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THE MCDADE AMENDMENT: MOVING TOWARDS A MEANINGFUL LIMITATION ON WRONGFUL PROSECUTORIAL CONTACT WITH REPRESENTED PARTIES

Nina Marino & Richard Kaplan

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. . . . 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.²³⁶

The preceding passage from Justice Sutherland's 1935 opinion in *Berger v. United States* should strike as deep a chord today as it did over sixty years ago. All too often, however, this "duty to refrain from improper methods,"²³⁷ seems to have taken a back seat for many prosecutors, especially when rules of ethical conduct are concerned. In particular, the duty to refrain from contacting parties who are represented by counsel (the "anti-contact" rule) is one which government attorneys apparently are not only willing to disregard but, before passage of the McDade Amendment, were indeed able to disregard at will.

In Part I, this article will examine the anti-contact rule, its history, goals, and the path it has taken in the context of prosecutorial contact with represented parties. Part II will discuss the McDade Amendment, its genesis and purpose. Part III will discuss the struggle undertaken by the

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²³⁶ *Berger v. United States*, 295 U.S. 78, 88 (1935).

²³⁷ *Id.*

Department of Justice [hereinafter "DOJ"] as it seeks to exempt its lawyers from the anti-contact rule. Finally, Part IV looks at arguments for and against prosecutorial exemption from the anti-contact rule.

I. THE CURRENT ANTI-CONTACT RULE: ABA MODEL RULE 4.2

The American Bar Association's Model Rules of Professional Conduct Rule 4.2 "is currently the paradigmatic anti-contact rule upon which state and federal district courts base their own anti-contact rules."²³⁸ As such, Model Rule 4.2 has been adopted and applied in one form or another in all fifty states.²³⁹ As amended in 1995, Model Rule 4.2 states, "[i]n representing a client, a lawyer shall not communicate 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."²⁴⁰ The 1995 amendment to the rule altered the language somewhat, protecting not only parties, but all represented persons. In short, the anti-contact rule "exists to protect 'the represented person against overreaching by adverse counsel, safeguard the client-lawyer relationship from interference by adverse counsel, and reduce the likelihood that clients will disclose privileged or other information that might harm their interests'."²⁴¹ Additional policies underlying the rule include: "protecting the lawyer's ability to monitor her client's case" and, "fundamentally, promoting a legal system premised on representation by and advice of learned counsel."²⁴²

The most significant aspect of Model Rule 4.2 is its facial acknowledgment that lawyers and non-lawyers are unequals in matters of law.²⁴³ Underscoring the potential inequality between lawyers and non-lawyers in legal discussions, "the rule is not satisfied with lawyers seeking permission from non-lawyers to talk about the subject of representation in the absence of the other lawyer, but instead demands permission come from an equal."²⁴⁴ Even the DOJ recognizes that "when two parties in a legal proceeding are represented, it is generally unfair for an attorney to

²³⁸ Jennifer M. Buettner, *Compromising Professionalism: The Justice Department's Anti-Contact Rule*, 23 J. LEGAL PROF. 121 (1999).

²³⁹ Ira H. Leesfield, *Ex Parte Communications By Government Lawyers With Represented Parties*, 72 DEC FLA. B.J. 18, 20 (1998).

²⁴⁰ Model Rule of Professional Conduct Rule 4.2 (1995). ("The Model rule is substantially the same as its predecessor Disciplinary rule 7-104(a)(1) of the Model Code of Professional Responsibility which finds its roots in Canon 9 of the 1908 ABA Canons of Ethics." Allan Van Fleet, *How Government Lawyers Tilt the Ethical Playing Field*, 13 FALL ANTI-TRUST 13 n. 1 (1999)).

²⁴¹ Buettner, *supra* note 3 (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 396 (1995)).

²⁴² Van Fleet, *supra* note 5, at 13.

²⁴³ Buettner, *supra* note 3 (citing Model Rules of Professional Conduct Rule 4.2 cmt. 2 (1996)).

²⁴⁴ *Id.*

circumvent opposing counsel and employ superior skills and legal training to take advantage of the opposing party."²⁴⁵ Apparently, however, the potential for unfairness does not exist when the circumvention is undertaken by those attorneys employed by the Department itself. Indeed, "it is surprising that the United States Department of Justice, a federal entity which by its very name exists to preserve justice, has exempted its attorneys from having to observe the anti-contact rule promulgated by the legal profession and imposed upon all lawyers."²⁴⁶

As discussed above, the background of Model Rule 4.2 seems simple enough. However, beginning in the late 1980's, the anti-contact rule embarked on a winding path which forms the basis for this article. Beginning with the basic directive of Rule 4.2, its journey leads us through a 1988 decision in the Second Circuit,²⁴⁷ to a now infamous memo written in 1989 by then-Attorney General Richard Thornburgh, further still through a critical Ninth Circuit decision,²⁴⁸ a Federal Regulation,²⁴⁹ another court decision-this time in the Eighth Circuit,²⁵⁰ and, finally, to a "little-noticed provision tacked on to a \$520 million omnibus spending bill, innocuously titled 'The Citizen's Protection Act.'"²⁵¹

