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OCTOBER 2019 / $5

EARN MCLE CREDIT

Sexual Harassment by Opposing Counsel

page 22

P.C. 496 Reconsidered

page 12

LACBA App Launch

page 8

PLUS

One-Stop Haven for Family Abuse Victims

page 30

Overt Activities

Los Angeles lawyer Michael Dore analyzes the relationship of legal precedent and California Rule of Professional Conduct 4.2 concerning prosecutorial ex parte contact with a represented target of an investigation

page 16

by Michael Dore

OVERT ACTIVITIES

Ninth Circuit cases cited in Rule 4.2 do not support allowing prosecutorial contact with a represented party except in unique circumstances

Whether a prosecutor may communicate with a lawyer's client about the subject of the representation without the lawyer's consent, or even knowledge, is a surprisingly complicated question to answer in California. The ethical prohibition on a lawyer's ability to contact a represented party dates back centuries. Courts have applied the same restriction when someone—e.g., a case agent—is functioning as the prosecutor's "alter ego." However, California's Rules of Professional Conduct include an exception when the contact is "otherwise authorized by law or a court order."[1] Although a prosecutor may think the law authorizes the external contact with the client, the client's counsel may disagree.

Who is right? The issue is subject to debate, and commentary adopted as guidance for interpreting the new Rules of Professional Conduct that went into effect November 1, 2018, complicates matters further. Commentary to the applicable new rule on contacts with represented parties—Rule 4.2—broadly states that the law "recognizes that prosecutors and other government lawyers are authorized to contact represented persons, either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal constitutions, statutes, rules, and case law."[2] It then cites two cases, *United States v. Carona*[3] and *United States v. Talao*,[4] as examples. However, these cases do not go nearly so far as the commentary suggests they do.

The Rule 4.2 commentary conflates direct, "overt" contacts with covert contacts through informants and undercover agents. Indeed, numerous cases have found no ethical violation when a prosecutor directed covert contacts with represented persons. As one Ninth Circuit court has concluded, "[l]ike the attorney-client privilege, the prohibition against ex parte contacts protects [the attorney-client] relationship at the expense of the full and free discovery of the truth."[5] At least in the pre-indictment setting, the ability for law enforcement to gather evidence through covert means typically prevails at the expense of an unimpeded attorney-client relationship. The overarching rationale is that "criminal suspects should not be permitted to insulate themselves from investigation simply by retaining counsel."[6] Thus, counsel and client should be prepared for the possibility that a friend

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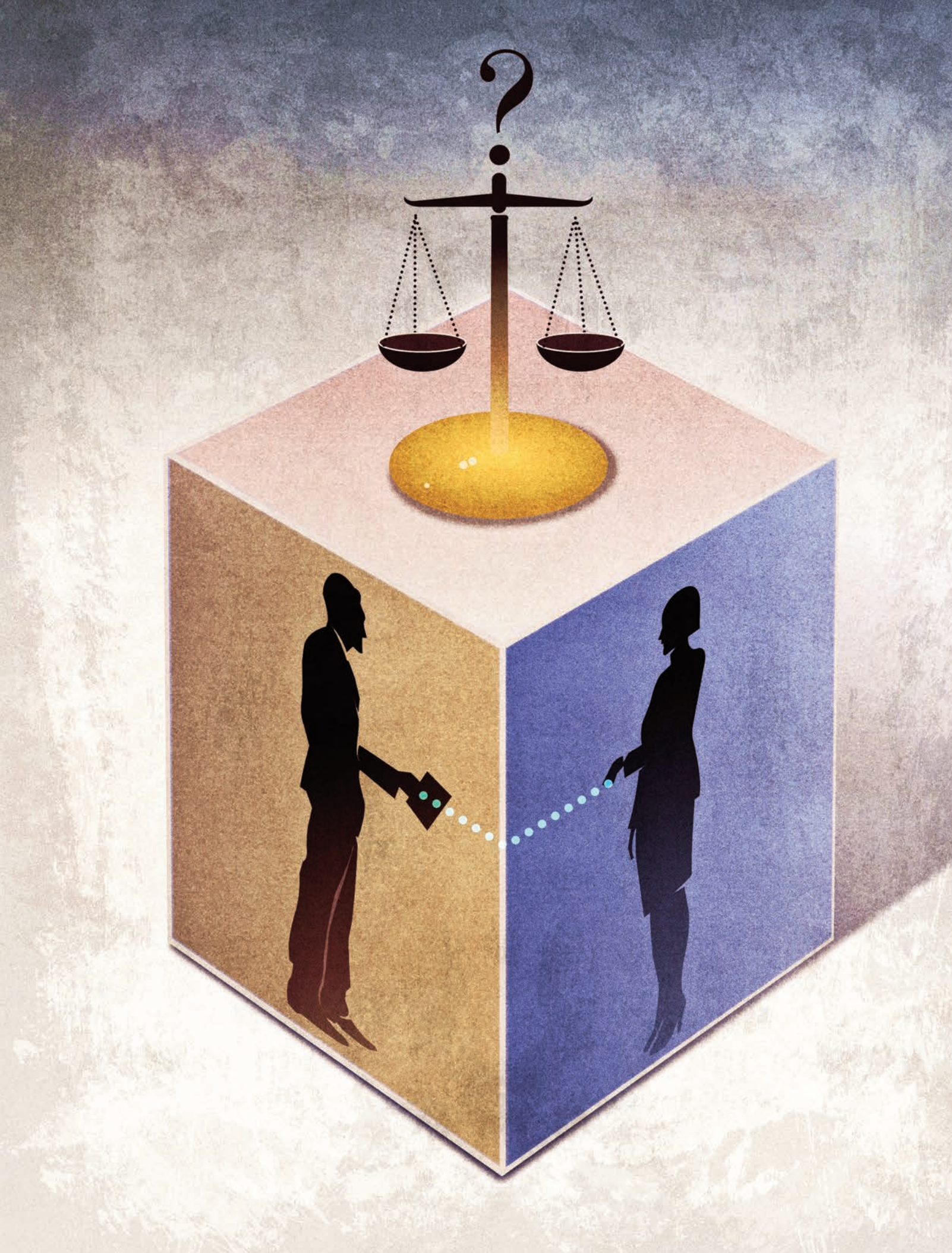

