ASSOCIATION OF BUSINESS TRIAL LAWYERS

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REPORT

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State Ethics Rules Now Apply to Federal Prosecutors

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.

With this seemingly simple proposition, the United States Congress has laid to rest a ten-year conflict between the U.S. Department of Justice ("DOJ"), on the one hand, and federal and state bar associations, on the other, about whether federal prosecutors are subject to the same rules of professional conduct that govern all private lawyers practicing in federal courts. Under new Section 530B of title 28 of the United States Code ("Section 530B" or the "McDade Act"), effective April 19, 1999, all federal government lawyers will for the first time have to comply with the rules of professional conduct for the state(s) in which they practice.

Allen Samelson

The enactment of Section 530B was the culmination of a long running controversy about the application of state ethics rules to federal prosecutors. This controversy focused primarily on state rules of professional conduct which generally prohibit an attorney

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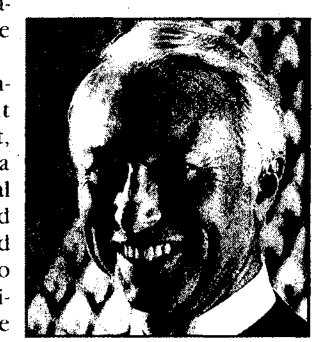
Division Proposal Jeopardizes Consistency of Circuit Law

In December 1998, the Commission on Structural Alternatives for the Federal Courts of Appeals, chaired by Retired Supreme Court Justice Byron R. White, submitted to the Congress and the President its Final Report (located on the Commission's web site: http://app.comm.uscourts.gov). In January 1999, Senators Murkowski (Alaska) and Gorton (Wash.) introduced S. 253, The Ninth Circuit Reorganization Act of 1999, to implement the Commission's proposals.



Hon. Procter Hug, Jr.

The Commission strongly recommended keeping the Ninth Circuit together as a single administrative unit, stressing the importance of having a single court interpret and apply federal law in the western United States and the Pacific Rim. It further proposed restructuring the court of appeals into three autonomous adjudicative divisions, an action that would have the opposite effect of diminishing the court's ability to provide consistent and stable law across the nine-state region. This article briefly describes the proposed legislation, how it might affect California business lawyers, and the steps the court is taking to respond to the Commission's concerns.

Findings and Recommendations

The Commission's principal recommendation was that the Ninth Circuit should not be split:

> There is no persuasive evidence that the Ninth Circuit (or any other circuit, for that matter) is not working effectively, or that creating new circuits will improve the administration of justice in any circuit or overall. Furthermore, splitting the circuit would impose substantial costs of administrative disruption, not to men-

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Circuit Division Proposal

> tion the monetary costs of creating a new circuit. Accordingly, we do not recommend to Congress and the President that they consider legislation to split the circuit. (page 29)

Although the Commission concluded that no objective data, and no substantial subjective findings, justify a major structural change, it nonetheless proposed the following divisional restructuring:

- The court of appeals would be reorganized into three regionally-based adjudicative divisions to hear and decide all appeals from the district courts in their divisions:

  Northern Division – Districts of Alaska, Idaho, Montana, Oregon, and Eastern and Western Washington.

  Middle Division – Districts of Eastern and Northern California, Guam, Hawaii, Nevada, and the Northern Mariana Islands.

  Southern Division – Districts of Arizona, Central and Southern California.

- Each active judge would be assigned to a particular regional division; each division would consist of seven judges or more, depending upon the caseload. A majority of the judges in each division would be residents of the division, but each division would include some non-resident judges assigned randomly for three-year terms.
- Each regional division would function as a semi-autonomous decisional unit, sitting in panels and *en banc*. Decisions made in one division would not bind any other division but should be accorded substantial weight by the other two divisions.
- A Circuit Division for conflict resolution would resolve conflicting decisions between two regional divisions. Comprised of 13 judges – the chief and four judges chosen by lot from each division for three-year terms – the Circuit Division's jurisdiction would be discretionary and could be invoked by a party after a divisional *en banc* decision or denial of an *en banc*.

The System Is Working Well Now

Why should California business trial lawyers be concerned about the Commission's proposal for restructuring the Ninth Circuit? The question essentially becomes whether the structural changes better serve the prime objective of maintaining a consistent body of coherent federal case law throughout the circuit. I believe they do not – nor do the chief judges of eight other federal circuits, the Department of Justice, and more than a dozen other bar organizations and key political leaders who have submitted comments opposing the divisional structure to the Commission.

The Commission's own surveys show that the vast majority of judges and lawyers within the circuit believe that the Ninth Circuit is operating well in its current structure. The court of appeals has a viable mechanism that maintains the consistency of the law throughout the circuit. Every decision of a three-judge panel is binding throughout the entire circuit, not just in one unit or division. The limited *en banc* procedure for reviewing conflicts and cases of exceptional importance provides a mechanism for all judges to participate in the process of selecting a case for review and for making their views known. Once a case is taken *en banc* and resolved, the decision becomes the law of the circuit which all later panels recognize and follow. Nor is there an additional layer of appeal, as there would be with the divisional approach.