II. THE MCDADE AMENDMENT

"Some folks don't like being prosecuted, so they've got to strike back at federal prosecutors."²⁵² Apparently, federal prosecutors picked on one of the wrong folks when they decided to go after Rep. Joseph M. McDade, a Republican from Pennsylvania. After being indicted by a federal grand jury in 1992, McDade endured an eight year investigation that eventually led to his acquittal of conspiracy and racketeering charges.²⁵³ McDade was charged with accepting over \$100,000 in gifts and other items from defense contractors and lobbyists.²⁵⁴ Before leaving the House of

²⁴⁵ *Id.* (citing Communications with Represented Persons, 59 Fed. Reg. 39, 910, 39, 910–11 (1994)).

²⁴⁶ *Id.* (citing DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.12 (1994)).

²⁴⁷ *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988).

²⁴⁸ *United States v. Lopez*, 4 F.3d 1455 (9th Cir. 1993).

²⁴⁹ DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77 (1994).

²⁵⁰ *United States v. McDonnell Douglas*, 132 F.3d 1252 (8th Cir. 1998).

²⁵¹ Otto G. Obermaier & Ronald R. Rossi, *Evaluating the Crime Legislation Passed by the 105th Congress*, 221 N.Y.L.J. 1 (1996).

²⁵² Eric Lichtblau, *Justice Department Contends Law Would Handcuff Prosecutor Rules*, L.A. TIMES, Feb. 2, 1999, at A8 (quoting a senior Justice Department official opining about Rep. Joseph McDade's (R-Pa.) motivation for authoring the Citizens Protection Act).

²⁵³ *Id.*; see also Richard C. Montgomery, *Ethical Standards for Prosecutors*, 147 PIT. L.J. 9 (1999).

²⁵⁴ Lichtblau, *supra* note 17.

Representatives after serving eighteen terms in office, Rep. McDade stated that "the liberty of every citizen of this country"²⁵⁵ depended on the passage of his Citizens Protection Act because federal prosecutors were allowed to engage in "questionable conduct without penalty and without oversight."²⁵⁶

The McDade Amendment easily made it off Capital Hill and to the President's desk with overwhelming bi-partisan support.²⁵⁷ In addition to the American Bar Association, other supporters of the measure included the Conference of Chief Justices, The American Corporation Counsel Association and the U.S. Chamber of Commerce.²⁵⁸ The McDade Amendment, in relevant part, states:

(a) 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. (b) The Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.²⁵⁹

The new law took effect on April 19, 1999, after a 180-day waiting period supposedly imposed so that Attorney General Janet Reno could amend Justice Department rules to reflect the statutory provision.²⁶⁰ According to one commentator, however, the Amendment, as approved, was "watered down," and the 180-day holding period was provided simply to "give the Justice Department time to get it [the McDade Amendment] repealed."²⁶¹

²⁵⁵ *Id.*

²⁵⁶ Jerry Seeper, *Hatch Offers Ethics Act to Free "Handcuffed" Prosecutors*, WASH. TIMES, Feb. 8, 1999, at A3.

²⁵⁷ *House Would Make Federal Counsels, Prosecutors Subject to Ethics Board*, STAR-TRIB. (Minneapolis-St. Paul), Aug. 6, 1998, at A7. The vote was 249-182, with 48 Republicans joining all but four Democrats in approving the provision as part of a pending appropriations bill for the Justice Department. Later, an attempt to kill the provision was crushed, 345-82. See also Walter Pincus, *Revisiting Rules for Federal Prosecutors*, WASH. POST, Feb. 10, 1999, at A6 (discussing the contribution of then-Speaker of the House, Newt Gingrich and the opposition of Department of Justice officials).

²⁵⁸ Rhona McMillion, *Playing By the Same Rules*, ABA J., June 1999, at 91.

²⁵⁹ 28 U.S.C. § 530(B) (1999).

²⁶⁰ Michael S. Sundermeyer & Richard M. Cooper, *Unanswered Questions About the McDade Amendment*, 12 BUS. CRIMES BULL. 1 (Jan. 1999).

²⁶¹ Paul Craig Roberts, *When Justice Takes a Holiday*, WASH. TIMES, Mar. 26, 1999, at A19; see also Richard C. Montgomery, *Ethical Standards for Federal Prosecutors*, 147 PITT. L.J. 9 (1999) ("[a]s originally proposed, the McDade Amendment has 10 categories of punishable misconduct, specified procedures for complaint and penalties for the misconduct, plus a misconduct independent overview by the establishment of a Misconduct Review Board. These provisions were deleted from the final bill.").