is wearing a wire or that a purported business contact is law enforcement. Putting aside whether it is the right result, ethical rules designed to safeguard the attorney-client relationship are no shield to covert government efforts to have a client inculpate him or herself in an investigation.

By contrast, overt, pre-indictment contacts add an element of subtle (or not so subtle) intimidation and coercion. In these situations, an (often armed) representative of the government will be directly confronting a target, subject, or witness, opening him or her up to "'the damage of "artful" legal questions the Code provisions appear designed in part to avoid.'"[7] Unlike the situation involving covert contacts, only a handful of cases around the country has addressed the ethics of overt government contacts with represented persons. Moreover, the cases in the Ninth Circuit—*Carona* and *Talao*—strongly suggest that these contacts generally are improper. Because the exception to Rule 4.2 applies where "authorized by law," the case law—and not the broadly framed commentary to the Rule—should guide lawyers' interpretation of the rule. These cases do not authorize a prosecutor (or his or her agent) to knock on a represented person's door to ask about the subject matter of the representation.

Applicability of California Ethics Rules

The California Rules of Professional Conduct apply to state and federal prosecutors alike.[8] While seemingly obvious, that proposition itself once was disputed. In the early 1990s, the U.S. Department of Justice (DOJ) took the controversial position in the "Thornburgh Memorandum" that federal attorneys were excused from complying with state ethics rules.[9] As the Ninth Circuit has noted, however, "[t]he conflict that developed was dissipated when the Congress adopted what is now 28 U.S.C. § 530B, and made state ethics rules applicable to government attorneys."[10]

Under Section 530B, "[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 attorney's duties, to the same extent and in the same manner as other attorneys in that State."[11] The core issue, though, remains: Do California's Rules of Professional Conduct allow a prosecutor to contact a represented party about the subject of the representation?

Many lawyers take a black-and-white view of contacts with a represented person about a matter within the scope of the representation: it is a breach of ethics and per se improper. Particularly in the criminal setting, however, the ethical restriction is more nuanced. Generally, even when the government knows a client is represented, it may at least use covert means of contact to build a case against the client. The underlying policy supporting this approach is that courts should show "restraint in applying the [no-contact] rule to criminal investigations to avoid handcuffing law enforcement officers in their efforts to develop evidence."[12] As the D.C. Circuit observed more than 45 years ago when addressing a cooperator's pre-indictment recordings of his former co-conspirators, "[w]e cannot say that at this stage of the Government's investigation of a criminal matter, the public interest does not—as opposed to the different interests involved in civil matters—permit advantage to be legally and ethically taken of 'a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.'"[13] Thus, numerous cases support the proposition that the government can send in an undercover agent or informant to talk to a client about the matter in which he or she is represented.

What about a prosecutor's overt contacts with represented persons? The commentary to Rule 4.2 cites *Carona* and *Talao* as examples of authorities supporting the broad proposition that "[t]he law…recognizes that prosecutors and other government lawyers are authorized to contact represented persons, either directly or through investigative agents and informants, in the context of investigative activities, as limited by relevant federal and state constitutions, statutes, rules, and case law." Analysis of these cases, however, along with other Ninth Circuit and California cases, paints a far narrower picture of what contacts the law authorizes.

