CAN THE FEDS INTERVIEW CORPORATE EMPLOYEES WITHOUT YOUR COUNSEL'S CONSENT?

Your company is under federal investigation. You have hired the best white-collar defense firm in town, and they have met with the prosecutors. Now, you hear from a regional manager that Federal Bureau of Investigation ("FBI") agents are out interviewing your employees. Hey, can they do that? Could an assistant U.S. attorney ("AUSA") interview your employees without your counsel's consent? Does it make any difference if the AUSA directs the FBI to do it? Under current law, such interviewing is not permitted, but proposed legislation could change that situation. Stay tuned.

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Every lawyer is, or should be, familiar with the ethical prohibition against communicating with a person represented by counsel without the consent of the person's lawyer. Known as the "anticontact" or "no-contact" rule, this prohibition is set forth in Rule 4.2 of the *Model Rules of Professional Conduct*, which provides as follows:

> 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.[1]

As the ABA has interpreted 4.2, it has a threefold purpose—namely, to prevent overreaching by adverse counsel, to protect the lawyer-client relationship from interference by adverse counsel, and to "reduce the likelihood that clients will disclose privileged or other information that might harm their interests."[2] These principles apply equally to corporate clients, as well as individuals, and it is well settled that corporate officers cannot be interviewed without the consent of corporate counsel.[3] This prohibition, however, runs afoul of the federal prosecutors' favorite tactic of isolating and interviewing corporate employees during investigations of alleged corporate criminal conduct. Over the past decade, these two principles have collided several times, and the ultimate resolution of the matter remains unresolved.

For example, some courts have taken the side of government prosecutors and, in support of their position, have cited a variety of rationales primarily premised on the view that ex parte contact with corporate employees by law enforcement agents is presumptively valid—that is, constitutes legally authorized activities—and is necessary to ensure an effective investigation of the allegedly criminal enterprise.[4] Other courts, on the other hand, have refused to accept an interpretation of the rule that categorically insulates such contact from the protections of the rule on the basis that it is "authorized by law."[5]

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To resolve this impasse, which the government seemed to be losing, the Justice Department ("DOJ") began exploring potential loopholes in Model Rule 4.2 and particularly the question of whether such contacts by government agents were "authorized by law."[6] There is little teaching on the meaning of that provision. Clearly, "a constitutional provision, statute, or court rule having the force and effect of law, that expressly

John K. Villa, "Can the Feds Interview Corporate Employees without Your Counsel's Consent?" *ACCA Docket* 20, no. 3 (2002): 100–103.

allows a particular communication to occur in the absence of counsel," satisfies the "authorized by law" exception.[7] But in the absence of these types of enactments or rulings, when, exactly, is a communication with a represented employee by a government investigator "authorized by law" so as to fall within the exception to the no-contact provision of Rule 4.2?

Before the enactment of the McDade Amendment[8] in 1998, DOJ took the position that the ethical prohibitions of DR7-104(A)(1) of the *Model Code of Professional Responsibility*, the predecessor to *Model Rule* 4.2, did not apply to federal prosecutors engaged in authorized law enforcement activity.[9] This position was memorialized in the so-called Thornburgh Memorandum, which Attorney General Richard Thornburgh issued in 1989.[10] Although several courts concurred with this position in decisions both before[11] and after[12] its official pronouncement in the Thornburgh Memorandum,[13] other courts refused to recognize that all criminal investigative activities of federal prosecutors or their agents before the institution of formal criminal proceedings fell within the "authorized by law" exception.[14]

In a classic case of bootstrapping, DOJ undertook to provide authorization "by law" for its own conduct by issuing regulations that not only purported to authorize federal prosecutors to engage in noncustodial, preindictment communications with employees of a corporation under investigation, but also declared that the regulations amounted to "law" within the meaning of the "authorized by law" exception to Rule 4.2.[15]

In 1998, Congress effectively invalidated DOJ's regulations through its enactment of the Citizens Protection Act, or McDade Amendment,[16] which subjects federal prosecutors to state ethics rules. Thus, in criminal investigations and prosecutions, "attorneys for the government shall conform their conduct and activities to the state rules and laws, and federal local court rules, governing attorneys in each State where such attorney engages in that attorney's duties."[17]

