Richmond Public Interest Law Review

Volume 4 | Issue 1 Article 3

1-1-1999

State Regulation of Federal Prosecutors: The Impact on Contact with Represented Persons in Virginia

Robert H. Burger

STATE REGULATION OF FEDERAL PROSECUTORS:

THE IMPACT ON CONTACT WITH REPRESENTED PERSONS IN VIRGINIA

Robert H. Burger·

I. INTRODUCTION

A basic rule of legal ethics, since at least 1836, requires lawyers to communicate only with an adverse party's lawyer, rather than directly with the represented party.[112] Criminal defense attorneys and federal prosecutors however, have long disagreed on the actual scope of this ethical rule in the criminal law context. For years, both sides have debated whether this "no-contact" rule extends protection to represented persons prior to their indictment or arrest.[113]

As states extended their "no-contact" prohibition to pre-indictment, non-custodial criminal investigations, the Department of Justice (DOJ) responded by promulgating its own ethical rule.[114] The DOJ rule limited the scope of its "no-contact" prohibition to represented parties who have already been indicted or arrested, and are no longer mere targets of a criminal investigation.

In response to the DOJ rule, the 105th Congress passed what is popularly known as the McDade Amendment.[115] The McDade Amendment, named after its chief sponsor Representative Joseph McDade (R-PA), was included in the Omnibus Consolidated and Emergency

---

· Robert H. Burger graduated from Washington and Lee University in 1993, and from the University of Richmond School of Law in 1999. During law school, Rob spent time clerking in the criminal division of the United States Attorney's Office. He is currently clerking for the Honorable William T. Prince, United States Magistrate Judge, Eastern District of Virginia.

[112] Elizabeth Allen, *Federalizing the No-Contact Rule: The Authority of the Attorney General*, 33 AM. CRIM. L. REV. 189, 194 (1995); *see also* Communications with Represented Persons, 59 Fed. Reg. 39910, 39910 (1994).

[113] The disagreement between criminal defense attorneys and federal prosecutors is highlighted in the Thornburgh Memorandum. *See infra* note 14.

[114] 28 C.F.R. Part 77 (1998); 59 Fed. Reg. at 39910–12.

[115] Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 801, 112 Stat. 2681, 2681–118 (1998).

Supplemental Appropriations Act of 1999. The bill was signed into law on October 21, 1998.

The McDade Amendment required federal prosecutors to fully comply with state bar ethics rules by April 19, 1999. Prior to the McDade Amendment, the DOJ contended that their communications with represented individuals were governed by their own rule. Following the McDade Amendment's implementation however, federal prosecutors practicing in Virginia will be governed by the Virginia State Bar ethics rules. This paper examines the effects of the McDade Amendment on federal prosecutors practicing in Virginia, with a specific focus on the impact of Virginia's "no-contact" rule.

The first section of this paper analyzes the ethics rule promulgated by the Department of Justice. The DOJ rule governs those circumstances in which federal prosecutors may communicate with individuals known to be represented by counsel, without the consent of such counsel.

The second and third sections of this paper discuss the judicial and statutory rejection of the DOJ rule respectively. First, in *O'Keefe v. McDonnell Douglas*,[116] the U.S. Court of Appeals for the Eighth Circuit reasoned that the DOJ lacked authority to promulgate their ethics rule. As a result of this conclusion, the Eighth Circuit held the DOJ rule invalid. Congress then statutorily rejected the DOJ rule through the McDade Amendment.

The final section of this paper discusses the impact of the McDade Amendment on federal prosecutors practicing in Virginia. Specifically, this section examines Virginia's ethics rule regarding contact with represented individuals. This analysis will cover both Virginia's current Code of Professional Responsibility, and Virginia's proposed Rules of Professional Conduct, expected to take effect in January 2000.

As of January 2000, when Virginia's proposed "no-contact" rule takes effect, the McDade Amendment will have minimal impact on the communications of federal prosecutors practicing in Virginia. As a result of collaborative efforts between the criminal defense bar and prosecutors, Virginia entered the unique position of resolving the conflict over the actual scope of the "no-contact" rule. The final sections of this paper analyze this compromise and what it means to federal prosecutors practicing in Virginia.

II. PROMULGATION OF THE DOJ "NO-CONTACT" RULE

A. ABA and State "No-Contact" Rules

[116] 132 F.3d 1252 (8th Cir. 1998).

Rules of professional conduct governing attorneys generally require lawyers for one party in a dispute to communicate only through an adverse party's lawyer, and prohibit communications directly with the party.[117] Both the ABA Model Code of Professional Responsibility and the ABA Model Rules of Professional Conduct follow this general "no-contact" approach. DR 7-104(A)(1) of the ABA Model Code of Professional Responsibility provides:

> A. During the course of his representation of a client a lawyer shall not:
> 1. Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.[118]

Rule 4.2 of the ABA Model Rules states:

> 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.[119]

In the criminal law context, the official ABA comments to Model Rule 4.2 explain that this "no-contact" rule extends protection beyond that provided by the United States Constitution.[120] For example, although the Sixth Amendment right to counsel attaches only after a person has been officially charged in an adversarial proceeding,[121] the "no-contact" rule should be applicable prior to any such adversarial proceedings.