Talao

In *Talao*, the Ninth Circuit considered a district court's sanction of a federal prosecutor for a purported violation of California Rule of Professional Conduct 2-100 (the predecessor to current Rule 4.2).[14] The case involved a criminal investigation of construction company San Luis Gonzaga Construction, Inc. (SLGC); its owner, Virgilio Talao; and its secretary/treasurer, Geraldina Talao, who also was the wife of Virgilio Talao.[15] There was a pending qui tam action against SLGC and the Talaos as well as complaints that SLGC employees filed with the U.S. Department of Labor. Attorney Christopher Brose represented SLGC and the Talaos in all civil and criminal matters. In early 1997, Brose initiated discussions with government attorneys, including the federal prosecutor handling the criminal investigation, regarding the possibility of settling the pending civil and criminal investigations of SLGC and the Talaos.[16]

In April 1997, the government subpoenaed SLGC's bookkeeper to testify in front of a grand jury. According to the Ninth Circuit opinion, "[w]hen Virgilio Talao learned of the subpoena he instructed Brose to be present for [the bookkeeper's] testimony."[17] Brose arranged to meet the bookkeeper prior to her grand jury appearance. Before that meeting happened, the bookkeeper went to the federal building and asked to speak with the prosecutor.[18] According to the *Talao* opinion, the bookkeeper told the prosecutor's supervisor that "she did not want Brose to be present before or during her grand jury testimony" because "she would feel pressured to give false testimony if Brose were present."[19]

The next day, the bookkeeper encountered the federal prosecutor and a Department of Labor special agent in the hallway outside the grand jury room. The bookkeeper then told them that "she did not wish to be represented by Brose."[20] In a subsequent witness room meeting, the bookkeeper told the prosecutor and special agent "that she was not and did not want to be represented by Brose."[21] According to the *Talao* court, "[d]uring the interview, Brose knocked on the door and demanded to speak with [the bookkeeper]," who "said she did not wish to speak with him."[22] The bookkeeper then provided information about wrongdoing by her SLGC employers, which she recounted a few minutes later in her grand jury testimony.[23]

A few months later, the grand jury returned a 20-count indictment against SLGC and the Talaos.[24] All three subsequently filed a motion to dismiss the indictment arguing that the contact between the prosecutor and the bookkeeper violated the California ethical rule proscribing ex parte contacts with represented parties and SLGC's constitutional rights.[25]

A threshold issue that the district court confronted in considering the motion was whether the rule against contact with a represented party extended to the represented corporation's employee. Under then-applicable Rule 2-100, as it is under current Rule 4.2, the prohibition on contacting a represented party (or, under Rule 4.2's articulation, a represented "person") extended to any current employee of a represented corporation "if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability."[26] Thus, if an employee

could have created liability for his or her employer, the no-contact rule applied to bar someone else's lawyer from talking to the employee about the matter potentially creating that liability.

The district court observed that a rationale for the extension of the rule to contact with a represented corporation's employees "is to prevent injurious disclosure."[27] That is, a corporation's lawyer "may be required to supervise the manner in which the information is solicited to prevent his client from making statements which through ambiguous use of language may not accurately reflect the client's position."[28] According to the district court, if a communication concerns the subject matter of the representation and "the employee committed an act which subjects the corporation to civil or criminal liability, the ex parte communication is improper."[29] This was, the court held, "clearly the case" with the SLGC bookkeeper, whom the government had contacted to determine "whether she had prepared and certified false payroll records and, if so, whether she had done so at the Talaos' direction."[30] Thus, the bookkeeper was "not legally entitled to waive Brose's representation of her insofar as she was testifying in her capacity as SLGC's bookkeeper" and "she was a represented party for the purposes of Rule 2-100."[31]

Having found that Rule 2-100 applied to the government's contact with the SLGC bookkeeper, the district court then considered whether the prosecutor had violated the rule. It noted the Ninth Circuit authority holding that "the government's use of undercover investigatory techniques in the early stages of a criminal investigation 'does not implicate the sorts of ethical problems addressed by the Code.'"[32] While "[i]n criminal cases it is undoubtedly necessary for the government to be able to conduct undercover investigations," the conversations with the bookkeeper in *Talao* "were not undercover."[33] The district court thus held that the prosecutor "did violate Rule 2-100."[34] Nevertheless, it denied the defendants' motion to dismiss the indictment because it did "not believe that simply because the government had ex parte contact with [the bookkeeper] the indictment must be dismissed."[35]

On appeal, the Ninth Circuit court ruled that the prosecutor did not commit an ethical violation.[36] A key disputed issue was whether the rule against ex parte contact with represented parties applied to preindictment, noncustodial communications by federal prosecutors and investigators with represented parties.[37] The *Talao* court noted that the Ninth Circuit had found Rule 2-100 inapplicable to such communications in particular cases[38] but emphasized that "we have declined to announce a categorical rule excusing all such communications from ethical inquiry."[39] Also, as the court's descriptions of the Ninth Circuit's prior cases made clear, the contacts had involved covert investigative communications by undercover law enforcement and government informants.[40] They did not involve overt contact between a prosecutor or agent, on the one hand, and a represented person, on the other hand.

