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## PROFESSIONAL CONDUCT

### 3rd Circuit Tests No-Contact Rule Under McDade Amendment

#### *Is the Represented Suspect Off-Limits?*

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*Special to the Legal*

In October 1998, Congress passed the McDade Amendment, which provides that attorneys employed by the federal government are subject to the ethical rules and responsibilities in each state where the attorney engages in his or her duties “to the same extent and in the same manner as any other attorney in the state.”

The amendment was enacted “in part to combat perceived abuses by federal prosecutors and require them to comply with state no-contact rules,” according to the 3rd U.S. Circuit Court of Appeals’ 2010 decision in *United States v. Brown*. Pennsylvania’s “no-contact rule,” found at Pennsylvania Rule of Professional Conduct 4.2, prohibits lawyers from communicating with persons that the lawyer knows to be represented. Also included in the prohibition is the use of surrogates to make such communications.

However, the rule does permit contacts with a represented party if the communication is “authorized by law or a court order.”



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In *United States v. Brown*, the 3rd Circuit faced the question of what contact with a represented party is “authorized by law” in the context of a federal investigation of an unindicted but represented suspect. According to the opinion, after Franklin Brown declined, through counsel, to meet with the government to discuss certain topics, the federal prosecutor used a cooperating witness to try to elicit

incriminating statements from Brown. The prosecutor provided the witness with a letter that purported to be from the government to the witness’ attorney. The witness was directed to use the letter to initiate a conversation with Brown and to wear a body wire in order to tape the conversation. Significantly, the fictitious letter outlined topics similar to those that Brown and his counsel had earlier declined to address with the government.

Prior to his trial, Brown sought to suppress the tapes, arguing that the government had obtained them in violation of Rule 4.2 and the McDade Amendment because the assistant U.S. attorney’s conduct was not “authorized by law.”

The district court first denied the motion to suppress the taped statements, relying on *United States v. Balter*. In *Balter*, interpreting New Jersey law, the 3rd Circuit upheld the use of a confidential informant to contact a represented person in the course of a pre-indictment investigation, because the New Jersey rule did not apply to a criminal suspect prior to the commencement of adversarial proceedings. However, the *Balter* court also stated that even if the rule did apply, “pre-indictment investigation by prosecutors is precisely the type of contact exempted from the Rule as ‘authorized by law.’”

On appeal, Brown argued that *Balter* was distinguishable because it dealt with New Jersey rather than Pennsylvania ethical rules and was decided prior to the enactment of the McDade Amendment. Whereas the New Jersey rule had been interpreted to apply only after the initiation of formal adversarial proceedings and the right to counsel adhered, Pennsylvania's Rule 4.2 applied to any "party" who had secured representation and was not limited by Sixth Amendment jurisprudence. (The rule has since been amended to cover any represented "person" rather than "party.")

Brown also contended that the McDade Amendment overruled *Balter* by making federal prosecutors subject to the ethical rules of the particular state where they engaged in the challenged communications. Given the absence of a Pennsylvania statute or court decision expressly authorizing the prosecutor's indirect communications with him, Brown argued that the prosecutor violated Pennsylvania's no-contact rule.

In response, the court stated, "... we do not believe the McDade Amendment prohibits federal prosecutors in Pennsylvania from using a well-established investigatory technique simply because the Pennsylvania courts have not considered whether such conduct is permissible. After all, the Pennsylvania courts have not held that such conduct is impermissible." In dicta, the court further stated that even if it concluded that a violation occurred, "suppression would not be the appropriate remedy."

The 2nd Circuit took a different approach when it addressed the scope of what is meant by "authorized by law" in 1988's *United States v. Hammad*. There, the prosecutor issued a fictitious grand jury subpoena to a C.I. not to secure his

testimony, but to elicit admissions from a represented suspect.

First, the 2nd Circuit rejected the government's argument that New York's no-contact rule was coextensive with the Sixth Amendment and remained inoperative until the onset of adversarial proceedings by emphasizing the differences between the Constitution and the ethical rules applicable to attorneys:

"[T]he Constitution prescribes a floor below which protections may not fall, rather than a ceiling beyond which they may not rise. The Model Code of Professional Responsibility, on the other hand, encompasses the attorney's duty to 'maintain the highest standards of ethical conduct.' The Code is designed to safeguard the integrity of the profession and preserve public confidence in our system of justice. ... Hence, the Code secures protections not contemplated by the Constitution."

The court explained that the assistant U.S. attorney overstepped the powers of his office by issuing a subpoena solely to create a pretense to obtain admissions from a represented subject. However, it noted that most government use of informants "will generally fall within the 'authorized by law' exception" to Rule 4.2.

We find it hard to reconcile the *Brown* court's analysis with the ethical prohibition under Rule 4.2. Specifically, we find it hard to believe that when the Supreme Court promulgated Rule 4.2, that it did not intend to prevent the prosecutor's conduct challenged in *Brown*. Finally, if suppression is not the appropriate remedy for federal prosecutors' Rule 4.2 violations, then how is the rule to be enforced in that context consistent with the McDade Amendment?

In response to *Brown*, we urge the

Pennsylvania Supreme Court to clarify that Rule 4.2 applies in criminal cases as it does in civil cases: the prohibition against communication is triggered by the lawyer's knowledge of representation and prohibits the use of surrogates or confidential informants in this proactive way.

Moreover, while we agree with the 2nd Circuit that whether conduct is so egregious as to fall outside the realm of pre-indictment investigation must be decided on a case-by-case basis, we do not believe that all pre-indictment contact by a federal prosecutor is "authorized by law." Federal prosecutors, in their pursuit of justice, should be operating at the highest standards of ethics and honor.

As the Supreme Court said in *Berger v. United States*, "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." •