The Divisional Structure Frustrates Consistency

As the Commission itself stated in favor of keeping the circuit together:

> Having a single court interpret and apply federal law in the western United States, particularly the federal commercial and maritime laws that govern relations with the other nations on the Pacific Rim, is a strength of the circuit that should be maintained. (page 29)

However, a closer look at the proposed divisional structure shows that it would have the opposite effect on circuit law:

- Neither the panel nor the *en banc* decisions of a division would have a binding precedential effect on the other two divisions. A circuit-wide *en banc* hearing for any purpose other than resolving direct conflicts would be abolished.
- The proposal would eliminate the participation of all judges circuit-wide in resolving circuit law. Circuit-wide law would be replaced by divisional law which would be developed only by the judges sitting in a single division.
- The likelihood of inconsistent interpretations of federal law would exist throughout the circuit and would not be adequately addressed by the Circuit Division, which would oversee only direct conflicts between two divisions.
- Federal law for California would be established by two different divisions (Middle and Southern), creating the potential for different interpretations and enforcement of the same law in different parts of a single state.
- The Circuit Division is a new level of appeal before finality, resulting in additional expense and delay for litigants.
- The chief judges of the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and D.C. Circuits strongly opposed divisional restructuring, stating that, "[T]he whole concept of intra-circuit divisions, replete with two levels of *en banc* review, has far more drawbacks than benefits."

Adverse Impact on California

Senator Dianne Feinstein, in her comments to the Commission, wrote:

> [I]t would be disastrous if California were split into Northern and Southern [Divisions]...[which] would not be bound precedentially by each other's decisions. Lawyers would engage in "forum shopping" within the same State for favorable rulings. California corporations subject to federal jurisdiction could be subject to varying interpretations of the same federal and state laws. This could compel businesses to build

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> headquarters in other States where there is no conflict within the federal court system. The lack of uniformity and certainty in the law could create chaos in our state. Imagine if two California divisions disagreed on the constitutionality of any state-wide initiative or law. This could do extraordinary damage to Californians' faith in the integrity and fairness of the judicial system. (Letter of December 3, 1998, to Justice White)

Nor would placing California in a single division resolve the flaws in the divisional structure. The situation would remain the same, since no single entity would have the ability to establish the law for the entire circuit.

Conclusion

While the judiciary is indebted to the Commission for its valuable and independent work, the evidence simply does not support change to a divisional structure for the Ninth Circuit Court of Appeals. The disadvantages of such a structure far outweigh the claimed advantages of increased collegiality and a smaller body of law to master. The Ninth Circuit has never hesitated to evaluate and modify its procedures; there is always room for improvement. But such an untried proposal does not justify scuttling the Ninth Circuit's time-tested mechanisms for maintaining consistency which are operating efficiently and effectively.

This spring, I appointed a 10-member Evaluation Committee, chaired by Senior Circuit Judge David R. Thompson of San Diego, to review areas of concern raised by the Commission. Consisting of judges, lawyers, and an academic, the committee will make recommendations to the court for correction. Its report is expected this summer and the court will act promptly upon its proposals. This is a far less disruptive and more constructive approach to achieve the goal we are all striving for - a fair and efficient judicial system.

Hon. Procter Hug, Jr., Chief Judge of the United States Court of Appeals for the Ninth Circuit, adds: "While these remarks are my own, they reflect the position of two-thirds of the members of the court. My thanks to Mark Mendenhall, Assistant Circuit Executive, for his assistance in the preparation of this article."

Cel-Tech *and Beyond: Unfair Competition Revisited*

The Supreme Court's much-anticipated decision in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Company*, 20 Cal. 4th 163 (1999), purports to establish a "more precise test for determining what is unfair under the unfair competition law." *Id.* at 185. Unfortunately, the *Cel-Tech* opinion fails to live up to this promise, and instead sets forth a cumbersome definition of unfair competition that is likely to make suits brought pursuant to Business and Professions Code section 17200 less, rather than more, predictable. Additionally, by referring California courts and litigants to the "persuasive" authority of cases interpreting section 5 of the Federal Trade Commission Act (15 U.S.C. § 45(a)), the Supreme Court has linked two statutory schemes that have profound procedural and substantive differences.

Marion C. Ingersoll

The Supreme Court will have ample opportunity to refine the reach and effects of section 17200 in the near future, however. The Court has granted review of at least two more 17200 cases, and, in the months since the *Cel-Tech* decision, the Court of Appeal has ordered the publication of a pair of opinions that place modest limits on the types of parties who can sue and be sued pursuant to this statute. Accordingly, whatever the current difficulties faced by businesses defending 17200 suits may be, there is cause for optimism that the high volume of cases brought under this statute, as well as continued pressure from the business community, will propel the courts and/or Legislature to clarify California's unfair competition law in the near future.