To resolve whether the ethical rule against ex parte contact with a represented person applied prior to indictment, the *Talao* court followed the Second Circuit's approach in *United States v. Hammad*.[41] In *Hammad*, a federal prosecutor instructed a cooperator to arrange and record a meeting with two investigation targets. The targets did not know that the cooperator was working with the government, and the government subsequently presented evidence obtained through the ruse to the grand jury, which returned a forty-five count indictment against the targets.[42]

Before trial, the *Hammad* defendants moved to suppress the recordings and videotapes obtained from their meeting with the cooperator, arguing that the prosecutor had violated DR 7-104(A)(1) of the American Bar Association's Code of Professional Responsibility. An analogue to former California Rule of Professional Conduct 2-100 (and current rule 4.2), the applicable version of DR 7-104(A)(1), according to the *Hammad* court, prohibited a lawyer from "communicating with a 'party' he knows to be represented by counsel regarding the subject matter of that representation."[43]

The government argued that the rule was coextensive with the Sixth Amendment's right to counsel, and thus that the ethical prohibition on contact with a represented party likewise remained "inoperative until the onset of adversarial proceedings" (here, the issuance of an indictment).[44] Courts generally have held that post-indictment contacts by or directed by a prosecutor are improper.[45] The scope of the matter at issue is clearly defined after someone has been indicted and the prospect of facing prosecution no longer theoretical. The *Hammad* court rejected the government's contention, noting that "the Constitution prescribes a floor below which protections may not fall, rather than a ceiling beyond which they may not rise."[46] By contrast, the "Model Rule of Professional Responsibility…encompasses the attorney's duty 'to maintain the highest standards of ethical conduct.'"[47] Moreover, the Second Circuit court observed, the timing of an indictment "lies substantially within the control of the prosecutor," who could "manipulate grand jury proceedings" to avoid being bound by an ethical rule triggered by when a defendant was charged.[48]

The Second Circuit court also rejected requests for a bright-line rule, instead favoring application of the ethical rule through "case-by-case adjudication."[49] Nevertheless, the *Hammad* court was clear that it "would not interpret the disciplinary rule as precluding undercover investigations," adding that "the use of informants by government prosecutors in a preindictment, non-custodial situation…will generally fall within the 'authorized by law' exception" to the applicable ethical rule against contact with represented parties.[50] *Hammad*, and cases like *Talao* that have followed its rationale, did not establish any safe harbor under Rule 4.2 for overt contacts by the government with represented persons about the subject of the representation.

While *Talao*, unlike *Hammad*, authorized an overt contact, the *Talao* court repeatedly noted the unique nature of the case.[51] Those specific circumstances—involving the potential subornation of perjury—were at the heart of the court's ruling. In finding no violation of the California Rule of Professional Conduct addressing contact with represented parties, the *Talao* court held that "the interests in the internal integrity of and public confidence in the judicial system weigh heavily in favor of the conclusion that [the plaintiff's] conduct was at all times ethical."[52]

The Ninth Circuit court emphasized that "[w]e deem manifest that when an employee/party of a defendant corporation initiates communications with an attorney for the government for the purpose of disclosing that corporate officers are attempting to suborn perjury and obstruct justice, Rule 2-100 does not bar discussions between the employee and the attorney."[53] According to the *Talao* court, "[i]t would be an anomaly to allow the subornation of perjury to be cloaked by an ethical rule, particularly one manifestly concerned with the administration of justice."[54]

Talao thus is hardly a basis for allowing a prosecutor to initiate overt contact—directly or indirectly—with an individual who is represented by counsel in the investigation. There, the represented party initiated contact with the government lawyer (not the other way around) and did so to expose his employer's efforts to coerce her into giving false testimony. Even then, the prosecutor first advised the represented party of her right to counsel. The *Talao*

court made sure to point out that "[i]t is these circumstances and acts that make the district court's finding of an ethical violation improper in this case."[55]

Carona

In *Carona*, Michael Carona, the former sheriff of Orange County, appealed his conviction for witness tampering under 18 USC Section 1512(b)(2)(A).[56] On appeal, Carona challenged the admission into evidence of a recorded conversation that he had with an assistant sheriff who was at the time of the conversation cooperating with federal prosecutors.