At first reading, the McDade Amendment appears fundamentally fair. After all, why should federal prosecutors be held to a different ethical standard than attorneys on the other side of the aisle? However, the notion of applying "[s]tate laws and rules, and local Federal court rules" to federal prosecutors "to the same extent and in the same manner as other attorneys in that State" has given rise to an ongoing battle of seemingly biblical proportions. Commenting that the group feels a bit like David vs. Goliath, past chairman of the ABA's ethics committee Lawrence J. Fox, stated, "it has always been our position that the regulation of lawyers is done on a state-by-state basis. Even if you work for the Department of God, you are still obliged to follow those rules."²⁶²

III. THE DEPARTMENT OF JUSTICE STRUFFLES WITH THE ANTI-CONTACT RULE

Before the 1970's, prosecutors virtually had de facto immunity with regard to ethical violations.²⁶³ Reported bar charges against prosecutors were rare.²⁶⁴ However, by the 1970's creative criminal defense lawyers began to develop arguments for suppressing evidence and sanctioning prosecuting attorneys for violating the anti-contact rule.²⁶⁵ These arguments were much more effective against State prosecutors than Federal prosecutors.²⁶⁶ Federal courts seldom, if ever, went after prosecutors for violating the anti-contact rule, and then only when the improper contact occurred in connection with another ethical violation.²⁶⁷ The status quo changed dramatically in 1988 with a decision out of the Second Circuit, *United States v. Hammad*.²⁶⁸

A. *United States v. Hammad*

Despite the apparent *carte blanche* of the federal prosecutor during the 1970's and through the mid-1980's, one remaining "sticking" point dealt with the anti-contact rule as applied before or after the indictment of an individual. In the majority of jurisdictions, courts consistently held that the anti-contact rule did not apply before there was an indictment, regardless of whether or not the criminal suspect had retained counsel.²⁶⁹ However, by 1988 the Second Circuit, in *United States v. Hammad*, held

²⁶² Lichtblau, *supra* note 16.

²⁶³ Panel Discussion, *The Regulation and Ethical Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 737, 742 (1999).

²⁶⁴ *Id.*

²⁶⁵ Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created?*, 64 GEO. WASH. L. REV. 460, 471 (1996).

²⁶⁶ *Id.* at 472.

²⁶⁷ *Id.* at 472.

²⁶⁸ *United States v. Hammad*, 846 F.2d 854, *amended*, 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990).

²⁶⁹ Leesfield, *supra* note 4, at 20.

that the anti-contact rule "applies to federal criminal investigations both before and after indictment, [and] that a prosecutor violates the rule by using an informant to gather information from a suspect known to be represented by counsel."²⁷⁰ In *Hammad*, the court initially invoked the anti-contact rule to "restrict prosecutors and their agents from communicating with represented suspects during the course of an investigation."²⁷¹ The *Hammad* court revised its opinion, however, providing "that as long as legitimate investigative techniques were used, direct communications with represented suspects would generally be permissible."²⁷² The investigative technique in *Hammad* included a sham grand jury subpoena presented to the defendant, a represented party, by an associate now acting on behalf of the government. Despite finding that the investigative technique was indeed illegitimate, the *Hammad* court declined to suppress statements obtained from the defendant.²⁷³ Although the *Hammad* decision ended somewhat favorably for the government, "the mere prospect that evidence might be suppressed or, even worse, that federal prosecutors might be sanctioned personally for violating the no-contact rule remained chilling" to the government.²⁷⁴

B. The Thornburgh Memorandum

It was the prospect of suppression or sanction that compelled then-Attorney General Richard Thornburgh to write his now infamous "Thornburgh Memorandum," which unilaterally excused federal prosecutors from the bounds of ethical conduct regarding contact with represented parties.²⁷⁵ In his memorandum, entitled "Communication With Persons Represented By Counsel," Thornburgh stated:

It is the clear policy of the Department that in the course of a criminal investigation, an attorney for the government is authorized to direct and supervise the use of undercover law enforcement agents, informants, and other cooperating individuals to gather evidence by communicating with any person who has not been made the subject of formal federal criminal adversarial proceedings arising from that investigation, regardless of whether the person is known to be represented by counsel. It is further the policy and the experience of the Department that what it may do in an undercover setting, it may similarly do overtly. Routine contacts with witnesses, even when not done undercover, are an integral part of federal law enforcement, even where

²⁷⁰ *United States v. Hammad*, 846 F.2d 854, *amended*, 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990).

²⁷¹ *Green*, *supra* note 29.

²⁷² *Id.*

²⁷³ *Id.* (discussing *United States v. Hammad*, 846 F.2d 854, *amended*, 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990)).