With the passage of time, the full scope of the "no-contact" rule in the criminal law context grew increasingly uncertain. Although many federal courts of appeal held that "no-contact" rules did not apply in pre-indictment and non-custodial situations,[122] state courts and state bars varied widely in defining the full scope of the "no-contact" rule.[123] The resulting uncertainty grew particularly troubling as federal prosecutors were encouraged by the DOJ to play a larger role in pre-indictment and pre-arrest investigations.[124] Such criminal investigations frequently included covert contacts with a criminal suspect by undercover agents or

---

[117] 59 Fed. Reg. 39910.
[118] Model Code of Professional Responsibility DR 7-104(A)(1) (1981).
[119] Model Rules of Professional Conduct Rule 4.2 (amended 1996).
[120] *Id.* cmt. 2.
[121] 59 Fed. Reg. at 39911; *see also* Allen, *supra* note 1, at 193 n.23.
[122] 59 Fed. Reg. at 39914 (citations omitted).
[123] *Id.* at 39911.
[124] *Id.*

informants, at the direction of a federal prosecutor.[125] Finally, as state courts and state bars expanded the scope of the "no-contact" rule to these pre-indictment and pre-arrest situations, the DOJ was prompted to seek federal preemption from the state ethics rules.

B. Thornburgh Memorandum

On June 8, 1989, Attorney General Dick Thornburgh distributed a policy memorandum to all DOJ litigators regarding communications with individuals represented by counsel.[126] Known as the Thornburgh Memorandum, it concluded that federal prosecutors were not governed by state bar ethics rules, particularly the "no-contact" rule.[127] A decision of the U.S. Court of Appeals for the Second Circuit in, *United States v. Hammad*,[128] was a direct cause for the Thornburgh Memorandum.[129]

In *Hammad*, an informant volunteered to obtain incriminating statements from an uncharged suspect of a federal investigation. The informant was given a phony subpoena to ease the procurement of evidence to present to the grand jury against the suspect. When subsequently challenged in court, the federal prosecutor offered no evidence to rebut the conclusion that he knew the suspect was represented by counsel when he gave the informant the phony subpoena.[130] In its initial opinion, on May 12, 1988, the *Hammad* court held that the "no-contact" rule applied to federal criminal investigations both before and after indictment, and that using an informant to gather information from a represented suspect was a violation of the rule.[131]

The original *Hammad* decision has been referred to as the "high-water mark" of the defense bar's litigative effort to limit otherwise appropriate federal investigative techniques.[132] In his memorandum, Attorney General Thornburgh accused defense counsel of using DR 4-107 and Model Rule 4.2 to achieve through the ethics rules what could not be achieved through the Constitution: a right to counsel at the investigative stage of criminal proceedings.[133] Thornburgh also noted, following publication of his memorandum, that state "no-contact" rules had become a defense weapon used to "threaten disciplinary action against a federal prosecutor for using

---

[125] Memorandum from Attorney General Dick Thornburgh to all Justice Department Litigators on Communication with Persons Represented by Counsel (June 8, 1989) (appended as Exhibit E to *In re* Doe, 801 F. Supp. 478, 489).
[126] *Id.*
[127] *Id.* at 493.
[128] 846 F.2d 854 (2d Cir. 1988), *modified* 858 F.2d 834 (2d Cir. 1988).
[129] Allen, *supra* note 1, at 199.
[130] *Id.* at 198–99.
[131] Thornburgh Memorandum, *supra* note 14, at 490.
[132] *Id.*
[133] *Id.* at 489.

confidential informants, seeking wiretap authorizations, or interviewing low-level functionaries to obtain evidence against principals."[134]

Subsequently, the Second Circuit revised its original holding in *Hammad*. The second *Hammad* decision expressed concern that the original opinion might unduly hamper criminal investigations, particularly in those cases in which career criminals have attempted to immunize themselves by hiring "house counsel."[135] The revised opinion still applied the "no-contact" rule to federal criminal investigations, but concluded that the use of informants to gather evidence against a suspect will frequently fall within the "authorized by law" exception to the rule.[136] Even after consideration of the revised opinion however, the *Hammad* decision still was seen as "exacerbat[ing] the uncertainty felt by many government attorneys over what is appropriate conduct in this area."[137]

In order to define DOJ policy in this area, the Thornburgh Memorandum concluded that a DOJ attorney's communication with individuals represented by counsel, either overtly or in an undercover context, will not violate state "no-contact" rules.[138] This conclusion was based on the Supremacy Clause which "forbids the states from regulating the attorneys' conduct in a manner inconsistent with their federal responsibilities, as determined by federal law and the Attorney General."[139] Thornburgh explained that the "federal interest in protecting federal officials in the performance of their federal duties is paramount."[140]

Although Thornburgh also stated his intention to codify his policy of federal preemption of state "no-contact" rules, there was no such codification during the Bush Administration. However, in 1994, Attorney General Janet Reno promulgated rules governing such communications with represented individuals.

