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CHILD SEXUAL EXPLOITATION PROGRAM

UPDATE

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Ethical Considerations in Undercover Online Investigations (Part I of II)

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Cases involving child pornography or the online solicitation of minors for sexual contact constitute a rapidly-growing area in law enforcement and prosecution. From investigation to trial, the law is rushing to catch up with technology. Largely overlooked thus far are the ethical considerations for local and federal prosecutors involved in undercover online investigations.

A prosecutor may have varying degrees of involvement with law enforcement in the investigation of these cases. Some may have no interaction with the police until the investigation is complete, while others might be very involved from the outset, giving direction to police who pose in an undercover capacity online. The temptation to be actively involved in investigations is great, especially for younger prosecutors who are often technologically savvy. However, the duty of a lawyer generally, and a prosecutor more specifically, is different from that of law enforcement and the public at large.

As practitioners are all well aware, attorneys are subject to rules of professional conduct that govern their professional behavior. With the passage of the McDade Amendment, federal prosecutors are also governed by the rules of the state(s) in which they practice law.[1] What impact, if any, do these rules have on prosecutors' ability to investigate or supervise the investigation of online child sexual exploitation cases?

Prohibitions on Contact with Defendants or Adverse Persons

One set of provisions that come in to play in these cases are those prohibiting contact with adverse parties. They are found in ABA Model rules 4.2 (Communication with Person Represented by Counsel), 4.3 (Dealing with Unrepresented Person), and their state counterparts.[2]

The full text of Rule 4.2, which will be the foundation of most of this article, is 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 to do so by law or a court order.[3]

Majority Rule. Many states have comments or case law interpreting this section, finding that the "authorized by law" language in Rule 4.2 and its equivalents permit "a prosecutor…engaged in a criminal…investigation to communicate with or direct investigative agents to communicate with a represented person prior to the represented person being arrested."[4]

A number of courts have weighed in on the requirements of this ethical rule. Before discussing them it is important to note that these cases deal with state rules similar to Model Rule 4.2, but not identical to it, in that most of the state rules in question prohibit contact with a represented *party,* not just a represented *person*. As in all ethical matters, the practitioner is well-advised to be thoroughly familiar with their local applicable rules of professional conduct for the exact ethical requirements under which they practice.

Grievance Committee v. Simels[5] involved a defense attorney (Simels) who represented an individual named Davis in a drug conspiracy case. Another individual, Harper, was charged with the attempted murder of a witness in Davis's drug conspiracy case. Simels had been advised that his client, Davis, was about to be charged in the same attempted murder case as Harper, at least in part because Harper had "rolled" and implicated Davis in the crime. Simels then interviewed Harper about the attempted murder, after being advised that Harper had court-appointed counsel.

The Second Circuit in *Simels* gave a very narrow interpretation of the ethical rule, holding that because Davis was not "officially" a codefendant in the attempted murder case at the time of the interview, it was permissible under the rules of professional conduct.[6] Two subsequent cases are useful to demonstrate the strict interpretation that has accompanied this rule in a majority of courts.

In re Chan,[7] a 2003 case out of the Southern District of New York, involved co-defendants being prosecuted for a criminal drug conspiracy. The defense attorney (Chan) spoke with one of his clients' co-defendants without notifying or getting the approval of the co-defendant's attorney. As such, the rule against contacting a represented "party" applied and the attorney in the case was properly disciplined, because Chan's client was "officially" a co-defendant.