²⁷⁴ *Id.*

²⁷⁵

a lawyer may represent the witness. Traditionally, local bar rules have not been thought to prohibit such contact and any attempt to use the rules in this way runs afoul of the Supremacy Clause.²⁷⁶

"The Thornburgh Memorandum set off a firestorm within the organized bar" as the ABA, private bar associations, and academics immediately cried foul.²⁷⁷ Subsequently, "Attorney General Thornburgh's attack on the judiciary's inherent supervisory power over officers of the court and the right of state bars to govern the ethical conduct of attorneys licensed in their jurisdictions was quickly and vigorously rejected by the courts."²⁷⁸ The DOJ's attempt to excuse its own attorneys from an ethical code of conduct, that had been widely accepted and complied with for almost a hundred years, buttressed for many the idea that prosecutors operate at a lower standard of ethical conduct than other attorneys.²⁷⁹

Attorney General Thornburgh justified the DOJ exemption from the code of ethics in two ways. First, he looked to the language of Model Rule 4.2, particularly that portion allowing contact with a represented party where the lawyer "is authorized by law to do so." In the memorandum, Thornburgh asserted that the "authorized by law" language in Model Rule 4.2 allows an exemption for federal prosecutors, as the DOJ's position on contacting represented parties would be codified "in the near future," and, as such, would have the force and effect of law.²⁸⁰ Under Thornburgh's second justification, the memorandum asserted that the Supremacy Clause of the Constitution barred the enforcement of ethics rules at state and local levels against federal prosecutors. "In the rare instance where an actual conflict arises [between the state ethics rules and conduct of the federal prosecutors]," Thornburgh stated, "the Supremacy Clause 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."²⁸¹ Considering the broad and somewhat cavalier assertions made in the Thornburgh Memorandum, it is not surprising that the courts wasted no time in once again addressing the issue of prosecutorial exemption from the anti-contact rule.

C. Judicial Outrage in the Aftermath of the Thornburgh Memorandum

²⁷⁶ Memorandum from Dick Thornburgh, United States Attorney General, to United States Attorneys (June 8, 1989), *reprinted in* Matter of Doe, 801 F. Supp. 478, 492 (D.N.M. 1992).

²⁷⁷ Van Fleet, *supra* note 5, at 13.

²⁷⁸ United States v. Talao, 1999 U.S. Dist. Lexis 10871, at *10 (N.D. Cal. June 12, 1999).

²⁷⁹ Green, *supra* note 30, at 474.

²⁸⁰ Thornburgh, *supra* note 41, at 493.

²⁸¹ *Id.* at 475.

By all accounts, the Thornburgh Memorandum was "a disaster both from a public relations and a legal perspective."²⁸² Courts nationwide did not take kindly to the notion that federal prosecutors were essentially untouchable with respect to ethical violations. The memorandum "posed a challenge to the constitutional authority of courts to regulate federal prosecutors. Courts did not take this challenge lightly."²⁸³ For instance, in *In re John Doe*, a federal district court in New Mexico responded to the Thornburgh Memorandum stating,

[t]he Government threatens the integrity of our tripartite structure by arguing [that] its lawyers, in the course of enforcing the laws regulating public conduct, may disregard the laws regulating their own conduct [T]he insolence with which the Government promotes this as official policy irresponsibly compromises the very trust which empowers it to act.²⁸⁴

The *Doe* court continued, addressing the contention that the DOJ itself is vested with the authority to interpret when and how the code of ethics applies to its attorneys:

[t]he idea of placing the discretion for a rule's interpretation and enforcement solely in the hands of those governed by it not only renders the rule meaningless, but the notion of such an idea coming from the country's highest law enforcement official displays an arrogant disregard for and irresponsibly undermines ethics in the legal profession.²⁸⁵

The *Doe* court was not the first to respond to the Thornburgh Memorandum. In *United States v. Lopez*, the U.S. District Court for the Northern District of California stated that the idea that the anti-contact rule does not apply to federal prosecutors simply because Richard Thornburgh's memorandum stated as much was, "to put it bluntly, preposterous."²⁸⁶ Moreover, "in addressing the government's claim that the government lawyer's actions were 'authorized by law,' the court held that nothing in the statutes cited by the government 'expressly or impliedly authorizes contact with represented individuals beyond that permitted by case law'."²⁸⁷

"The majority of courts following *Lopez* have held that the memorandum, far from being a meaningful authority, was nothing more than a policy statement issued by the head of a federal agency which could

²⁸² Green, *supra* note 30, at 477.

²⁸³ *Id.* at 475.

²⁸⁴ *In re John Doe*, 801 F. Supp. 478, 480 (D.N.M. 1992).

²⁸⁵ *Id.* at 546.

²⁸⁶ *United States v. Lopez*, 765 F. Supp. 1433, 1453 (N.D. Cal. 1991), *vacated*, 989 F.2d 1032 (9th Cir.), *amended and superceded*, 4 F.3d 1455 (9th Cir. 1993).

²⁸⁷ *See* Talao, 1999 U.S. Dist. Lexis 10871, at *10.

not constitute federal law sufficient to supplant state regulations."²⁸⁸ Indeed, according to one commentator, "[t]he Thornburgh Memorandum was just that - a memorandum. It did not have the force of law."²⁸⁹ Before the Thornburgh Memorandum, when Federal prosecutors confronted the problem of an ethical charge concerning an improper contact with a represented person, courts tended to interpret the rule favorably to the prosecutors and carve out wide exceptions for them.²⁹⁰ However, after the memorandum, once the DOJ changed its strategy from abiding by the ethical rules to ignoring them, courts tended to look less favorably at DOJ attorney conduct, especially in cases in which the federal prosecutor cited the Thornburgh Memorandum to justify such conduct.²⁹¹ It quickly became clear that Richard Thornburgh's memorandum was not going to be the anti-contact rule answer the DOJ had initially hoped.