C. Promulgation of DOJ Rules

The final rule, promulgated by the DOJ in 1994, outlined the situations in which federal prosecutors may communicate with represented individuals during the course of law enforcement investigations and proceedings.[141] The final rule generally prohibited contacts with "represented parties" without the prior consent of counsel, with certain

---

[134] Dick Thornburgh, *Ethics and the Attorney General: The Attorney General Responds*, 74 JUDICATURE 290, 290 (1991).
[135] Thornburgh Memorandum, *supra* note 14, at 490.
[136] *Id.*
[137] *Id.*
[138] *Id.* at 493; Thornburgh, *supra* note 23, at 290.
[139] Thornburgh Memorandum, *supra* note 14, at 492.
[140] *Id.* at 490.
[141] 59 Fed. Reg. at 39910; *see also* 28 C.F.R. § 77.1(a) (1998).

limited and enumerated exceptions.[142] Alternatively, the final rule generally permitted investigative contacts with "represented persons," unless the contact was for the purpose of negotiating plea agreements, settlement, or other similar legal arrangements.[143]

The following analyzes the "represented party"-"represented person" distinction created by the final rule.

1. "Represented Party" vs. "Represented Person"

The final rule differentiates between a "represented party" and a "represented person."[144] An individual is considered to be a "represented party" if:

> (1) the person is represented by counsel;
> (2) the representation is current and concerns the subject matter in question; and
> (3) the person has either been arrested or charged in a federal criminal case or is a defendant in a civil law enforcement proceeding concerning the subject matter of the representation.[145]

Alternatively, if the individual is represented by counsel on the subject matter in question, but has not been arrested or charged, that individual is considered a "represented person."[146] In other words, an individual is considered a "represented person," rather than a "represented party," if paragraphs (1) and (2) above apply, but the circumstance in paragraph (3) above does not exist. Thus, suspects and targets of criminal investigations who have not been indicted or arrested, but are represented in the subject matter at issue, are considered "represented persons."[147]

2. General Prohibition from Contacting "Represented Parties"

A federal prosecutor is prohibited from communicating, or causing another to communicate, with a "represented party" about the subject matter of the representation without the consent of that party's attorney.[148] This general prohibition applies only if the prosecutor knows that the "represented party" is, in fact, represented by counsel.

3. Permitted Contacts with "Represented Parties"

The final rule enumerates a number of limited circumstances where a federal prosecutor may communicate with a "represented party" without first obtaining consent of that party's counsel. These enumerated

---

[142] 59 Fed. Reg. at 39910.
[143] *Id.*
[144] 28 C.F.R. § 77.3 (1998).
[145] *Id.* § 77.3(a).
[146] *Id.* § 77.3(b); *see also* 59 Fed. Reg. at 39919.
[147] 59 Fed. Reg. at 39919.
[148] 28 C.F.R. § 77.5; 59 Fed. Reg. at 39919.

circumstances serve as exceptions to the general no-contact rule for "represented parties," and include the following areas: determination if representation exists;[149] discovery or judicial or administrative process;[150] initiation of communication by the "represented party;"[151] waivers at the time of arrest;[152] investigation of additional, different, or ongoing crimes;[153] and threat to safety or life.[154]

4. General Authorization for Communications with "Represented Persons"

The general prohibition against communicating with "represented parties" does not apply to individuals and organizations who are neither defendants nor arrestees.[155] Therefore, federal prosecutors are generally authorized to communicate, either directly or indirectly, with a "represented person" during the process of a criminal investigation.[156]

5. Plea Negotiations and Other Legal Agreements

While negotiating a legal agreement, a federal prosecutor is generally prohibited from communicating with either "represented parties" or "represented persons" without the consent of counsel.[157] Such legal agreements include: plea agreements, settlements, immunity agreements, or any other disposition of a claim or charge.[158]

6. Respect for Attorney-Client Relationships

---

[149] 28 C.F.R. § 77.6(a). In promulgating the final rule, the DOJ explained that there was no reason to prohibit such a limited communication and that this exception was consistent with DR 7-104(A)(1) and Model Rule 4.2. *See* 59 Fed. Reg. at 39919.

[150] 28 C.F.R. § 77.6(b). For instance, communications authorized by the judicial process, such as a grand jury, deposition, or trial subpoena, are not prohibited by the final rule. 59 Fed. Reg. at 39920.

[151] 28 C.F.R. § 77.6(c). Such a situation may arise when the "represented party's" attorney is being paid by another individual involved in a criminal enterprise and the "represented party" questions counsel's loyalty, or when a single attorney represents multiple parties all belonging to the same criminal enterprise. 59 Fed. Reg. at 39920-21.

[152] 28 C.F.R. § 77.6(d). A federal prosecutor may communicate directly with a "represented party" at the time of his or her arrest, provided the "represented party" is advised of his or her rights under Miranda v. Arizona, 384 U.S. 436 (1966), and voluntarily and knowingly waives them. This exception preserves the ability of federal prosecutors to interview individuals within hours of an arrest. 59 Fed. Reg. at 39921-22.

[153] 28 C.F.R. § 77.6(e). Similar in approach to the Sixth Amendment right to counsel, the DOJ rule also is "offense-specific." The final rule permits communications with a "represented party" if the communication involves the investigation of conduct for which the "represented party" has neither been arrested nor charged. 59 Fed. Reg. at 39922.

[154] 28 C.F.R. § 77.6(f). This exception may be invoked only in "rare circumstances." Any such communication may not be designed to elicit testimonial evidence. 59 Fed. Reg. at 39922.

[155] 59 Fed. Reg. at 39922–23.