The *Cel-Tech* Decision

In *Cel-Tech*, four companies that sold cellular telephones charged that L.A. Cellular damaged or destroyed their businesses when L.A. Cellular and rival AirTouch began selling telephones below cost and recouping their losses with profits on their sales of cellular services. The *Cel-Tech* plaintiffs claimed that L.A. Cellular, which along with AirTouch had a government-protected "duopoly" for the provision of cellular telephone services in the Los Angeles area, violated California's Unfair Practices Act (Bus. & Prof. Code § 17000) and section 17200 of the Business and Professions Code, which the Court labeled the "unfair competition law." The Unfair Practices Act prohibits, among other things, sales of products below cost "for the purpose of injuring competitors or destroying competition" and sales of "loss leaders." Section 17200 proscribes unfair competition, which is defined to

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Cel-Tech *and Beyond*

include "any unlawful, unfair or fraudulent business act or practice."

At the end of plaintiffs' case-in-chief, the trial court granted L.A. Cellular's motion for judgment and held that (1) L.A. Cellular did not violate the Unfair Practices Act because it intended merely to compete with AirTouch, not to harm plaintiffs, and (2) plaintiffs' claim of unfair competition pursuant to section 17200 necessarily failed when plaintiffs' other claims were dismissed.

The Court of Appeal affirmed with respect to plaintiffs' Unfair Practices Act claim but reversed as to the cause of action under the unfair competition law. The court held that, notwithstanding that L.A. Cellular did not have an "injurious intent" and thus was not subject to the treble damages provision of the Unfair Practices Act, L.A. Cellular might have independently violated section 17200. The Supreme Court affirmed the Court of Appeal opinion, remanded the case to the trial court and held that L.A. Cellular's price-cutting tactics might be deemed unfair even though L.A. Cellular had not violated the Unfair Practices Act. Specifically, the Court concluded that, although a plaintiff may not maintain an action under 17200 if some other provision bars the action or provides a "safe harbor" for the defendant, "the Legislature's mere failure to prohibit an activity does not prevent a court from finding it unfair." *Id.* at 184.

The Court, by reference to section 5 of the Federal Trade Commission Act, set forth the following standard for determining whether a direct competitor's conduct violates section 17200: "the word unfair in that section means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition." *Id.* at 187. In her dissenting opinion, Justice Kennard referred to the majority's three-pronged standard as encompassing "penumbral antitrust threats" and as creating in California an overbroad doctrine of "antitrust lite" encompassing "such vague and dubious metaphysical entities as incipient violations, violations of policies and spirits, and anything that might be characterized as a significant threat or harm to competition." *Id.* at 196, 206 (Kennard, J., dissenting).

Comparison With Federal Antitrust Law

In the interest of bringing California law under the definitional umbrella of federal antitrust law, the majority opinion in *Cel-Tech* summarily dismisses the profound differences between the federal antitrust laws and the California statutory scheme. The Court admits that "the two statutes are enforced in significantly different ways. California has no administrative agency equivalent to the...FTC, and private citizens have no right to seek personal enforcement of section 5 in lieu of FTC action." *Id.* at 185-186. Indeed, in addition to allowing individuals to sue on their own behalf, California's unfair competition law also provides that private parties can sue, and potentially recover money, on behalf of nonparties without satisfying the strict standards applicable to class actions.

In contrast, as the Supreme Court recognized in *Cel-Tech*, there is no private right of action afforded under section 5 of the Federal Trade Commission Act, pursuant to which enforcement is limited solely to the FTC. Congress created a restricted enforcement mechanism for the FTC Act because of concerns pertaining to the breadth of the definition of unfairness in the Act and the danger that private actions might generate inconsistent and duplicative results. As the Court of Appeals for the District of Columbia Circuit observed in *Holloway v. Bristol Myers Corporation*, 485 F.2d 986 (D.C. Cir. 1973):

> Private litigants are not subject to the same constraints [as the FTC]. They may institute piecemeal lawsuits, reflect disparate concerns and not a coordinated enforcement program. The consequence would not only burden the defendants selected but also the judicial system. It was to avoid such possibilities as lack of coherence that Congress focused on the FTC as an exclusive enforcement authority.

Id. at 997-998.

The remedies provided under the California statutory scheme are also far broader and more punitive than the "cease-and-desist" order that the FTC can issue to instruct a business to modify its future conduct. In California, although plaintiffs are technically precluded from recovering traditional damages, large monetary awards in the form of restitution and/or disgorgement are permissible, as are civil penalties pursuant to section 17206 of the Business and Professions Code.