D. The Reno Rules

Despite heavy criticism from courts and commentators across the country, the DOJ continued its fight for exemption from the rules of ethical conduct. In 1994, one year after *Lopez*, Attorney General Janet Reno decided to enter the fray with her own attempt at exempting prosecutors from the Model Rules' ethical standards. Under Reno, the DOJ sought to use 5 U.S.C. § 301, also known as the "housekeeping statute," as authority to create a new regulation that would exempt DOJ attorneys from outside accountability.²⁹² The DOJ hoped that codification of the exemption would give it the legal authority of federal law. In addition to exempting DOJ attorneys from state and local ethical rules, §77.11 of Title 28 (the "Reno Rules") provide the sole power to discipline any ethical violations to the DOJ itself.²⁹³ Nevertheless, these new regulations purported to adhere to the general principles that are the foundation of the anti-contact rule.²⁹⁴

Although the "Reno Rules" generally indicated the DOJ's intent to conform to the overall spirit of the anti-contact rule thereby prohibiting federal prosecutors from communicating with a represented party without his attorney's consent, the Rules also provided for wide latitude, recognizing six situations in which prosecutors could contact a defendant without his or her attorney's permission.²⁹⁵ The Rules allowed prosecutors

²⁸⁸ *Id.*

²⁸⁹

²⁹⁰ *Id.* at 476–77.

²⁹¹ *See id.* at 477.

²⁹² 5 U.S.C. § 301 (1994) (stating, in pertinent part, "[t]he head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of his employees, that distribution and performance of its business, and the custody, use, and preservation of its records, papers and property.").

²⁹³ *See* Leesfield, *supra* note 4, at 22.

²⁹⁴ Buettner, *supra* note 3, at 122.

²⁹⁵ *Id.* at 128–29.

to contact represented parties in the following situations: first, to determine whether the individual was represented;²⁹⁶ second, to "discuss the subject matter of the representation with a defendant in the course of conducting discovery and performing judicial or administrative processes, provided [prosecutors] do so in accordance with the court's orders or rules;"²⁹⁷ third, without seeking prior approval from a party's attorney, federal prosecutors can communicate with a party who initiated the contact if the prosecutors obtain a "signed, written statement acknowledging the party's waiver of his right to have an attorney present" and "permission from the court which had either determined the waiver is valid or obtained substitute counsel who consented to the conversations;"²⁹⁸ fourth, "if at the time of arrest the represented party knowingly waived his *Miranda* rights, discussions conducted at that time are permissible;"²⁹⁹ fifth, the Rules permit "contacts involving 'investigations of additional, different or ongoing crimes or civil violations';"³⁰⁰ and sixth, in "situations in which prosecutors have a good faith belief that a person's life or safety is endangered and that communications with a represented party are necessary to eliminate the risk, contact with the party aimed at gaining information to provide protection is acceptable."³⁰¹ In light of the wide prosecutorial latitude given under the six exceptions, the "Reno Rules," did not differ significantly from the original Thornburgh Memorandum. Essentially, the Rules were a codification of the principles of the Thornburgh Memorandum, and, indeed, the "Reno Rules" had a similar lack of success.

E. *United States v. McDonnell Douglas*

For approximately four years, the "Reno Rules," as codified at §77.11 of Title 28, were the law of the land. However, in response to a decision of the Eighth Circuit Court of Appeals, the status of Model Rule 4.2's application to prosecutors was about to change again. In *United States v. McDonnell Douglas Corporation*,³⁰² government investigative agents made ex parte contacts with present and former employees of the defendant, a corporation having contracts with the military, without the consent of counsel. The defendant moved for a protective order barring

²⁹⁶ See *id.* at 134 (citing DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.6(a) (1994)).

²⁹⁷ *Id.* (citing DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.6(b) (1994)).

²⁹⁸ *Id.* (citing DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.6(c) (1994)).

²⁹⁹ *Id.* (citing DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.6(d) (1994)).

³⁰⁰ (citing DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.6(e) (1994)).

³⁰¹ (citing DOJ Communications with Represented Persons Rule, 28 C.F.R. § 77.6(f) (1994)).