In a 2006 case, *People v. Kabir,*[8] the prosecutor conducted a two-hour interview with a grand jury witness who was represented by counsel and had testified on the basis of an immunity agreement. At the time of the interview, the witness's attorney was not present and had not approved of any contact between the prosecutor and the witness. The court found no ethical violation, because New York's equivalent to Rule 4.2 "does not include among its ancillary effects a shield against unwelcome communications from … a prosecutor concerning a criminal proceeding as to which one is merely a witness."[9] What this series of cases demonstrates is that the courts following this rule have tended to interpret it very narrowly, limiting its application to those persons who are *actual* "parties" to the prosecution.[10]

This majority rule is also generally upheld by the National Prosecution Standards, particularly Section 24.6: "nothing prohibits a prosecutor from advising or authorizing a police officer to engage in communications with an uncharged, represented suspect in the absence of the suspect's counsel provided such a communication is "authorized by law."[11] The commentary to this standard provides additional guidance, recognizing that while prosecutors "have a duty to investigate criminal activity" they must be sure that their communications are not only "authorized by law" but also ethically permissible.[12]

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Drawing a comparison to a Constitutional standard with which prosecutors are very familiar, the general rule as delineated by these cases is that to comply with Rule 4.2, it is *usually* enough that a prosecutor simply complies with the requirements of the Sixth Amendment in their interactions with suspects.[13] In the undercover investigations of online crimes against children, the prosecutor will typically be acting in a supervisory role. To avoid questions of ethical misconduct down the road, direct contact with potential suspects is best left to the police officers, investigators, and detectives working the case, whenever possible. While practitioners are encouraged to serve in an "advisory capacity to insure the legality of documents and procedures"[14] in a criminal investigation, getting too involved in the "hands-on" part of an undercover operation might open the prosecutor up to additional ethical liability: the same ethical rules discussed herein will also apply to conversations and conduct engaged in by agents (such as police officers) acting as the prosecutor's *alter ego.*[15]

Minority Rule. The landmark federal case holding a contrary view to the general rule mentioned above is *U.S. v. Hammad*,[16] where an Assistant United States Attorney provided a fake subpoena for an undercover informant to display in a meeting with the targets of the investigation. The *Hammad* court acknowledged that prosecutors *are* "authorized by law to employ legitimate investigative techniques in conducting or supervising criminal investigations, and the use of informants to gather evidence against a suspect will frequently fall within the ambit of such authorization."[17] Nevertheless, the Second Circuit found that a "government prosecutor may overstep the already broad powers of his (sic) office, and in so doing, violate the ethical precepts" of Rule 4.2.[18] By using a fake subpoena, complete with the official seal of the court and forged clerk's signature, *Hammad* found that the prosecutor had gone too far and thus violated the rule.[19] The broad language of the decision, however, has had long-lasting implications in other jurisdictions.[20]

The practitioner should be aware that the ABA adopts this minority approach, as well:[21]

> …When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is *insufficient* to establish that the communication is permissible under this Rule.[22]

Courts following this minority rule make this argument: because the government is able to "control the timing of the indictment… [it] creates a potential for abuse"[23] and justifies the expansion of Rule 4.2's scope beyond the constraints of the Sixth Amendment.

So long as a suspect's Constitutional rights are respected, it is well settled that police officers are permitted to use deception in the course of undercover investigations. In the end it may be the best practice for prosecutors to delegate the responsibility for creating undercover identities and engaging in online conversations to their police officers who are trained in approved undercover tactics.

Rule 4.3. Litigation concerning prosecutors and Rule 4.3 is virtually non-existent. Nonetheless, this rule covers situations that many prosecutors will run across in conducting or supervising online investigations. As such, there are some points to which one should pay attention: Rule 4.3 uses the word *person* rather than *party*, which would undermine the logic of a number of decisions concerning Rule 4.2 that grounded the permissibility of pre-indictment contact on the use of the word *party*. It also requires that the prosecutor only give legal advice to the extent that a person is advised to secure counsel, which has been fodder for at least one state-level court.[24]

1 28 U.S.C. §530B(a)(2006).

2 As of November 1, 2006, 47 states have adopted the ABA Model Rules of Professional Conduct. California, Maine, and New York remain the exceptions. *See* ABA Model Rules at http://www.abanet.org/cpr/mrpc/model_rules.html (last visited November 1, 2006). The full text of Rule 4.3 is as follows:

> Rule 4.3: In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that an unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client. MODEL RULES OF PROF'L CONDUCT R. 4.3 (2006).