[156] *Id.*; *see also* 28 C.F.R. § 77.7.

[157] 28 C.F.R. § 77.8.

[158] 59 Fed. Reg. at 39923.

Although a communication may otherwise be permitted under the final rule, the communication will nevertheless be prohibited if it seeks to disrupt the attorney-client relationship. Examples of such disruption include: (a) attempts to elicit information regarding lawful defense strategies, or (b) disparaging the "represented party's" or "represented person's" counsel.[159] This prohibition applies to every phase of criminal investigations and proceedings, and does not differentiate between a "represented party" and "represented person."[160]

7. Organizations and Employees

When an organization is a "represented party," a federal prosecutor may not communicate with any controlling individual of that organization without the consent of the organization's attorney, subject to the aforementioned "represented party" exceptions.[161] However, if the organization merely qualifies as a "represented person," a federal prosecutor may communicate with any controlling individual.[162] A "controlling individual," as referred to above, refers to individuals who are a part of the organization's control group. The "controlling individual" must hold a high-level position within the organization and participate as a decision-maker.[163] Former employees are not considered "controlling individuals;" therefore, communications with former employees of represented organizations are generally permitted.[164]

If any current or former member of an organization retains his or her own personal counsel, that individual receives individualized protection under the DOJ rule.[165] The scope of any such individualized protection however, is dependent on whether that individual is considered a "represented party" or "represented person."[166]

8. Relationship to State and Local Regulations

The DOJ intended its final rule to constitute communications "authorized by law" within the meaning of DR 7-104 and Model Rule 4.2.[167] Therefore, the DOJ did not expect the final rule to create tension with state and local rules.[168] However, if the communications permitted under the DOJ rule are viewed as inconsistent with state or local rules, the DOJ rule also preempts and supersedes the entire field of any such

[159] 28 C.F.R. § 77.9.
[160] 59 Fed. Reg. at 39923–24.
[161] 28 C.F.R. § 77.10.
[162] 59 Fed. Reg. at 39925.
[163] 28 C.F.R. § 77.10(a); *see also* 59 Fed. Reg. at 39925.
[164] 28 C.F.R. § 77.10(b); *see also* 59 Fed. Reg. at 39925.
[165] 28 C.F.R. § 77.10(c); *see also* 59 Fed. Reg. at 39925–26.
[166] *Id.*
[167] 28 C.F.R. § 77.12.
[168] 59 Fed. Reg. at 39927.

inconsistent rules.[169] Preemption of inconsistent state and local rules was deemed necessary in order to ensure uniform regulation and predictable standards for federal criminal investigations.[170]

III. JUDICIAL REJECTION OF DOJ RULE

In 1998, the U.S. Circuit Court of Appeals for the Eighth Circuit invalidated the DOJ rule. The case, *O'Keefe v. McDonnell Douglas Corporation*,[171] was an appeal by the federal government from a protective order preventing it from communicating with current employees of the defendant, McDonnell Douglas, without consent of the corporation's counsel.[172]

The action against McDonnell Douglas arose under the False Claims Act, "alleging mischarging of labor hours by employees of McDonnell Douglas Corporation . . . while working on United States military contracts."[173] While the lawsuit was pending, DOJ attorneys conducted a pretrial investigation. "In particular, investigative agents of the DOJ began making ex parte contacts with various present and former lower-level employees of McDonnell Douglas without the consent of McDonnell Douglas's counsel."[174] The communication at issue involved a questionnaire asking "whether the [low-level] employee ever engaged in mischarging of labor, and, if so, at the direction of whom."[175]

Thereafter, McDonnell Douglas moved for a protective order preventing such DOJ communications, "arguing that they were barred by Missouri Supreme Court Rule 4-4.2."[176] The United States District Court for the Eastern District of Missouri, in which the lawsuit was pending, also adopted this rule.[177] Rule 4-4.2 provides:

> [i]n 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.[178]

"The official comment explains that where the opposing party is a organization, Rule 4-4.2 bars ex parte communications with 'persons

---

[169] 28 C.F.R. § 77.12.
[170] 59 Fed. Reg. at 39927.
[171] 132 F.3d 1252.
[172] *Id.* at 1253.
[173] *Id.*
[174] *Id.*
[175] O'Keefe v. McDonnell Douglas Corp., 961 F. Supp. 1288, 1291 (E.D. Mo. 1997).
[176] *O'Keefe*, 132 F.3d at 1253.
[177] *Id.* at 1254.
[178] *Id.* at 1253.

having managerial responsibility . . ., and with any other person whose act or omission. . . may be imputed on the organization. . ., or whose statement may constitute an admission on the part of the organization."[179]

The protective order was granted notwithstanding DOJ objections.[180] The government argued that the protective order was unwarranted because the communications were "authorized by law," an exception to Missouri's general "no-contact" rule.[181] The government argued this authorization resulted from the DOJ rule governing communications with "represented parties" and "represented persons."[182] In particular, as long as the current employee was not considered a "controlling individual" of McDonnell Douglas, the federal government could communicate with the current employee without the consent of the corporation's counsel.[183]