³⁰² See *United States v. McDonnell Douglas*, 132 F.3d 1252, 1253 (8th Cir. 1998).

such contacts based on a Missouri Supreme Court rule similar to Model Rule 4.2. In response, the government claimed that the "Reno Rules", 28 C.F.R. §77.10(a), specifically allowed such contact.³⁰³ According to the Eighth Circuit, in order for DOJ's new regulation to have the effect of federal law, the creation of the regulation must have been within the agency's authority.³⁰⁴ In ruling that the DOJ was not granted the authority to issue the regulation by Congress, the *McDonnell Douglas* court reasoned that the congressional intent behind §5 U.S.C. 301, the "housekeeping statute," was to provide governmental departments with the authority to regulate the day-to-day operations of their offices, not to provide segments of the executive bureaucracy, such as the DOJ, with autonomous authority to exempt their employees from state and local federal court rules of ethics.³⁰⁵ Indeed, the *McDonnell Douglas* court stated, "attempts to construe [the "housekeeping statute"] as something more was 'misuse' which 'twisted' the statute."³⁰⁶ And, with that, the "Reno Rules" were essentially nullified.

F. The End of the Line for the DOJ?

After *McDonnell Douglas*, the passage of the McDade Amendment, mentioned above, was the next major development in the anti-contact rule's application. The McDade Amendment emphasized the notion that Congress wants federal prosecutors to be held accountable for ethical violations in the same manner as all other attorneys. With passage of the McDade Amendment, the DOJ's ten year battle to avoid external ethical regulation ended in abject defeat. Undaunted, the DOJ is now concentrating its efforts on modifying Model Rule 4.2 itself. Surely, certain proposals for modification may be beneficial, as members of the bar should have input into the construction of the rules governing the practice of law. There is also little doubt that under certain circumstances exceptions to the anti-contact rule may be appropriate. However, argument can be made for either side of the dueling propositions, to exempt or not to exempt prosecutors from the anti-contact rule. The following constitutes an overview of points for and against anti-contact rule exemption for federal prosecutors.

IV. ARGUMENTS FOR AND AGAINST PROSECUTORIAL EXEMPTION FROM THE ANTI-CONTACT RULE

A. The Arguments for Exemption

³⁰³ *See id.*

³⁰⁴ Leesfield, *supra* note 4, at 23.

³⁰⁵ *See id.* at 22.

³⁰⁶ *United States v. McDonnell Douglas*, 132 F.3d 1252, 1255 (quoting *Crysler Corp. v. Brown*, 441 U.S. 281, 310 n.41 (1979)).

1. Ample Safeguards Against Prosecutorial Misconduct Currently Exist

In his recent testimony before the new Subcommittee on Criminal Justice Oversight, Richard Delonis, President of the National Association of Assistant United States Attorneys, spoke out in favor of exempting federal prosecutors from ethical limitations such as those found in the McDade Amendment. Delonis noted what he called current "barriers" to prosecutorial misconduct which, he argued, preempted the need for application of the anti-contact rules to federal prosecutors.³⁰⁷ These prosecutorial restraints include case agent training, experience, judgment, agency investigative policy and guidelines, internal U.S. Attorney's Office investigative and prosecutorial guidelines and policy, and judicial approval of search warrants.³⁰⁸ Delonis also cited certain procedural mechanisms as restraints against prosecutorial misconduct: grand jury indictments, motions to dismiss, motions to suppress, motions for judgment of acquittal, and various judicial sanctions. He argued that these are safeguards already in place, thus eliminating the need for prosecutorial compliance with the ethical rule against contacting represented parties.³⁰⁹

2. Federalism and the Supremacy Clause

Delonis also drew attention to his concerns that "the blanket subjugation of federal prosecutors to state 'laws and rules'. . . seriously implicates the constitutional principles of federalism and the Supremacy Clause."³¹⁰ According to Delonis, the Amendment creates an opportunity for state bar associations, and perhaps state legislatures, to promulgate new "State laws and rules" governing federal law enforcement.³¹¹ "So construed, the [McDade Amendment] amounts to a congressional delegation or cession of its legislative authority to the states."³¹²

3. Potential for Chaos and a Need for Uniformity

Along with Richard Delonis, Deputy Attorney General Eric Holder has voiced his concern over the McDade Amendment. Testifying before a Senate subcommittee on March 24, 1999, Holder stated that the McDade Amendment is "too vague and would leave prosecutors wondering which ethics rules they must follow in cases involving more than one state."³¹³ According to Deputy Attorney General Holder, "We [the DOJ] firmly believe that federal prosecutors should comply with the highest ethical standards, regardless of who makes and enforces the rules. But we also

³⁰⁷ See Richard L. Delonis, Testimony at Subcommittee on Criminal Justice Oversight, <http://www.naaua.org/mcdade.htm> (visited Sept. 24, 1999).