The assistant sheriff, Don Haidl, signed a cooperation plea agreement with the government and entered a guilty plea that was taken under seal to facilitate his cooperation against Carona and others.[57] After Haidl entered into the plea agreement, "Government attorneys sent Haidl to contact [Carona]," whom the government knew was represented by counsel.[58] The government even provided Haidl with fake subpoena documents "as a trick to elicit admissions from [Carona]."[59] During meetings with Haidl, Carona "made statements that could be used to show that he received cash and gifts from Haidl and that he intended to convince Haidl to lie if asked to testify about those matters."[60]

Carona argued in the district court that the government's conduct violated Rule 2-100, and that the violation required suppression of the statements Carona made to Haidl. The district court agreed that the government violated Rule 2-100, but it refused to suppress the resulting evidence as "too high a price to pay."[61]

The Ninth Circuit rejected the conclusion that the prosecutors had violated the "no-contact rule" set forth in Rule 2-100.[62] It held that "[t]o determine whether 'pre-indictment, non-custodial communications by federal prosecutors and investigators with represented parties' violated Rule 2-100, we have adopted a 'case-by-case adjudication' approach rather than a bright line rule."[63] This approach is somewhat at odds with the views expressed by multiple California courts that a bright-line test in applying the California Rules of Professional Conduct is "essential."[64] But even absent a categorical rule in the Ninth Circuit, the *Carona* court found that "our cases have more often than not held that specific instances of contact between undercover agents or cooperating witnesses and represented suspects did not violate Rule 2-100."[65]

The "covert" contact in *Carona* distinguished the *Talao* case, which "dealt with communications between a prosecutor and an employee who claimed that his employer's attorney, who purported to represent the employee as well, was trying to intimidate him into giving false testimony."[66] However, *Talao* itself was unique. As the *Carona* court explained, the prosecutor in *Talao* did not violate Rule 2-100 "because '[i]t would be an anomaly to allow the subornation of perjury to be cloaked by an ethical rule, particularly one manifestly concerned with the administration of justice.'"[67]

The rest of the *Carona* court's analysis stressed the importance of the covert nature of the contact between the prosecutor and the represented party. The court noted that "it has long been established that the government may use deception in its investigations in order to induce suspects into making incriminating statements."[68] Even the false subpoena attachment did not make Haidl more of an alter ego for the prosecutor than any other cooperating witness.

If the prosecutor or his agent had overtly reached out to Carona, the court implied that the result would be different. The *Carona* court found, for example, that "the concern that a suspect might be tricked by counsel's artful examination is inapplicable here, since Carona was not subject to any interrogation, let alone one by the prosecutor."[69] In short, "[t]here were no direct communications…between the prosecutors and Carona," and thus, under the circumstances, the prosecutor's conduct was in a relative ethical safe zone.[70] Unlike an overt contact, a covert communication with a represented investigation target "'does not implicate the sorts of ethical problems addressed by the Code.'"[71] But *Carona* did not approve of any overt contacts between a prosecutor and a represented party. If anything, the Ninth Circuit court counseled against them by noting the "concern" with, and potential "ethical problems" arising from, overt contacts.

Other Cases

The commentary to Rule 4.2 frames overt and covert contacts by a prosecutor with a represented party as synonymous—and "authorized by law" in the context of undefined "investigative activities."[72] Even the DOJ seems to view them as different. For example, in its Criminal Resource Manual for federal prosecutors, the DOJ distinguishes between overt and covert contacts in its "issues for consideration" regarding communications with represented parties.[73]

According to the DOJ Criminal Resource Manual, "[s]everal jurisdictions have established by case law a law enforcement investigatory exception to the contact rule in limited circumstances."[74] "Generally," according to the manual, "the case law recognizes covert contacts in non-custodial and pre-indictment situations as 'authorized by law.'"[75] By contrast, "[a] few courts have recognized such an exception in connection with overt, pre-indictment contacts during a criminal investigation."[76] But even the two cases that the manual cites—*United States v. Dobbs* and *United States v. Joseph Binder Schweitzer Emblem Company*—offer virtually no support for the proposition that a prosecutor can directly or indirectly make an overt contact with someone whom the prosecutor knows is represented in the matter at issue.

In *Dobbs*, for example, the Eighth Circuit rejected the argument that there was an ethical breach when a government agent interviewed the represented defendant prior to his being charged.[77] The court recognized that "in some circumstances the conduct of a prosecutor and an investigator acting at the prosecutor's behest may implicate the ethical concerns addressed by [the Minnesota analogue to California's rule regarding contact with represented parties]" but did not say what those circumstances were.[78] Instead, the *Dobbs* court ruled with no explanation that the agent's "noncustodial interview of Dobbs prior to the initiation of judicial proceedings against [him] did not constitute an ethical breach."[79] The *Dobbs* court then cited as support three cases that all involved covert contacts between a cooperator and a target.[80]

In *Emblem Company*, there was an overt contact by a federal agent with an employee of a company being served with a search warrant, but when the agent specifically asked the woman if she was represented by counsel, she "answered in the negative."[81] The *Emblem Co.* court found it especially significant that "the party connoted to the government that she was not represented by counsel."[82] Thus, the "few cases" that the DOJ cites to justify overt contacts with represented parties either failed to discuss the issue in any detail or arose from unique and distinguishable circumstances.