So what is the current understanding of "authorized by law" when applied to federal criminal investigations? As stated in one of the comments to the rule, a communication "authorized by law" includes "constitutionally permissible investigative activities of lawyers representing governmental entities, directly or through investigative agents," before criminal or civil enforcement proceedings have been commenced, "*when* there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable."[18] Thus, where a body of decisional law exists that permits prearrest or preindictment contacts with represented persons, based on the conclusion "that the public interest in investigating crime may outweigh the interests served by the Rule in the criminal context,"[19] such decisional authority falls within the meaning of the phrase "authorized by law."[20]

As a general rule, therefore, federal prosecutors are "authorized by law" when they "employ legitimate investigative techniques in conducting or supervising criminal investigations."[21] Although the use of informants in gathering evidence is ordinarily regarded as a legitimate investigative tactic,[22] ex parte contact by government lawyers or agents with managerial employees[23] of an unindicted corporate target of a criminal investigation is probably not a legitimate, ethical tactic.[24]

One important question is whether a federal prosecutor who would be prohibited by Model Rule 4.2 from contacting a managerial employee of a target corporation could send out non-

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- "Internal Investigations: You May Be Working for the Government," *Outside Counsel*, Winter 2001, available on ACCA Online℠ at www.acca.com/protected/pubs/oc/winter01/Zuckerman.pdf.
- David M. Zornow and Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, AM. CRIM. L. REV., Spring 2000.

lawyer FBI agents or other investigators to perform the same task. Well, the ABA's answer to this question is clearly no, as indicated in Part XI of ABA Opinion 95-396, which holds that, "if the lawyer has direct supervisory authority over the investigator, then in the context of contacts with represented persons, the lawyer would be ethically responsible for such contacts made by the investigator if she had not made reasonable efforts to prevent them (Rule 5.3(b)); if she [had] instructed the investigator to make them (Rule 5.3(c)(1); or if, specifically knowing that the investigator [had] planned to make such contacts[, she had] failed to instruct the investigator not to do so (Rule 5.3(c)(2))."

That being said, the law may very well change in the near future depending upon the action of Congress. In view of the horrific events of September 11, 2001, legislation is pending before Congress that seeks to nullify the McDade Amendment and authorize federal prosecutors to direct certain undercover investigative activities notwithstanding state ethics rules to the contrary.[25]

NOTES

1. *ABA Model Rules of Professional Conduct*, Rule 4.2 (2001). The *Restatement* similarly proscribes such communication. *See Restatement (Third) of the Law Governing Lawyers* § 99 (2000).
2. *ABA Comm. on Ethics and Professional Responsibility*, Formal Op. 95-396 (1995); *see also* Polycast Tech. Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 625 (S.D.N.Y. 1990) (rule prevents lawyer from using his superior legal skills so as to obtain unwise statements from lay person, preserves the integrity of the attorney-client relationship, and protects against the inadvertent disclosure of privileged information).
3. *See* Hill v. St. Louis Univ., 123 F.R.D. 1114, 1121 (8th Cir. 1997) (recognizing application of Rule 4.2 to organizational employees); *see also* Niesig v. Team I, 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (N.Y. 1990); Wright v. Group Health Hosp., 691 P.2d 564 (Wash. 1984); Dent v. Kaufman, 185 W.Va. 171, 406 S.E.2d 68 (1991) (cases recognizing application of no-contact rule to corporate employees and delineating standards for determining its application to particular employees); *ABA Model Rules of Professional Conduct*, Rule 4.2, cmt. 4, *infra*, n. 23.
4. *See* In re Disciplinary Proceedings Regarding John Doe, 876 F. Supp. 265, 268 (M.D. Fla. 1993); *see also*, *infra*, notes 11 and 12.
5. *See* United States v. McDonnell Douglas Corp.,132 F.3d 1252 (8th Cir. 1998) (ex parte contact with corporate employees without the consent of counsel is not authorized by law); United States v. Hammad, 858 F.2d 834, 838–40 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990) (refusing to set forth a "bright-line rule" that would sanction preindictment ex parte contacts with corporate employees by federal investigators as authorized by law).
6. *ABA Comm. on Ethics and Professional Responsibility*, Formal Op. 95-396, *supra* note *2*.
7. *Id*.
8. 28 U.S.C. § 530B.
9. *See* Richard Thornburgh, U.S. Department of Justice, *Memorandum, Communications with Persons Represented by Counsel* (June 6, 1989).
10. *Id*.
11. *See* United States v. Sutton, 801 F.2d 1346, 1366 (D.C. Cir. 1986); United States v. Fitterer, 710 F.2d 1328, 1333 (8th Cir.), *cert. denied*, 464 U.S. 852 (1983); United States v. Kenny, 645 F.2d 1323, 1339 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981); United States v. Lemonakis, 485 F.2d 941, 945 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974).
12. *See* United States v. Balter, 91 F.3d 427 (3d Cir.), *cert. denied*, 117 S.Ct. 518 (1996); United States v. Heinz, 983 F.2d 609, 613 (5th Cir. 1993); United States v. Ryans, 903 F.2d 731, 739 (10th Cir.), *cert. denied*, 498 U.S. 855 (1990); In re Doe, 876 F. Supp. 265, 269 (M.D. Fla. 1993).
13. *See supra* note 2. In holding the no-contact rule inapplicable to government investigations, some courts have held that it is coextensive with the Sixth Amendment's right to counsel and, consequently, is inapplicable to noncustodial investigations by government agents or informants before the institution of judicial proceedings. *See* United States v. Heinz, 983 F.2d 609, 613 (5th Cir. 1993). Other courts, relying on the pre-1995 version of the rule, which used the term "party" rather than the term "person," have limited application of the rule to those who have been made defendants in criminal proceedings, *see* United States v. Balter, 91 F.3d 427 (3d Cir.), *cert. denied*, 117 S.Ct. 518 (1996); United States v. Ryans, 903 F.2d 731, 739 (10th