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ Cassandra Burrell, *Feds Seek to Help U.S. Attorneys*, ASSOCIATED PRESS ONLINE, Mar. 24, 1999.

believe that ethics rules should be clear, predictable and reasonably uniform, and also that they should not unreasonably interfere with legitimate law enforcement techniques."³¹⁴

Another vocal opponent of the McDade Amendment, Senator Strom Thurmond (R-SC), echoed Deputy Attorney General Holder's concerns. According to Sen. Thurmond, federal prosecutors already have volumes of ethics rules they must heed. Indeed, "the problem is not that there are not enough rules and regulations for federal prosecutors to follow."³¹⁵ Fellow Senator Orrin Hatch (R-UT) agrees with Thurmond, holding the position that the McDade Amendment will "hamstring the government's get-tough-on-crime efforts and cause chaos among prosecutors who will face ethics rules that differ from state to state."³¹⁶

According to the Amendment's opponents, varying interpretations of the Model Rules could pose significant problems when numerous federal prosecutors, all licensed in different states, work on the same case.³¹⁷ Indeed, the difficulty and time wasted in trying to discover which prosecutors are barred by their state codes from such communications and which are not could be a significant impediment to law enforcement.³¹⁸ For example, a California court may prohibit attorney contact once that attorney knows that the opposing party is represented by counsel, even where no formal action has been filed.³¹⁹ While in Washington D.C., a court might allow law enforcement authorities to engage in pre-indictment, pre-arrest, or investigative contacts with suspects known to be represented by counsel.³²⁰ From Richard Delonis' testimony, he is clearly concerned with possible prosecutor confusion and the application of state laws as opposed to federal laws of conduct. In his testimony, Delonis pointed to the fact that many states have laws prohibiting the obtaining of evidence by wiretap. However, federal prosecutors have been authorized by law to gather evidence from the use of judicially sanctioned and supervised electronic surveillance. According to Delonis, "We can

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ Bill Moushey, *Win at All Costs: Law to Curb Federal Prosecutors Effective Tomorrow*, PITT. POST-GAZETTE, Apr. 18, 1999, at A18.

³¹⁷ Leesfield, *supra* note 4, at 20.

³¹⁸ *Id.*

³¹⁹ *Id.* at n.14 (citing Jamie S. Gorelick and Geoffrey M. Klineberg, *Justice Department Contacts with Represented Persons*, 78 JUDICATURE 136, 142 (1994) (examining *Triple A Machine Shop, Inc. v. State*, 261 Cal.Rptr. at 498)).

³²⁰ *Id.* at n.18 (citing Jamie S. Gorelick and Geoffrey M. Klineberg, *Justice Department Contacts with Represented Persons*, 78 JUDICATURE 136, 142 (1994) (examining *United States v. Western Electric Co.*, No. 82-0192 (HHG), 1990 U.S. Dist. Lexis 6178 at 2 (D.D.C. 1990)).

realistically anticipate many challenges to wiretap evidence obtained in states where state laws proscribe the use of electronic surveillance."³²¹

For each of these arguments in favor of exempting federal prosecutors from ethical rules of conduct there exists a persuasive response in favor of the blanket application of the ethical guidelines. Below are the most common points addressed by those in favor of the McDade Amendment.

B. The Arguments Against Exemption

1. Exemption will Foster Abuse by Federal Prosecutors

Government proposals for modifying Model Rule 4.2 to allow a government exemption from the anti-contact rule "will open the door for extensive abuse by federal prosecutors."³²² Indeed, exempting federal prosecutors from the ban on ex parte communications with represented parties at the pre-indictment stage would allow prosecutors to "manipulate the timing of an indictment solely to gather information it could not obtain after the Sixth Amendment right to counsel attached."³²³ Exemption would allow prosecutors to interview a target just prior to indictment even if the target had notified the federal agent that they had retained counsel.³²⁴

Also, despite arguably valid intentions by the government in seeking exemption, "it seems likely that in any [number] of ...situations, prosecutors' questioning strategies could easily manipulate the defendant into offering an unintentional but harmful or even inculpatory response simply because the defendant did not have his attorney's assistance."³²⁵ In addition to purposeful abuse by federal prosecutors, some harmful effects of prosecutorial exemption from the anti-contact rule may not even manifest themselves by intentional acts of these prosecutors. "At the very least, a defendant who is sitting alone in an interview with an adversary may inadvertently damage his own case because he is intimidated by the mere presence of the government attorney and his surroundings."

2. Government Lawyers Do Not Need Exemption

In its amicus brief submitted in the *McDonnell Douglas* case, the Conference of Chief Justices stated that "Model Rule 4.2 does not stifle the ability of federal prosecutors to enforce the law."³²⁶ Indeed, Model

³²¹ See Richard Delonis testimony, <http://www.naausa.org/mcdade.htm> (visited Sept. 28, 1999).

³²² Leesfield, *supra* note 4, at 24.

³²³ *Id.* (citing Amy Baron-Evans, *Comment on Proposed Changes to ABA Rule 4.2*, National Association of Criminal Defense Lawyers, <http://www.criminaljustice.org> (last visited Sept. 28, 1999)).

³²⁴ *Id.*

³²⁵ Buettner, *supra* note 3.

³²⁶ Leesfield, *supra* note 4, at 25 (discussing *United States v. McDonnell Douglas*, 132 F.3d 1252 (1998)).