There remain few cases that have upheld overt contacts with represented parties in the years since the DOJ updated its Criminal Resource Manual in 2005. Courts generally have distinguished between covert and overt contacts, approving covert contacts while disfavoring overt contacts—to the extent the cases address overt contacts at all. These cases, like *Talao* and *Carona*, suggest a narrower scope of permissible contact with a represented party than the new commentary to California's Rule of Professional Conduct 4.2 suggests is permissible.[83]

That said, even when a prosecutor violates an ethical rule, it may have no effect on the criminal case. For example, the *Carona* court noted in its original 2011 ruling that "no court ha[d] ever suppressed evidence in a criminal case based on a violation of Rule 2-100 or a similar rule by a government attorney unless there was also a violation of the Sixth Amendment."[84] While a strong disincentive in its own right, a state bar's conclusion that a prosecutor committed an ethical violation often is the most severe consequence that could result from a violation of Rule 4.2.[85]

For any adverse ethical finding to be in play under the California Rules of Professional Conduct, however, the contacting attorney must know that he or she is contacting someone who is represented in the matter. A mere inference that someone is represented is not enough to create an ethical violation,[86] nor is the fact that the interviewee works for an employer that has a general counsel.[87] Thus, when the attorney is aware of an ongoing investigation, he or she should confirm the representation to the government in writing. The attorney also cannot assume the government will view a represented person as off-limits. Among the many events to anticipate and discuss with the client, one must be ready for government agents to call the client or knock on her door without any notice to the client's attorney.[88]

Although such contact is not "authorized by law" under existing Ninth Circuit jurisprudence, the government may believe based on the commentary to Rule 4.2 that the ethical rules permit such overt contacts with a person known to be represented by counsel in the matter. The best ethical practice would be for prosecutors to avoid such overt contacts given the lack of clear guidance permitting them.[89] Nevertheless, lawyers representing clients who might be targeted for an interview should be ready both for the government to reach out to the client and for it to incorrectly argue that *Talao* and *Carona* authorize such contact.

In addressing the predecessor to California's current rule regarding contact with represented parties, the Ninth Circuit has held that "Rule 2-100 is intended to allow no more contact between prosecutors and represented defendants than the case law permits."[90] Although the commentary to new Rule 4.2 states that case law permits overt contact between a prosecutor and a represented party about matters within the scope of the representation, it does not. Neither the cited cases (*Talao* and *Carona*), nor any other case in the Ninth Circuit permits a prosecutor to initiate an overt contact with a represented party in a typical investigation.

Indeed, there is subtle coercion when a presumably armed law enforcement officer seeks to discuss a matter with any person, no matter how sophisticated and/or well-prepared for the encounter.[91] Thus, there is strong support for the position that prosecutors should instruct their agents not to overtly contact represented parties. With the power to decide which cases are presented to a grand jury, the prosecutor should show the same restraint, whether or not an ethical rule expressly requires it. That is not the standard in any event.

Rule 4.2 requires the contact to be "authorized by law." In California—and the Ninth Circuit—except in unique circumstances, courts have not authorized direct contacts between a prosecutor and/or his or her alter ego and a represented party about the subject of the representation. Unless and until the law expressly allows it, prosecutors should refrain from these ex parte contacts and instruct their agents to do the same. ■

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1 CAL. R. PROF'L CONDUCT R. 4.2.

2 CAL. R. PROF'L CONDUCT R. 4.2 (effective Nov. 1, 2018), Cmt. ¶ 8.

3 United States v. Carona, 660 F. 3d 917 (9th Cir. 2011). The comment to Rule 4.2 cites the original Ninth Circuit opinion in *Carona*, but the court amended and superseded on denial of rehearing *en banc*. *See Id.*

4 United States v. Talao, 222 F. 3d 1133 (9th Cir. 2000).

5 *Id. at* 1140 (internal quotations omitted).

6 United States v. Lopez, 4 F. 3d 1455, 1460 (9th Cir. 1993); *see also* United States v. Tapp, No. CR 107-108, 2008 WL 2371422, at *15 (N.D. Ga. June 4, 2008).

7 Lopez, 4 F. 3d at 1460 (quoting United States v. Lemonakis, 485 F. 2d 941, 956 (D.C. Cir. 1973)); *see also* Michigan v. Jackson, 475 U.S. 625, 634 n.7 (1986) (internal quotations omitted).

8 *See, e.g.*, CAL. R. PROF'L CONDUCT R. 5-110.

9 *See* Talao, 222 F. 3d at 1139.

10 *Id.* at 1139-40.

11 28 U.S.C. §530B(a).

12 United States v. Hammad, 858 F. 2d 834, 838 (2d Cir. 1988).

13 United States v. Lemonakis, 485 F. 2d 941, 956 (D.C. Cir. 1973) (quoting Hoffa v. United States, 385 U.S. 293, 302 (1966)).

14 The provisions of Rules 2-100 and 4.2 relevant to the discussion here are substantively identical except as otherwise noted.

15 Talao, 222 F. 3d at 1135.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.* at 1136.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.*

26 CAL. R. PROF'L CONDUCT R. 2-100(B). Rule 2-100(B) also extended to any current employee of a represented corporation "whose statement may constitute an admission on the part of the organization." This provision was not included in the recently adopted Rule 4.2.