3 MODEL RULES OF PROF'L CONDUCT R. 4.2 (2006).

4 Tenn. Sup. Ct. Rule 8, Canon 4.2; U.S. v. Balter, 91 F.3d 427 (3d Cir. 1996), Grievance Comm. For the Southern Dist. Of New York v. Simels, 48 F.3d 640 (2d Cir. 1995) ('party'), U.S. v. Powe, 9 F.3d 68 (9th Cir. 1993), U.S. v. Heinz, 983 F.2d 609 (5th Cir. 1993), U.S. v. Ryans, 903 F.2d 731 (10th cir.), *cert. denied,* (1990)(4.2)('party'), U.S. v. Brown, 356 F. Supp. 2d 470 (D. Pa. 2005), U.S. v. Joseph Binder Schweizer Emplem Co., 167 F. Supp. 2d 862 (D.N.C. 2001), In re Criminal Investigation of John Doe, In., 194 F.R.D. 375 (D. Mass 2000), State v. Smart, 622 A.2d 1197 (N.H. 1993); *but see* U.S. v. Talao, 222 F.3d 1133 (9th Cir. 2000), U.S. v. Sutton, 801 F.2d 1346 (D.C. Cir. 1986), State v. Zaman, 1997 Ariz. App. LEXIS 166 (Ariz. Ct. App. 1997) (citing comment to ABA rule 4.2), State v. Lang, 702 A.2d 135 (Vt. 1997), In re Criminal Investigation No. 13, 573 A.2d 51 (Md. App. 1990) ('party').

5 Grievance Comm. For the Southern Dist. Of New York v. Simels, 48 F.3d 640 (2d Cir. 1995). All of the facts in the following paragraph come from this opinion.

6 *Id.* at 650.

7 271 F.Supp. 2d 539 (S.D.N.Y. 2003).

8 922 N.Y.S.2d 864 (Sup. Ct. Bronx Co. N.Y., 2006).

9 *Id.* at 867.

10 U.S. v. Santiago-Lugo, 162 F.R.D. 11, 13 (D. P.R. 1995) ("a cooperating witness who may be a possible codefendant or a party in a criminal proceeding is not a 'party' for the purposes of Model Rule 4.2")

11 National District Attorneys Association, NATIONAL PROSECUTION STANDARDS, 2d ed. (1991) §24.6.

12 *Id.*, commentary to §24.6.

13 U.S. v. Ward, 895 F. Supp. 1000, 1004 (N.D. Ill. 1995) (cases cited therein); *but see* Tenn. Sup. Ct. Rule 8, Canon 4.2, U.S. v. Talao, 222 F.3d 1133 (9th Cir. 2000), U.S. v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988), *cert. denied,* 498 U.S. 871 (1990), People v. White, 567 N.E.2d 1368 (Ill. App. Ct. 1991).

14 National District Attorneys Association, NATIONAL PROSECUTION STANDARDS, 2d ed. (1991) §22.1.

15 *See* Grievance Comm. V. Simels, 48 F.3d at 647, U.S. v. Ryans 903 F.2d at 735, U.S. v. Jamil, 707 F.2d 638 (2d Cir. 1982).

16 858 F.2d 834 (2d Cir. 1988), *cert. denied,* 498 U.S. 871 (1990).

17 Hammad at 839.

18 *Id.* at 839-840.

19 *Id.* at 840.

20 See cases cited *supra* note 5.

21 ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995).

22 MODEL RULES OF PROFESSIONAL CONDUCT, R. 4.2, cmt. [5] (emphasis added).

23 In re Criminal Investigation of John Doe, In., 194 F.R.D. 375 (D. Mass. 2000); *see* ABA Comm. On Ethics and Prof'l Responsibility, Formal Op. 95-396 (1995) ("limiting the Rule to post-indictment communications could allow the government to 'manipulate grand jury proceedings to avoid its encumbrances") (quoting U.S. v. Hammad, 858 F.2d at 839).

24 Harlow v. State, 70 P.3d 179 (Wyo. 2003) (based on prosecutor's *direction* of an investigation).

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