In the district court's opinion granting the protective order requested by McDonnell Douglas, it concluded that the DOJ lacked authorization to issue its rule exempting federal attorneys from the "no-contact" requirements of state ethical rules.[184] Additionally, with reference to the specific issue before the court, the district court held that promulgation of the DOJ rule dealing with "organizations and employees" was beyond the limits of the Attorney General's statutory authority.[185] On appeal, the Eighth Circuit affirmed the district court's finding that the DOJ rule was invalid, thereby rejecting the government's "authorized by law" argument.[186]

IV. STATUTORY REJECTION OF THE DOJ RULE

As part of the Omnibus Appropriations Bill of 1998, Congress passed a provision subjecting federal prosecutors to state and local rules of professional responsibility.[187] The pertinent language states:

> [a]n 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

---

[179] *Id.* at 1253–54.
[180] *Id.* at 1254.
[181] *Id.*
[182] *Id.*
[183] *Id.* (citing 28 C.F.R. § 77.10(a)).
[184] *O'Keefe*, 961 F. Supp. at 1294.
[185] *O'Keefe*, 132 F.3d at 1254.
[186] *Id.* at 1257. The Eighth Circuit concluded: (1) the DOJ rule was not authorized under a housekeeping statute, and (2) the rule also was not authorized by statutes defining the roles of the Attorney General and United States Attorneys. Both the housekeeping statute and the statutes defining the roles of the Attorney General and United States Attorneys were referenced by the DOJ as properly authorizing its rule on communications with represented parties and persons. *Id.* at 1254-57.
[187] Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 801, 112 Stat. 2681-118 (1998).

> attorney's duties, to the same extent and in the same manner as other attorneys in that State.[188]

This provision, named after its chief sponsor Representative Joseph McDade (R-PA), negates the DOJ rule which attempted to exempt federal prosecutors from state "no-contact" rules.[189] The McDade Amendment passed the House of Representatives with strong support from both political parties, including current Speaker Dennis Hastert (R-IL), Majority Whip Tom DeLay (R-TX), House Judiciary Committee Chairman Henry Hyde (R-IL), Minority Leader Richard Gephardt (D-MO) and Minority Whip David Bonior (D-MI).[190] It also received support from the American Bar Association, the American Corporate Counsel Association, and the National Association of Criminal Defense Lawyers.[191]

During the legislative deliberations, the DOJ vigorously fought the McDade Amendment.[192] In support of its position, the DOJ set forth specific instances in which compliance with state laws or rules posed problems for federal law enforcement efforts. These specific instances include:

> (1) the conduct of undercover investigations involving persons represented by counsel;
> (2) contacts with persons represented on one matter concerning additional, different or ongoing new offenses;
> (3) situations where a represented person has initiated contact with law enforcement agents, and seeks to cooperate without informing his current counsel; and
> (4) state rules requiring prosecutors to honor a blanket claim by corporate counsel that he or she represents both the corporation and all employees . . . .[193]

As a result of legislative wrangling between proponents and opponents of the McDade Amendment, the effective date of the provision was delayed for six months, until April 19, 1999.[194] Theoretically, this delay

---

[188] *Id.* § 801(a).
[189] *Congress Enacts Statute that Subjects Federal Prosecutors to State Laws and Rules*, 64 CRIM. L. REP. No. 4 at 70 (Oct. 28, 1998).
[190] Press Release from National Association of Criminal Defense Lawyers (Jan. 15, 1999).
[191] *Senate Bill Seeks to Preempt, Revamp New Law on Federal Prosecutors' Ethics*, 64 CRIM. L. REP. No. 17 at 337 (Feb. 3, 1999).
[192] Memorandum from Attorney General Janet Reno to all United States Attorneys on the McDade Provision (1998).
[193] Memorandum from the Executive Office of United States Attorneys to All United States Attorneys on the Impact of McDade Bill (Oct. 28, 1998).
[194] Memorandum from Attorney General Janet Reno, *supra* note 81.

was to allow the DOJ to amend its rules to comply with the new law.[195] However, during the six month delay, in addition to preparing for implementation of the new law, the DOJ continued efforts to repeal or modify the McDade Amendment.[196]

On January 19, 1999, in support of DOJ lobbying efforts, Senate Judiciary Chairman Orrin Hatch (R-UT) introduced legislation to overturn the McDade Amendment.[197] If enacted, Hatch's bill would expressly exempt federal prosecutors from complying with state ethics rules that interfere with federal law enforcement.[198] The measure also specifies categories of punishable conduct for employees of DOJ, sets out penalties ranging from reprimand to dismissal, and creates a commission of federal judges to study the subject of federal prosecutorial conduct.[199] In a statement accompanying his bill, Senator Hatch also suggested "perhaps it is time to consider the development of federal rules of ethics."[200]

On March 24, 1999, the Senate Judiciary Subcommittee on Criminal Justice Oversight held a hearing on the Hatch bill.[201] Witnesses testifying in support of the Hatch bill included the Deputy Attorney General and United States Attorneys from New York and Florida. Subcommittee Chairman Strom Thurmond commenced the hearing with a statement supporting repeal of the McDade Amendment. Thurmond mostly expressed concern over the state "no-contact" rules which effectively prohibit certain undercover investigations and sting operations. An additional concern of Thurmond's involved state rules which restrict the ability of authorities to speak with low-level company employees who voluntarily wish to expose corporate wrongdoing.[202]