27 United States v. Talao, No. CR-97-0217-VRW, 1998 WL 1114043, at *5 (N.D. Cal. Aug. 14, 1998).

28 *Id.* (quoting Continental Ins. Co. v. Superior Ct., 32 Cal. App. 4th 94, 112 (1995)).

29 Talao, 1998 WL 1114043, at *5.

30 *Id.*; *see also id.* ("Furthermore, Fererr's preparation and certification of the allegedly false payroll records could be imputed to SLGC and the Talaos whether or not she did so at their direction.") (citing CORP. CODE §1507).

31 Talao, 1998 WL 1114043, at *5.

32 *Id.* at *6 (quoting United States v. Kenny, 645 F. 2d 1323, 1339 (9th Cir. 1981)).

33 Talao, 1998 WL 1114043, at *6.

34 *Id.* at *7.

35 *Id.* at *9.

36 United States v. Talao, 222 F. 3d 1133, 1141 (9th Cir. 2000).

37 *See id.* at 1140.

38 *Id.* at 1140 n.18.

39 *Id.* at 1139.

40 *See id.* at 1140 n.18 (citing United States v. Powe, 9 F. 3d 68, 69-70 (9th Cir. 1993); United States v. Kenny, 645 F. 2d 1323, 1339 (9th Cir. 1981)).

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

42 *Id.* at 835-36.

43 *Id.*

44 *Id.* at 838.

45 *See* United States v. Tapp, No. CR 107-108, 2008 WL 2371422, at *15 (N.D. Ga. June 4, 2008); United States v. Lopez, 4 F. 3d 1455, 1460 (9th Cir. 1993) (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion)).

46 Hammad, 858 F. 2d at 839.

47 *Id.* (quoting Preamble, MODEL CODE OF PROF'L RESPONSIBILITY (1981)).

48 Hammad, 858 F. 2d at 839. The government's (rejected) argument in *Hammad*, tying application of the ethical rule to the formal commencement of criminal proceedings, also is unsupported under the California analogue. Even under the now-replaced Rule 2-100, the applicability of the term "party" was "not limited to a litigation context." CAL. R. PROF'L CONDUCT R. Conduct 2-100 cmts. The modified rule replaces the term "party" with "person," making even clearer that no formal proceeding need be initiated for the prohibitions in the rule to apply. CAL. R. PROF'L CONDUCT R. 4.2.

49 Hammad, 858 F.2d at 841.

50 *Id.* at 839-40.

51 United States v. Talao, 222 F. 3d 1133, 1140 (9th Cir. 2000).

52 *Id.* Robin Harris, an assistant U.S. attorney, was the principal plaintiff in *Talao*.

53 *Id.*

54 *Id.* The Ninth Circuit court added that "[o]nce the employee makes known her desire to give truthful information about potential criminal activity she has witnessed, a clear conflict of interest exists between the employee and the corporation." *Id.* Under those circumstances, "corporate counsel cannot continue to represent both the employee and the corporation" and "*ex parte* contacts with the employee cannot be deemed to, in any way, affect the attorney-client relationship between the corporation and its counsel." *Id.* at 1141. Accordingly, "[i]n this setting, the corporation's interest … clearly does not provide the basis for application of the rule" and "[t]he trial court erred in otherwise concluding." *Id.* Recognizing the potential right to largely unfettered contact with represented parties that prosecutors might perceive the court's language to

(continued on page 35)

Overt Activities

(continued from page 21)

prosecutors might perceive the court's language to have bestowed upon them, the *Talao* court later in its opinion clarified that "we do not mean to suggest that government officials have a license to approach an employee and initiate communications whenever there is a possible conflict of interest between the employee and the corporation for whom the employee works." *Id.* Instead, when the represented employee initiated contact with the government and when the prosecutor responded "by clarifying her ethical duties and advising [the bookkeeper] of her right to counsel," it was those circumstances and acts that made the district court's finding of an ethical violation improper in *Talao*.

[55] *Id.*

[56] United States v. Carona, 660 F. 3d 917, 918 (9th Cir. 2011).

[57] United States v. Carona, No. SACR 06-224-AG, 2008 WL 1970218, at *1 (C.D. Cal. May 2, 2008) (Carona I).

[58] *Id.*

[59] *Id.* at *5.

[60] *Id.* at *1.

[61] *Id.*

[62] Carona, 660 F. 3d at 921.

[63] *Id.* (quoting United States v. Talao, 222 F. 3d 1133, 1138-39 (9th Cir. 2000).

[64] *See, e.g.*, Snider v. Superior Ct., 113 Cal. App. 4th 1187, 1197-98 (2003) (quoting Nalian Truck Lines, Inc. v. Nakano Warehouse & Transp. Corp., 6 Cal. App. 4th 1256, 1261 (1992)).