Rule 4.2 "allows government lawyers to engage in 'constitutionally permissible investigative activities. . . prior to the commencement of criminal or civil enforcement proceedings, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable'."³²⁷ "[V]arious non-custodial pre-indictment communications have actually been found permissible under Model Rule 4.2."³²⁸ Also, if no judicial precedent exists, "the federal prosecutor need only show the court that the law enforcement objectives outweigh the interests in protecting the attorney-client relationship in order to obtain an order granting a right to communicate ex parte with a represented party."³²⁹

3. Fundamental Fairness

The powers of the prosecutor are at an all time high.³³⁰ Prosecutors not only have the power to grant plea bargains, but, because of sentencing guidelines, they also have the power to determine the sentence as well.³³¹ As such, creating an entirely separate body of rules allowing prosecutors to engage in a wider range of conduct would undermine principles of "fundamental fairness" and equality.³³² As one commentator asks, "how can fairness and justice prevail when a similarly situated group is governed by totally different standards and a totally different regulatory body?"³³³ Furthermore, "[i]n its position paper supporting the McDade Amendment, the ABA noted. . . that an internal Justice Department ethics system could not guarantee the objectivity that the current, independent system delivers."³³⁴ Clearly, the "notion that attorneys for the government are to be held to a different and lower standard of ethics than are other members of the bar is very disquieting."³³⁵ The lack of objectivity in ethics review, coupled with prospects for prosecutorial abuse, certainly weighs in favor of the McDade Amendment.

Finally, the effect of "prosecutorial authority to contact defendants without first obtaining permission from their attorneys will possibly be to 'intrude upon the function of defense counsel and impede his or her ability

³²⁷ *Id.* (citing Model Rules of Professional Conduct Rule 4.2 cmt.2).

³²⁸ *Id.* (citing Amy Baron-Evans, *Comment on Proposed Changes to ABA Rule 4.2*, National Association of Criminal Defense Lawyers, <http://www.criminaljustice.org> (last modified Sept. 28, 1999)).

³²⁹ *Id.*

³³⁰ See *Panel Discussion, The Regulation and Ethical Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 737, 740 (1999).

³³¹ *Id.*

³³² Buettner, *supra* note 3 (citing Hearings on H.R. 3386 Before the Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary, 104th Cong. (1996)).

³³³ *Id.*

³³⁴ *The NJSBA Report: McDade Repeal Opposed*, 8 N.J. LAW. 169 (1999).

³³⁵ Buettner, *supra* note 3, at 142 (citing Jerry E. Norton, *Ethics and the Attorney General*, 74 JUDICATURE 203, 207 (1991)).

to negotiate a settlement and properly represent the client'.³³⁶ This fact alone dictates in favor of a blanket application of Model Rule 4.2. Indeed, "[t]he obtainment of justice should never outweigh the need to be just in obtaining it by applying only legitimate, lawful investigative techniques narrowly tailored to be fair to the suspect in the situation."³³⁷

V. CONCLUSION

The McDade Amendment essentially returned the application of the anti-contact rule to its post-*Hammad*, pre-Thornburgh Memorandum status. As of today, the general ethical prohibition against contacting a represented individual applies to every member of the bar, prosecution or defense, state or federal. However, the future of the McDade Amendment will indeed be short-lived if opponents such as Utah Senator Orrin Hatch have anything to say about it. "On January 19, 1999, Hatch introduced Senate Bill 250, which would grant the Department of Justice an exemption from the state and local federal court rules of ethics whenever the Department of Justice decides that the rule of ethical conduct would conflict with its own 'policies'."³³⁸ According to one commentator, "Hatch's bill would not only put a congressional imprimatur on the Department's roundly condemned self-authorizing regulations purporting to allow it to self-exempt its own attorneys and agents from the fundamental. . . Rules of Ethics," but the bill would also be a tremendous waste of tax dollars by "creating a commission on federal prosecutorial conduct, made up of federal judges appointed by the Chief Justice of the Supreme Court."³³⁹

In the face of such formidable opposition, the future of the McDade Amendment is certainly tenuous. While "the importance of ensuring that federal prosecutors abide by the same rules as everyone else is self-evident to most, it remains to be seen how this hotly charged political, constitutional and fundamentally ethical issue will play out."³⁴⁰ As members of the legal community, our universal support for the McDade Amendment is crucial. The alternative, a selected assortment of different ethical standards to apply different attorneys, will not succeed in carrying out the penultimate goal of our legal system: equal justice under law. Truly, only uniform application of one ethical standard for all attorneys will lead to achievement of this ideal.

³³⁶ *Id.* at 136 (citing *United States v. Lopez*, 4 F.3d 1455 (9th Cir. 1993) (quoting *People v. Sharp*, 150 Cal. App. 3d 13 (Cal. Ct. App. 1983)).

³³⁷ *Id.*

³³⁸ See Barry Tarlow, *Federal Prosecutors No Longer Subject to Thornburgh Memorandum*, 23 THE CHAMPION 49 (1999).

³³⁹ *Id.* at 49 (citing statement by National Association of Criminal Defense Lawyers).

³⁴⁰ *Id.*