With the exception of the Senate Judiciary Subcommittee's hearing, the Hatch bill received no further legislative action prior to the April 19 deadline. Additionally, no comparable bill was introduced in the House of Representatives.[203]

Witnessing little movement on his bill to repeal the McDade Amendment, on March 25, 1999, Hatch introduced a bill postponing the

---

[195] Press Release from National Association of Criminal Defense Lawyers, *supra* note 79.
[196] Memorandum from Attorney General Janet Reno, *supra* note 81.
[197] S. 250, 106th Cong. (1999).
[198] *Senate Bill Seeks to Preempt, Revamp New Law on Federal Prosecutors' Ethics*, *supra* note 80.
[199] *Id.*
[200] *Id.* at 338.
[201] *The Effect of State Ethics Rules on Federal Law Enforcement, 1999: Hearings on S. 250 Before the Senate Subcomm. on Criminal Justice Oversight*, 106th Cong. (1999).
[202] *Id.* (statement of Senator Strom Thurmond, Subcomm. Chairman).
[203] *Senate Bill Seeks to Preempt, Revamp New Law on Federal Prosecutors' Ethics*, *supra* note 80.

McDade Amendment's effective date for an additional six months.[204] A bi-partisan group of senators co-sponsored the bill. Hatch's postponement bill was not referred to any committee; instead, it was referred directly to and approved by the full Senate.[205]

V. CONSEQUENCES OF THE MCDADE AMENDMENT IN VIRGINIA

As a consequence of the McDade Amendment, federal prosecutors practicing in Virginia may soon be governed by Virginia State Bar ethics rules. The following analyzes Virginia's rule on communications with represented individuals, and considers the impact of applying Virginia's rule to federal prosecutors.

As of the McDade Amendment's original effective date, Virginia's ethical rules mirrored the ABA Model Code of Professional Responsibility. However, the Supreme Court of Virginia has formally approved new ethical rules paralleling the ABA Model Rules of Professional Conduct. Virginia's new legal ethics rules will take effect in January 2000. Since the Virginia State Bar's transfer from the ethics code to the new ethics rules takes place approximately eight months after the McDade Amendment's original effective date, both the Virginia code and rules may govern federal prosecutors practicing in Virginia at different times.

A. Virginia State Bar Code of Professional Responsibility

Unless Congress modifies or repeals the McDade Amendment, Virginia's ethical code will govern federal prosecutors practicing in Virginia through 1999. Virginia's current "no-contact" rule, DR 7-103(A)(1), creates a blanket prohibition against contacting a represented individual without the consent of counsel. Virginia's "no-contact" disciplinary rule mirrors the ABA Model Code provision, and states:

> (A) During the course of his representation of a client, a lawyer shall not:
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior written consent of the lawyer representing such other party or is authorized by law to do so.[206]

Though the specific language of Virginia's DR 7-103(A)(1) prohibits ex parte communications with a represented "party," this blanket

---

[204] S. 755, 106th Cong. (1999).
[205] *Senate Bill Seeks Second Postponement of Statute on Federal Prosecutors' Ethics*, CRIM. L. REP., Apr. 6, 1999, at 2581; Interview with Staff of Senate Judiciary Committee (Apr. 16, 1999).
[206] Va. Code of Professional Responsibility DR 7-103(A)(1) (1997).

prohibition has been extended to persons who are not yet parties in the criminal context.[207] Specifically, prosecutors may not communicate with a represented, uncharged suspect without consent of the uncharged suspect's lawyer.[208]

The Virginia State Bar's extension of "no-contact" protection to uncharged criminal suspects, breaks down the careful distinction between a "represented party" and a "represented person" created by the DOJ rule. Under the DOJ rule, federal prosecutors are generally prohibited from communicating with "represented parties", but are generally permitted to make contact with "represented persons."[209] Under the Virginia disciplinary rule, in effect through 1999, communications are prohibited in both situations. Based on the Virginia State Bar's broad interpretation of "party" in DR 7-104(A)(1), federal prosecutors will be prohibited from communicating, directly or indirectly, with both "represented parties" and "represented persons."

Additionally, in the context of organizations in Virginia, current employees of a corporate adversary may not be contacted if they are in the corporation's "control group."[210] Although reference to "control group" may parallel the DOJ's rule concerning "controlling individual," the Virginia rule covers a much broader class of people. Virginia's "control group" covers current employees who may speak for the corporation or bind it by his or her acts or omissions, even though the same employee may not hold a high-level position or be a decision-maker.[211] The DOJ rule meanwhile limits protection to current, high-level employees who participate as actual decision-makers in the organization.[212]

It should be recalled that the *O'Keefe* case, referenced earlier for its invalidation of the DOJ rule, found that the federal government's attorney violated a local ethics rule which mirrored Virginia's rule on communications with current employees.[213] Although the employees contacted in *O'Keefe* were low-level and non-controlling individuals, after reviewing the substantive law under which the corporation was charged, the court determined that the employees' acts or omissions could be imputed to the corporate defendant. Apparently, while the DOJ rule relies largely upon the current employees' position in the corporation, the ethical rules in *O'Keefe* and Virginia rely on something very different. Application of the "no-contact" rules in *O'Keefe* and Virginia ultimately

---

[207] VA. CODE ANN., Legal Ethics Op. 1670 (Apr. 1, 1996).
[208] *Id.*
[209] 28 C.F.R. §§ 77.5, 77.7 (1998).
[210] VA. CODE ANN., Legal Ethics Op. 1670 (Apr. 1, 1996) (1996).
[211] *Id.*
[212] 28 C.F.R. § 77.10.
[213] O'Keefe v. McDonnell Douglas, 132 F.3d 1252, 1253–54 (8th Cir. 1998).

rely upon a determination of whether the substantive law,[214] under which an organization is charged, makes the corporation liable for the acts or omissions of the current employees.