As these differences make clear, application of federal antitrust standards to cases brought under California law poses substantial risks to the courts, to businesses named as defendants and to consumers, whose interests the consumer protection statutes are intended to protect.

Post *Cel-Tech* Cases

Lest it appear that there is no hope for businesses faced with a rising tide of unfair competition litigation in California, the Supreme Court is scheduled to decide at least two more cases involving section 17200 this year. Although neither case deals directly with the statutory definition of "unfair," both discuss important aspects of the law that have presented challenges to defense counsel and business interests.

In *Cortez v. Purolator Air Filter Products, Inc.*, 65 Cal. App. 4th 573A (1998), *rev. granted*, 78 Cal. Rptr. 2d 702 (1998), the Court of Appeal awarded restitution in the form of back wages to 175 former employees of Purolator, even though two prior decisions of the Court of Appeal had deemed back wages "damages" that were unavailable in section 17200 actions. The court in *Cortez* concluded that "[p]laintiff's unpaid wages [were]

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simply one method by which to measure the disgorgement of wrongful benefit." *Id.* at 897. The court also applied the four-year statute of limitations of section 17200 to the plaintiff's unfair competition claim, rather than the three-year statute of limitations contained in the Labor Code provision that formed the basis of the plaintiff's claim that Purolator had acted unlawfully. *Id.* at 898.

Kraus v. Trinity Management, 57 Cal. App. 4th 709 (1997), *rev. granted,* 68 Cal. Rptr. 2d 475 (1997) deals directly with the remedies available to a plaintiff bringing a representative action pursuant to section 17204, which provides that enforcement actions may be brought by certain government officials or by "any person acting for the interests of itself, its members or the general public." In *Kraus*, six former tenants alleged that their San Francisco landlord had charged them and other tenants improper security deposits and assessed liquidated damages against them in violation of various provisions of the Civil Code and section 17200. Notwithstanding its concerns regarding the uncertain preclusive effect of judgments obtained in representative unfair competition actions, the Court of Appeal affirmed the portion of the trial court's ruling that awarded the named plaintiffs restitution and ordered defendants to disgorge into a "fluid recovery fund" the amounts they had obtained from other tenants while engaging in the unlawful practices that were the subject of the named plaintiffs' claims.

The California Court of Appeal has also decided two cases in the months since the Supreme Court's decision in *Cel-Tech*. Both of these decisions limit, rather than expand, the reach of the state's unfair competition law. The court in *Norwest Mortgage, Inc. v. Superior Court*, 1999 Cal. App. LEXIS 487 (1999) issued a writ directing the trial court to vacate its order certifying a nationwide class asserting a claim pursuant to section 17200. The court held that, in keeping with broad jurisdictional principles, California's unfair competition law does not apply to non-California residents for whom a defendant's allegedly improper conduct occurred entirely outside California. In *Trinkle v. California State Lottery*, 1999 Cal. App. LEXIS 441 (1999), the court held that the California State Lottery was not a person that could be subject to suit under section 17200.

Businesses and defense attorneys should not expect immediate relief from the current climate of regulation by hindsight in section 17200 actions. With increased judicial scrutiny of the law, however, further refinement and clarification seem inevitable. For now, companies should be counseled that they can be subject to multiple 17200 suits not only by acting in a manner that is or could be construed to be unlawful, but also by engaging in actions that might be considered deceptive or that threaten or harm competition.

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Jurisdictional Discovery Against Foreign Parties

A recurring problem in international litigation is the extent to which foreign parties, who have been sued in the United States, can be subjected to U.S.-style discovery, where those parties have objected to the Court's exercise of personal jurisdiction over them.

This problem is important because it illustrates a Catch-22 for U.S. plaintiffs who seek to have the Court exercise personal jurisdiction over foreign defendants: on the one hand, a U.S. plaintiff will frequently need to conduct discovery to establish the jurisdictional facts necessary to overcome a foreign defendant's motion to dismiss; on the other hand, the foreign defendant will argue that until and unless the Court has determined that personal jurisdiction exists, it should not be compelled to respond to discovery authorized by a U.S. Court, especially where such discovery would not be allowed in its home forum.

Peter S. Selvin

At the threshold, it is settled law that a U.S. Court has the discretion to allow discovery concerning jurisdictional facts in a case where a foreign defendant contests the Court's exercise of personal jurisdiction. *See, e.g., America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 801 (9th Cir. 1989), *citing Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430-31, n. 24 (9th Cir. 1977). At the same time, however, discovery will not be allowed where the pertinent facts bearing on the question of jurisdiction are not in dispute (H2O *Houseboat Vacations, Inc. v. Hernandez*, 103 F.3d 914, 917 (9th Cir. 1996)) or where the development of additional facts would not affect the outcome of the Court's jurisdictional determination (*Razore v. Tualip Tribes of Washington*, 66 F.3d 236, 240 (9th Cir. 1995)).