Cir.), *cert. denied*, 498 U.S. 855 (1990), even though the comment to the rule stated that the rule was not limited to formal parties in litigation.

14. *See* United States v. Hammad, 858 F.2d 834, 838–40 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990); *see also* United States v. Scozzafava, 833 F. Supp. 203 (W.D.N.Y. 1993) (recognizing application of no-contact rule to federal prosecutors).
15. *See* JOHN K. VILLA, CORPORATE COUNSEL GUIDELINES § 3.26 and app. 3-8 (ACCA and West 2001).
16. 28 U.S.C. § 530B.
17. 28 C.F.R. § 77.3.
18. *ABA Model Rules of Professional Conduct*, Rule 4.2, *supra*, cmt. 2 (emphasis added).
19. *ABA Comm. on Ethics and Professional Responsibility*, Formal Op. 95-396, *supra* note 2.
20. *Id.* Notwithstanding the 1995 clarification of the rule on this point, some courts still adhere to the position that the rule applies only to represented parties. *See* United States v. Whittaker, 201 F.R.D. 363 (E.D. Pa. 2001), *rev'd on other grounds*, 268 F.3d 185 (3d Cir. 2001).
21. United States v. Hammad, 858 F.2d at 839.
22. *See id.; see also* In re Criminal Investigation of John Doe, Inc. 194 F.R.D. 375, 377 (D. Mass. 2000) (citing United States v. Ward, 895 F. Supp 1000, 1006 (N.D. Ill. 1995)).
23. Comment 4 to Rule 4.2 prohibits communications "with persons having a mangerial responsibility . . . or whose statements may constitute an admission on the part of the organization." Thus, the degree to which the rule applies in the case of a corporation may depend on the status of the employee whom the government seeks to contact.
24. *See* United States v. Ward.
25. H.R. 2215, the 21st Century Department of Justice Appropriations Authorization Act, seeks to amend 28 U.S.C. § 530B by adding a provision authorizing federal prosecutors, when investigating terrorism, to provide legal advice, as well as authorization for undercover activities involving the use of deceit or misrepresentation, notwithstanding contrary state law. S. 1437 is another piece of legislation pending in the Senate that would alter the McDade Amendment even further. H.R. 2506, which Congress recently passed, had contained a provision, called the Federal Investigation Enhancement Act of 2001, that significantly amended the McDade Amendment. This provision, however, was not included in the measure that was recently passed.