B. Virginia's Rules of Professional Conduct

1. The Virginia and ABA Rule 4.2 Compared

In January 2000, the Virginia rules of professional conduct will officially take effect. As for communications with individuals represented by counsel, Virginia borrowed the language of its ethics rule directly from ABA Model Rule 4.2. The Virginia and ABA Rule 4.2 generally prohibit communications with represented persons, stating:

> 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.[215]

Although the actual language of Virginia Rule 4.2 is identical to ABA Model Rule 4.2, there are critical differences in the language of their official comments. Of particular importance are the differences in Comment 2, which deals with criminal investigations.

Comment 2, of ABA Model Rule 4.2, attempts to explain when criminal investigative contacts will be "authorized by law," an exception to the Rule.[216] ABA Comment 2 states:

> Communications authorized by law also include constitutionally permissible activities of lawyers representing government entities, directly or through investigative agents, prior to the commencement of criminal or law enforcement proceedings, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable. However, the Rule imposes ethical restrictions that go beyond those imposed by constitutional provisions.[217]

In Virginia, the official comments to ABA Model Rule 4.2 were rejected.[218] Having rejected the ABA comments, Virginia Rule 4.2, Comment 2, states:

---

[214] O'Keefe v. McDonnell Douglas Corp., 961 F. Supp. 1288, 1292 (E.D. Mo. 1997).
[215] Model Rules of Professional Conduct Rule 4.2; Virginia Rules of Professional Conduct Rule 4.2 (January 2000).
[216] Model Rules of Professional Conduct Rule 4.2 cmt. 2.
[217] *Id.*
[218] Virginia Rules of Professional Conduct Rule 4.2 cmt. 3.

> In circumstances where applicable judicial precedent has approved investigative contacts in pre-indictment, non-custodial circumstances, and they are not prohibited by any provision of the United States Constitution or Virginia Constitution, they should be considered to be authorized by law within the meaning of the Rule. Similarly, communications in civil matters may be considered authorized by law if they have been approved by judicial precedent.[219]

Conspicuously absent from Comment 2 of Virginia Rule 4.2 is language imposing "ethical restrictions that go beyond those imposed by constitutional provisions." The rejection of such language found in ABA Model Rule 4.2, Comment 2, suggests Virginia wanted to avoid this ABA commentary on Rule 4.2.[220] In particular, the ABA has extended its "no-contact" prohibition to "represented persons" prior to their indictment or arrest; thereby, extending protection beyond the Sixth Amendment right to counsel.[221]

Additionally, ABA Model Rule 4.2, Comment 2 explains that communications are authorized by law when there is "applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable."[222] The ABA Comment therefore, suggests that judicial precedent is "applicable" when a court has reviewed the communication at issue as against the actual rule. It would seem to follow then, that if courts have not spoken on the actual rule, there can be no "applicable judicial precedent."

Unlike ABA Comment 2, Virginia Rule 4.2, Comment 2, does not link "applicable judicial precedent" to case law on the rule itself. Ironically, if the language of ABA Comment 2 had been adopted in Virginia, "applicable judicial precedent" could not exist until after Rule 4.2 took effect in January 2000. And even then, it begs the question of how to get the first case saying a communication already had been approved.

2. The Virginia Rule 4.2 Explained

The final language of Virginia Rule 4.2, and its correlative comments, was drafted by a subcommittee of the Special Committee to Study the Code of Professional Responsibility. This subcommittee included Dennis Dohnal - chairman of the full committee, Helen Fahey - United States

---

[219] *Id.* at cmt. 2.

[220] Interview with Dennis Dohnal, Chairman of the Special Committee of the Virginia State Bar to Study the Virginia Code of Professional Responsibility (Apr. 9, 1999).

[221] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995) (communications with represented persons).

[222] Model Rules of Professional Conduct Rule 4.2, at comt. 2.

Attorney for the Eastern District of Virginia, Bill Petty - Commonwealth's Attorney for Lynchburg, and Craig Cooley - criminal defense attorney. The final language for Rule 4.2, Comment 2 however, resulted largely from the efforts of Chairman Dennis Dohnal and United States Attorney Helen Fahey.[223]

Originally, Fahey declined to participate in the drafting process. Her participation was conditioned on sufficiently massaging the language of Rule 4.2 to permit communications with "represented persons" who are merely targets of a criminal investigation. Chairman Dohnal, intent on the United States Attorney's involvement in drafting the Virginia rule, agreed to work with Fahey to craft agreeable "wiggle room" into Rule 4.2.[224] Together, Dohnal and Fahey, crafted language which set Virginia Rule 4.2 apart from her sister states and the ABA.