In circumstances where a U.S. court determines that jurisdictional discovery will be allowed as to a foreign defendant who has contested the court's exercise of personal jurisdiction, an important question frequently arises: whether a U.S. plaintiff will be permitted to invoke the discovery procedures available under U.S. law or whether the plaintiff must instead proceed only via the Hague Convention or other bilateral agreement governing the production of evidence overseas.

As to foreign defendants over whom it has been determined that the Court has personal jurisdiction, the answer was provided by the U.S. Supreme Court in *Societé Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522 (1987). In that decision, the Court held that U.S. plaintiffs are not required to proceed exclusively via the Hague Convention in

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Jurisdictional Discovery

obtaining the production of evidence overseas, even in circumstances where the production of evidence which is sought may potentially put the foreign defendant in conflict with the law of its forum. In the *Societé Nationalle* decision, the U.S. Supreme Court admonished U.S. District Courts to proceed on a case by case basis in determining the application of the Hague Convention, and warned that special concern must be given to the prevention of discovery abuse and the demands of international comity. *Id.* at 546-547.

In *Societé Nationalle* the Supreme Court did not address, however, whether the application of the Hague Convention becomes mandatory where the foreign defendant contests personal jurisdiction and the U.S. court has not yet made a determination on that issue. In such circumstances, international comity would seem to favor mandatory application of the Hague Convention.

Although the U.S. Supreme Court has not squarely addressed this issue, lower courts have. In *Geo-Culture, Inc. v. Siam Investment Management*, 147 Or.App. 536, 936 P.2d 1063 (1997), a U.S. plaintiff brought suit against HBZ Finance Limited (HBZ), a company based in Hong Kong. Arguing that the Oregon court lacked personal jurisdiction over it, HBZ moved to dismiss the complaint.

In response, the plaintiff sought an order from the court allowing it to take a telephonic deposition of HBZ to discover the pertinent jurisdictional facts. The trial court ruled that plaintiff could take discovery from HBZ concerning the pertinent jurisdictional facts, but only, at least initially, in accordance with the Hague Convention. The trial court "reserved" for later determination whether the U.S. plaintiff could utilize U.S. discovery rules and procedures in connection with his jurisdictional discovery.

Faced with the requirement that it proceed with jurisdictional discovery, if at all, solely in accordance with the procedures described in the Hague Convention, the plaintiff elected to simply respond to the HBZ's motion to dismiss – without proceeding with such jurisdictional discovery.

The Oregon court granted HBZ's motion to dismiss, and the plaintiff appealed. On appeal, the plaintiff argued, among other things, that the trial court erred in requiring it to proceed, at least initially, solely in accordance with the requirements of the Hague Convention.

Without reaching the international comity issues identified by the Court in *Societé Nationalle*, the Oregon Court of Appeals affirmed the lower court's determination that the plaintiff would be permitted to undertake jurisdictional discovery, at least initially, solely in accordance with the Hague Convention. 936 P.2d at 1067. It is significant that the decision in *Geo-Culture* appears to be the only U.S. decision which in recent years has limited in this way the means by which jurisdictional discovery of a foreign party can be taken.

Numerous cases decided by the federal courts go the other way. *See, e.g., Fishel v. BASF Group, et al.*, 175 F.R.D. 525, 528 (S.D.Iowa 1997) ("The Court does not believe plaintiff is limited to the Hague Evidence Convention until the Court rules on the personal jurisdiction issue"); *Rich v. KIS California*, 121 F.R.D. 254, 258 (M.D.N.C. 1988); *Jenco v. Martech International, Inc.*, 1988 US Dist. LEXIS 3991 (E.D.La. 1988).

Those courts which have not adopted the limitation articulated in *Geo-Culture* have required that foreign defendants respond to discovery directed toward jurisdictional issues, without regard to plaintiff's compliance with the procedures specified in the Hague Convention. In such circumstances, a foreign party may be tempted to refuse to provide such discovery on the theory that, absent compliance by the U.S. plaintiff with the Hague Convention's procedures, it cannot be compelled to respond to such discovery.

A U.S. Supreme Court decision on this point, however, should give pause to a foreign party contemplating such a step. In *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694 (1982), the Court concluded that a U.S. Court can make a finding on personal jurisdiction over a foreign defendant as a *sanction* for that defendant's refusal to respond to jurisdictional discovery. In that case, the U.S. Supreme Court affirmed the issuance of such a sanction against a group of foreign defendants who refused to comply with certain court-ordered discovery. The discovery in question represented an attempt on the part of the plaintiff to establish jurisdictional facts, in response to the foreign defendants' defense based on lack of personal jurisdiction.

