards also departed substantially from state ethics rules. Specifically, the 1994 DOJ regulations: (1) applied the no-contact rule to a current employee of an organization (which itself was a represented party) only if the employee was considered a "controlling individual," defined in a manner substantially more narrow than that used by ABA Model Rule 4.2; and (2) through several broadly worded exceptions, permitted ex parte contacts even if an employee was a "controlling individual" who had obtained separate counsel.

Finally, in what was the most controversial aspect of the final 1994 regulations, DOJ stated the rules would "preempt and supersede the operation of state and local federal court rules as they relate to contacts by Department attorneys, regardless of whether such rules are inconsistent or consistent with this regulationÉ" 59 Fed. Reg. at 39,916.

The Eighth Circuit's 1998 Decision in O'Keefe United States ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F. 3d 1252 (8th Cir. 1998) put the validity of DOJ's former regulations squarely before a federal appeals court for the first time. O'Keefe involved a qui tam action brought under the False Claims Act, 31 U.S.C. §§ 3729-33, alleging that McDonnell Douglas Corp. had directed its employees to mischarge deliberately their labor hours under a number of defense contracts. The government intervened in the case. As part of its pretrial investigation, DOJ agents sent a questionnaire to various present and former lower-level McDonnell Douglas employees asking whether they had ever engaged in labor hour mischarging and, if so, at whose direction. McDonnell Douglas responded by filing a motion for a protective order seeking to prevent such contacts on the ground that they were barred by Missouri Supreme Court Rule 4-4.2, which had been adopted by the federal court for the Eastern District of Missouri where the action was pending.

In the district court, the government argued that the ex parte contacts with these company employees were permitted by section 77.10(a) of DOJ's former rules because the employees were not "controlling individuals" under the 1994 DOJ regulations, which DOJ argued should supersede the local rules of the federal district court. Alternatively, the government argued that because the DOJ regulations permitted the ex parte contacts, they came within the exception in Missouri Rule 4-4.2 for contacts "authorized by law." The district court, and ultimately the Eighth Circuit, rejected these arguments, finding that

Congress had not intended for government lawyers to be exempt from local ethics rules, and holding that DOJ lacked statutory authority to establish its own separate standards for communications with employees of a represented party. The government's request for rehearing en banc in O'Keefe was denied, and the Justice Department did not seek review by the Supreme Court.

DOJ "Interim Rules" Under The McDade Act

To resolve the controversy, Congress passed the McDade Act (quoted above). On April 20, 1999, DOJ published for comment an Interim Final Rule (the "Interim Rule") implementing the requirements of Section 530B. 64 Fed. Reg. 19273 (1999). The Interim Rule became effective immediately but is subject to change after a sixty-day comment period. 64 Fed. Reg. at 19275. The Interim Rule supersedes DOJ's previous regulations governing contacts with represented persons, but nevertheless contains several important limitations on the application of state ethics rules to federal prosecutors.

The Interim Rule covers all attorneys employed by DOJ who are authorized to conduct civil or criminal enforcement proceedings on behalf of the United States, as well as any specially appointed independent counsel. 28 CFR § 77.2(a). The new regulations will not apply to attorneys employed as investigators by DOJ or other law enforcement agents who are not authorized to represent the United States in criminal or civil law enforcement litigation. Id., § 77.1(c). The Interim Rule also provides that Section 530B should not be construed to alter rules of professional responsibility that expressly exempt government attorneys from their application. Id.

The Interim Rule expressly applies to investigative agents operating under DOJ direction. Id., § 77.4(f). The regulations admonish Department attorneys against "direct[ing] an investigative agent acting under the attorney's supervision to engage in conduct under circumstances that would violate the attorney's obligations under Section 530B." Id. The regulations contain a good faith exception for a Department attorney who provides legal advice or guidance upon request to an investigative agent. Id.

Under the Interim Rule, a federal prosecutor will not be subject to a state's ethics rules unless the attorney's conduct is "substantial and continuous" in that jurisdiction. Thus, taking a deposition (related to a case pending in another court), directing a contact to be made by an investigative agent, or responding to an inquiry by an investigative agent will not be considered sufficient to trigger the application of a particular state's ethical rules. Id. § 77.2(j)(2). One may question, however, whether even these "isolated" acts might constitute substantial and ongoing involvement by a lawyer in some situations.