Comment 2 explains that investigative contacts in pre-indictment and non-custodial situations are "authorized by law" and not prohibited by Rule 4.2 when: (1) "applicable judicial precedent" has approved of such contacts, and (2) they are not prohibited by any provision of the United States Constitution or the Virginia Constitution. As explained by Chairman Dohnal, Comment 2 ultimately gives prosecutors an "ethical out" from the constraints of Rule 4.2 during the investigation of criminal suspects.[225]

Communications with represented criminal suspects in Virginia will be permitted so long as approved by "applicable judicial precedent" and not violative of the United States or Virginia Constitutions.[226] "Applicable judicial precedent" incorporates case law on the books, including case law involving the Sixth Amendment right to counsel.[227] Sixth Amendment case law generally permits communications, both direct and indirect, with "represented persons" without the consent of counsel prior to the commencement of formal charges.[228] Therefore, unless otherwise prohibited by the United States or Virginia Constitutions, prosecutors generally will be permitted to communicate with "represented persons" prior to indictment or arrest.[229] However, once a criminal suspect is

[223] Interview with Dennis Dohnal, *supra* note 109.
[224] *Id.*
[225] *Id.*
[226] Virginia Rules of Professional Conduct Rule 4.2, at cmt. 2.
[227] Interview with Dennis Dohnal, *supra* note 109.
[228] 59 Fed. Reg. at 39911; *see also* Brewer v. Williams, 430 U.S. 387 (1977).
[229] Although Virginia Rule 4.2 refers to "person" instead of "party" to emphasize that the prohibition on certain communications with a represented person applies outside the litigation context. Comment 2 "indicates that certain investigative contacts in pre-indictment, non-custodial situations are authorized." Virginia State Bar Comparison Chart (September 27, 1998).

formally charged, Sixth Amendment protections attach and communications with the "represented party" generally will be prohibited. By incorporating Sixth Amendment case law through Comment 2, Virginia Rule 4.2 basically parallels the DOJ rule and its "represented party" "represented person" distinction. The Virginia Rule also avoids Attorney General Thornburgh's fear, referenced above: the creation of a right to counsel at the investigative stage of criminal proceedings.[230]

Communications with targets of criminal investigations also are referenced in Comment 5a of Virginia Rule 4.2. Comment 5a however, simply expresses concern about protecting the attorney-client relationship where the target of the criminal investigation is represented by counsel.[231] Protection of the attorney-client relationship in all stages of a criminal investigation also was an express concern of the DOJ rule.[232]

In the case of an organization, Virginia Rule 4.2, Comment 4, mirrors the Virginia State Bar's interpretation of DR 7-103(A)(1). Communications with current employees of a corporation will be prohibited where the employee is a member of the corporation's "control group," which includes current employees who have the authority to bind the corporation.[233] Unlike the DOJ rule, Virginia Rule 4.2 concerns itself not only with the current employee's position in the organization, but also with the authority of the current employee to bind the organization.

VI. CONCLUSION

In promulgating Rule 4.2 and its correlative comments, particularly Comment 2, Virginia has been described as a "renegade."[234] However, Rule 4.2 was crafted with the intention of bringing federal prosecutors back into the fold of state bar ethical control. Chairman Dohnal ultimately hoped federal prosecutors practicing in Virginia would abide by Virginia's ethical rules and not fight implementation of the McDade Amendment.[235]

Within the context of communications with represented individuals, implementation of the McDade Amendment will have little effect on federal prosecutors practicing in Virginia as of January 2000. When Virginia Rule 4.2 takes effect, investigative communications with represented individuals in Virginia largely will be governed by case law, particularly that involving the Sixth Amendment right to counsel. Such case law largely dictated the DOJ ethics rule. As a result, Virginia's

[230] *See supra* note 22.
[231] Virginia Rules of Professional Conduct Rule 4.2 cmt. 5a.
[232] 28 C.F.R. § 77.9.
[233] *See supra* notes 94–95; Virginia Rules of Professional Conduct Rule 4.2, at cmt. 4.
[234] Interview with Dennis Dohnal, *supra* note 109.
[235] *Id.*

federal prosecutors will continue to be generally prohibited from communicating with "represented parties" and permitted to communicate with "represented persons," as those terms were defined in the DOJ rule.

Virginia Rule 4.2 is not completely devoid of negative consequences for federal prosecutors however. When organizations are involved, the Virginia rule restricts the ability of federal prosecutors to speak with low-level employees. The DOJ rule meanwhile, only restricted federal prosecutors from speaking with high-level, decision-making employees. Virginia's more expansive restriction on such communications will only attach at the time the organization is formally charged, in accordance with Comment 2. Prior to formal charges being filed, prosecutors generally may communicate with any current employee of the organization.

As a result of the collaborative efforts between criminal defense attorneys and prosecutors, Virginia may have silenced the ongoing debate over the scope of the "no-contact" rule. Prosecutors will be permitted to communicate with represented persons who are targets of criminal investigations; however, they may not communicate with low-level employees of an indicted organization who have the authority to bind their organization. The compromise reached between criminal defense attorneys and prosecutors, in drafting Virginia Rule 4.2 and its correlative comments, illustrates the benefits of active involvement within state bar associations. Such active involvement may be a positive, yet unintended, consequence of the McDade Amendment.