The holding in *Insurance Corp. of Ireland* stands for the proposition that a foreign defendant who asserts a defense based on lack of personal jurisdiction will nonetheless be obliged to respond to discovery concerning jurisdictional facts, even if that discovery is not propounded in accordance with the Hague Convention's rules and procedures. The sanction for the failure of a foreign defendant to respond to such discovery may be an adverse finding on the issue of personal jurisdiction itself.

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State Ethics Rules

from communicating directly with a person whom the lawyer knows is represented by counsel. Prior to the enactment of Section 530B, DOJ took the position that a federal prosecutor could privately question represented persons in certain situations, including communications with current employees of a corporation which the prosecutor knows is represented by counsel. Thus, DOJ's prior rules permitted federal prosecutors to initiate contact with certain corporate employees without notice to corporate counsel, even if the corporation could be held liable for the conduct of the employee, as long as no formal legal action had been taken against the employee in the matter. *See* former 28 C.F.R. Part 77 (1998). The former DOJ rules also permitted *ex parte* communications with an employee who had been made a defendant in a civil or criminal action in limited circumstances. *Id.*, § 77.6.

The former DOJ rules expressly permitting *ex parte*

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ZELA G. CLAIBORNE

On MEDIATION

This column continues the list of tips for successful mediation advocacy that first appeared in the *ABTL Report* of November '98.

Cooperative Tone

It would seem obvious that, in the context of a voluntary settlement negotiation, it is unproductive to insult the opposing party. Calling opponents "liars" or "thugs" is seldom conducive to prompt resolution. Although lawyers sometimes hurl insults – perhaps to impress their clients – it is far more effective to focus on making a forceful presentation of the facts and the law. Impress the decision-makers on the other side with their litigation risks and with the strengths of your client's case. Insults only arouse anger and may eclipse productive negotiation.

Insurance Issues

Many complex cases involve insurance issues. If you represent an insured party, be sure that the carrier's representative attends the mediation and is not just on telephone standby. If the claims person is not present, the other side may assume that you, your clients, and the carrier are not serious about settlement. Problems also may arise if the carrier's representative is not at the mediation to hear the presentations of the other parties and, therefore, cannot or will not change positions as strong arguments are made and new facts are outlined. When the carrier's representative attends, it is possible to reevaluate the case as the mediation progresses and, perhaps, change positions on the dollar amount for settlement. As a mediator, I want all decision makers to be present and, when they are not, may ask the parties to reconvene at a later date when everyone can attend.

Confidential Statements

Be open with your mediator. Given the rules on discovery, it is practically impossible to keep a "smoking gun" hidden until trial. If you have information or documents you think the other side is unaware of, it may be a good idea to use the material to advance settlement. Sometimes, parties may want to give the mediator information in caucus that they do not want repeated to the other side. A good mediator will be careful to protect confidentiality, but may be assisted by the disclosure nonetheless.

Preparation of Settlement Agreement

No matter how tired you are at the end of the mediation, work with all counsel to be sure that the key terms of the settlement are outlined in writing and signed by the parties and their attorneys before anyone leaves. Be sure that this outline agreement specifically states who will release whom and for what. If the settlement includes a confidentiality agreement, mention it and agree about who will draft that provision and the rest of the final agreement by a specific date. That executed outline agreement will be legally enforceable and should prevent the settlement from falling apart later because of a disagreement over terms.

Resist the impulse to take a laptop to the mediation to prepare a detailed, polished settlement agreement. After a long day of negotiation, often late at night, every lawyer in the room will want to make changes. The revisions will be endless. The process will be far more efficient if one lawyer agrees to prepare the final agreement later and circulate it for changes and final approval by all counsel.


Zela G. Claiborne

Selecting a Mediator

There is a debate about whether it is important to choose a mediator with subject matter expertise or simply someone with good mediation or "process" skills. While the ideal mediator would have both, it is important, especially in a large and complex case, to work with someone who has expertise in the substantive area at issue.

For example, in a construction case, a mediator with a construction background will understand the construction process generally, including the relationship of the parties involved in the project and the technical terms. He or she will understand what schematics are, what roles the architect and the contractor play on a project, how RFIs and COs are handled, and so forth. Such a mediator also will understand indemnity and insurance issues and a wide range of other specialized matters. Working with an experienced construction mediator will save time and prevent lengthy discussion of peripheral issues. Even more important, this mediator can provide you and your clients with the insights and evaluation of someone experienced in the field.

Counsel's skill in using the mediation process can have an enormous influence on whether a complex case will settle and on whether the settlement will be favorable to the client.