The selection of which state's ethics rules are applied under the Interim Rule is based on whether or not a case is pending. When a case is pending, DOJ attorneys are required to comply with the ethical rules of conduct of the court where the case is venued. Id., § 77.4(a). If no case is pending, the attorney is directed to comply generally with the ethical rules of the federal attorney's state of licensure, unless application of traditional choice of law principles directs the attorney to comply with the ethical rules of another jurisdiction or court, such as the ethical rules adopted by the court in which the case is likely to be brought. Id., § 77.4(c)(1).

At any one time, DOJ attorneys may be engaged in activities in a number of different jurisdictions. When a case is pending and the rules of the attorney's state of licensure are more restrictive than the applicable state's ethics rules, the Interim Rule directs the attorney to consider various factors in deciding which ethics rules will apply. These factors include: (1) whether the attorney's state of licensure would apply the rule of the court before which the case is pending rather than the rule of the state of licensure; (2) whether the local federal court rule pre-empts contrary state rules; and (3) whether application of traditional choice of law principles directs the attorney to comply with a

particular rule. Id., § 77.4(b)(1). In making this determination, the Interim Rule encourages an attorney to consult with a supervisor or professional responsibility officer to determine the best course of conduct. Id., § 77.4(b)(2). When no case is pending and the attorney concludes that multiple rules are conflicting, DOJ attorneys are also directed to consult with a DOJ supervisor or professional responsibility officer to determine the best course of conduct if consideration of traditional choice of law principles does not provide an adequate answer. Id., § 77.4(c)(2).

DOJ intends to limit the effect of the Interim Rule on litigants. Thus, the regulations expressly provide that they are intended solely for the guidance of attorneys for the government, and are not intended to create any private rights in parties to litigation with the United States, including criminal defendants. Id., § 77.5. Further, DOJ maintains that compliance with state and local federal court rules of professional responsibility are not to be construed in any way to alter federal substantive, procedural, or evidentiary law, or to interfere with the Attorney General's authority to send DOJ attorneys into any court in the United States. 28 CFR § 77.1(b). See also United States v. Lowrey, 166 F.3rd 1119 (11th Cir. 1999) (interpreting Section 530B prior to its effective date, and rejecting the argument that state rules of professional responsibility governed admission of evidence in federal court). The rules make clear that they shall not be used as a basis for dismissing civil or criminal charges or proceedings or for excluding relevant evidence in any judicial or administrative proceeding. 28 CFR § 77.5.

While the Interim Rule provides that Department attorneys shall not direct any attorney to engage in conduct that violates Section 530B, § 77.4(e), the Rule also contains a safe harbor: a supervisor or other Department attorney who in good faith gives ethics advice to another Department attorney will not be deemed to violate the Rule. Id. Finally, DOJ states that the decision to replace the Department's former regulations does not constitute a determination that any of the conduct previously authorized by those regulations is impermissible. 64 Fed. Reg. at 19274. Although the Interim Rule is a major step forward toward resolution of the debate over application of state ethics rules to DOJ attorneys, it is not likely to be the final chapter in this long-standing controversy. Prior to passage of the McDade Act, the U.S. Judicial Conference Standing Committee on Rules of Practice had proposed issuance of uniform "Federal Rules of Attorney Conduct," to address the "maze of often ambiguous and sometimes conflicting ethical guidelines" in the federal courts. In addition, in the American Bar Association's current effort to update the Model Code, dubbed "ABA Ethics 2000," DOJ and others are seeking to amend ABA Model Rule 4.2 to permit DOJ contacts with represented parties pursuant to the guidelines established in DOJ's former rules. And legislation has already been introduced in Congress to repeal or limit the McDade Act. It will therefore be important to monitor these developments closely. But unless the sea change made by the McDade Act is reversed, federal prosecutors must comply with the state ethics rules of the forums in which they practice and, in particular, the rules governing communications with represented persons.

Rogers Joseph O'Donnell
311 California Street, 10th Floor
San Francisco, CA 94104-2695
Telephone: 415/956-2828
Facsimile: 415/956-6457