[65] Carona, 660 F. 3d at 921 (citing United States v. Powe, 9 F. 3d 68, 69 (9th Cir. 1993) (per curiam); United States v. Kenny, 645 F. 2d 1323, 1337-38 (9th Cir. 1981) (holding there was no ethical violation where a cooperating co-defendant recorded a telephone conversation with the represented defendant)).

[66] Carona, 660 F. 3d at 365.

[67] *Id.* (quoting United States v. Talao, 222 F. 3d 1133, 1140 (9th Cir. 2000)).

[68] Carona, 660 F. 3d at 365-66.

[69] *Id.* at 366.

[70] *See id.*

[71] *Id.* (quoting Kenny, 645 F. 2d at 1339).

[72] The "investigative activities" limitation has limited utility since prosecutors and agents could argue that any witness interviews fall within its scope. *See* Opinion of Daniel E. Lundgren, Cal. Attorney General, No. 91-1205 at 1, 5 (Oct. 8, 1992).

[73] Criminal Resource Manual at 296 (updated 2005), U.S. Dep't of Justice, *available at* https://www.justice.gov/jm/criminal-resource-manual-296-communications-represented-persons-issues [hereinafter Criminal Resource Manual].

[74] *Id.*

[75] *Id.* (citing United States v. Balter, 91 F. 3d 427 (3d Cir.), cert. denied, 519 U.S. 1011 (1996); United States v. Powe, 9 F. 3d 68 (9th Cir. 1993); United States v. Heinz, 983 F. 2d 609 (5th Cir. 1993); United States v. Ryans, 903 F. 2d 731 (10th Cir.), cert. denied, 498 U.S. 855 (1990); United States v. Schwimmer, 882 F. 2d 22 (2d Cir. 1989), cert. denied, 493 U.S. 1071 (1990); United States v. Sutton, 801 F. 2d 1346 (D.C. Cir. 1986); United States v. Fitterer, 710 F. 2d 1328 (8th Cir.), cert. denied, 464 U.S. 852 (1983); United States v. Jamil, 707 F. 2d 638 (2d Cir. 1983); United States v. Kenny, 645 F. 2d 1323 (9th Cir.), cert. denied, 452 U.S. 920 (1981); United States v. Lemonakis, 485 F. 2d 941 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974)).

[76] Criminal Resource Manual, *supra* note 73, at 296 (citing United States v. Dobbs, 711 F. 2d 84 (8th Cir. 1983); United States v. Joseph Binder Schweitzer Emblem Co., 167 F. Supp. 2d 862 (E.D. N.C. 2001)).

[77] Dobbs, 711 F. 2d at 86.

[78] *Id.*

[79] *Id.*

[80] *Id.* (citing United States v. Vasquez, 675 F. 2d 16, 17 (2d Cir. 1982); Kenny, 645 F. 2d at 1339; Lemonakis, 485 F. 2d at 955-56).

[81] Emblem Co., 167 F. Supp. 2d at 864.

[82] *Id.* at 866.

[83] *See, e.g.*, United States v. Koerber, 966 F. Supp. 2d 1207, 1232 (D. Utah 2013) (internal quotation marks omitted); United States v. Ward, 895 F. Supp. 1000, 1006 (N.D. Ill. 1995); *but see* United States v. Sabean, No. 2:15-cr-175-GZS, 2016 WL 5721135, at *3, *5 (D. Me. Oct. 3, 2016).

[84] United States v. Carona, 660 F. 3d 917, 918, 923 (9th Cir. 2011); *see, e.g.*, *id.* at 922; United States v. Hammad, 858 F. 2d 834, 842 (2d Cir. 1988); Emblem Co., 167 F. Supp. 2d at 867; Sabean, 2016 WL 5721135, at *6; *see also id* (distinguishing the District of Utah court's decision to suppress evidence in United States v. Koerber, 966 F. Supp. 2d 1207 (D. Utah 2013), as "an isolated, unusual case").

[85] City of San Diego v. Superior Ct., 30 Cal. App. 5th 457, 470 (2018).

[86] Von Saher v. Norton Simon Museum of Art, CV 07-2866 JFW (SSx), 2016 WL 7626149, at *19 (C.D. Cal. June 22, 2016); *see also* Truitt v. Super. Ct., 59 Cal. App. 4th 1183, 1188 (1997).

[87] Jorgensen v. Taco Bell Corp., 50 Cal. App. 4th 1398, 1402 (1996).

[88] *Cf. id.* at 1403.

[89] *See* San Francisco Unified Sch. Dist. v. First Student, Inc., 213 Cal. App. 4th 1212, 1232 n.13 (2013)); Norton Simon, 2016 WL 7626149, at *23.

[90] United States v. Lopez, 4 F. 3d 1455, 1461 (9th Cir. 1993).

[91] *Cf.* Berkemer v. McCarty, 468 U.S. 420, 438 (1984).