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contacts with represented parties were the object of much criticism in the private bar. Moreover, some federal and state courts found that DOJ did not have the statutory authority to pre-empt conflicting state ethics rules. *See United States ex rel O'Keefe v. McDonnell Douglas Corp.*, 132 F. 3d 1252 (8th Cir. 1998) (discussed below); *United States v. Ferrara*, 847 F.Supp. 964, 969 (D.D.C. 1993), aff'd, 54 F.3d 825 (D.C. Cir. 1995). This controversy has been at least temporarily put to rest by DOJ's repeal of its former rules governing *ex parte* contacts, and adoption of a new Interim Rule to implement the requirements of the McDade Act. *See* 64 Fed. Reg. 19273 (1999). This article describes the controversy over DOJ's compliance with state ethics rules for contacts with represented parties, and analyzes the new rules governing DOJ's implementation of Section 530B.

ABA Model Rule 4.2

Rule 4.2 of the ABA Model Rules of Professional Conduct provides:

> 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.

Virtually all 50 states and the District of Columbia have adopted an ethical rule identical or similar to ABA Model Rule 4.2 or its predecessor. The purpose of the "no-contact" rule is to protect represented persons against overreaching by adverse counsel, safeguard the attorney-client relationship from interference, and reduce the likelihood that clients will disclose privileged or other information harmful to their interests. *See* ABA Formal Ethics Opinion 95-396 (1995). These interests are balanced in the rule by two exceptions: (1) when consent is given by the person's lawyer; and (2) when such contact is "authorized by law." It is mainly through the latter exception that DOJ previously attempted to justify its exemption from the no-contact prohibition.

There has been considerable tension between the various states' no-contact rules and the perceived needs of federal law enforcement officials, especially in recent years as DOJ encouraged federal prosecutors to play a larger role in investigations conducted before indictment, arrest, or the filing of a civil complaint. In the criminal context, most courts held that the ethical restriction against contacts with represented persons did not apply at the pre-indictment investigation stage before the Sixth Amendment right to counsel attaches. *See, e.g., United States v. Ryans*, 903 F.2d 731, 739 (10th Cir. 1990), *cert. denied*, 498 U.S. 855 (1990); *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir. 1981), *cert. denied*, 452 U.S. 920 (1981). But the Second Circuit muddied this rule in *United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988), *cert. denied*, 498 U.S. 871 (1990), which held that federal prosecutors violated New York's no-contact rule even though the Sixth Amendment right to counsel had not yet attached.

The Thornburgh Memo

DOJ reacted strongly to the *Hammad* decision. In 1989, then-Attorney General Richard Thornburgh issued a memorandum warning that the Justice Department would resist what it viewed as efforts by the criminal defense bar to achieve through local ethical rules "what cannot be achieved through the Constitution: a right to counsel at the investigative stage of a proceeding." *See In re Doe*, 801 F. Supp. 478, 489 (D. N.M. 1992) (attaching Thornburgh Memorandum). The "Thornburgh Memorandum" concluded by stating that:

> contact with a represented individual in the course of authorized law enforcement activity does not violate DR 7-104 [the predecessor to Model Rule 4.2]. The Department will resist, on Supremacy Clause grounds, local attempts to curb legitimate federal law enforcement techniques.

801 F. Supp. at 493.

In response, the American Bar Association questioned the Attorney General's authority to use an internal executive branch memorandum to supply the requisite "authority of law" that would exempt federal prosecutors from state ethics rules. *See* ABA House of Delegates, Report No. 301, approved Feb. 12-13, 1990. Several federal courts also rejected DOJ's assertion that a federal prosecutor is not subject to discipline for violating state ethics rules. *See, e.g., United States v. Lopez*, 4 F.3d 1455 (9th Cir. 1993) (dismissing criminal charges because of prosecutor's *ex parte* communications with defendant in violation of California ethics rules); *In re Doe*, 801 F. Supp. 478 (D.N.M. 1992)(holding that "Thornburgh Memorandum" does not provide authority for federal prosecutor to ignore state no-contact rule). These and other similar cases spurred DOJ's efforts to adopt a formal rule governing *ex parte* contacts with represented parties.

DOJ Issues Regulations Conflicting With State Ethics Rules

In 1992, DOJ began what turned out to be a protracted rulemaking concerning the circumstances under which DOJ lawyers could properly communicate with persons known to be represented by counsel in the course of law enforcement investigations and proceedings. Proposed rules were issued three separate times before a final rule was issued on Aug. 4, 1994. 59 *Fed. Reg*. 39,910, former 28 C.F.R. Part 77 (1998).

Contrary to ABA Model Rule 4.2, the 1994 DOJ regulations generally permitted *ex parte* communications with represented individuals and organizations if they had not yet been named as defendants in a civil or criminal enforcement action. *See* former 28 C.F.R. §§ 77.3, 77.7 (1998). After an arrest, indictment, or filing of a complaint, communications with a "represented party" on the subject matter of the representation were generally prohibited. *Id.* § 77.5.

But the regulations also contained several broad exceptions. For example, the regulations allowed contacts with a represented party when the communication was made: (1) "pursuant to discovery procedures or judicial or administrative process," such as by grand jury testimony, an administrative summons or subpoena, or a civil investigative demand; or (2) in the course of an investigation of "additional, different or ongoing criminal activity or other unlawful conduct." *Id.*, § 77.6 (b), (e). The regulations also contained exceptions for communications to determine if the person was in fact represent-

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MARY E. McCUTCHEON

On INSURANCE

As companies continue to experience increasingly serious employment-related claims, insurers continue to draft increasingly onerous "employment practices exclusions." A careful review of these exclusions demonstrates, however, that they are not as ironclad as carriers would have you believe. The policyholder's attorney can exploit loopholes in these exclusions which might raise at least the potential for coverage and thus creates a duty to defend.

As always, the search for coverage begins with a painstaking review of the policy language. For example, some older exclusions refer only to claims arising out of the hiring and termination of an employee. In a case where an employee alleges a pattern of wrongful conduct over a period of time, some of that conduct may be covered under the policy's personal injury coverage (*e.g.*, claims for defamation and invasion of privacy) but not related to the employee's termination.

As another example, most commercial general liability policies contain four coverage parts – bodily injury, property damage, personal injury and advertising injury liability. One insurer has issued an extensive employment practices exclusion, encompassing nearly every conceivable injury to a past, current or future employee. The exclusion, however, explicitly applies to "bodily injury, personal injury or property damage" suffered by an employee. So, it does not extend to any advertising injury committed against an employee.

Now, you might assume that an employer cannot commit advertising injury against an employee. Several advertising injury offenses, however, simply are personal injury offenses committed "in the course of" the insured's advertising activities. Depending on the policy's definition of "advertising injury" (or lack thereof), potentially defamatory statements about employees made in press releases, sales meetings or communications to customers may in fact constitute covered "advertising injury."

In the past, employers argued that post-termination defamation did not fall within the scope of an employment practices exclusion because it was committed against someone who was no longer an employee. California courts eliminated that argument in *Loyola Marymount University v. Hartford Accident and Indemnity Co.* (1990) 219 Cal.App.3d 1217, 1223. The *Loyola* court found that an exclusion for personal injury "directly or indirectly related to the employment" of an individual encompassed post-employment defamation. The *Loyola* court explained that the exclusionary language was not limited to personal injury "committed during the employment." Rather, it covered all "personal injuries" "alleged or potentially at issue in the [employees'] actions, because all of them arise from or derive from, and hence are 'related to,' [the former employees'] employment and termination." See also *Frank and Freedus v. Allstate Ins. Co.* (1996) 45 Cal.App.4th 461, 471 (post-employment defamation is "employment-related").

This argument, however, was revived by two federal cases, which noted that injuries to current or former employees might not necessarily arise out of the employment context. In *HS Services, Inc. v. Nationalwide Mutual Ins. Co.* (9th Cir. 1997) 109 F.3d 642, 646, the court found that defamatory statements concerning a former employee were not "clearly employment-related" and therefore not subject to the employment practices exclusions contained in that policy. The former employee (Cade) had started a business which competed with his former employer (Cade-Grayson) and was telling Cade-Grayson's vendors that Cade-Grayson was experiencing financial difficulties. Cade-Grayson instructed its sales managers to respond to inquiries regarding the company's financial status by stating, among other things, that Cade had been terminated by Cade-Grayson for acts involving dishonesty. Cade subsequently amended his pending wrongful termination claim to include a claim for defamation. In the ensuing coverage litigation, the court ruled:

> The remarks related directly to the competition between Cade and Cade-Grayson in the marketplace and the latter's attempt to protect itself against the remarks made by Cade, not as an ex-employee, but as a present competitor; that was their context. While it may be literally true that the remarks "related" to Cade's employment, that relationship was too indirect and attenuated to qualify under the exclusion.

Mary E. McCutcheon

A second federal case held that an employee's claims of false arrest and imprisonment did not fall within the "catch-all" phrase of "or other employment-related practices, polices, acts or omissions" of an insurer's employment-related practices exclusion. *Zurich Ins. Co. v. Smart & Final Inc.* (C.D. Cal. 1998) 996 F.Supp. 979, 988. These two cases demonstrate that the policyholder's attorney must scrutinize the complaint, as well as other relevant facts and allegations uncovered through discovery or investigation, for any claim arguably outside of the employment context.

Finally, primary commercial general liability policies are not the only sources of coverage for employment practices claims. The provisions of excess/umbrella policies are not necessarily identical to those of the primary policy. There may be coverage for employment-related torts in an upper layer of coverage even if not available in the primary layer. And directors and officers liability policies often provide at least some limited coverage for employment practices claims if the company's directors and officers are sued as well.

As I write this article, underwriters are probably drafting new exclusions to close these and other possible loopholes in employment practices exclusions. Nevertheless, policyholders' attorneys who carefully study the policy and the employee's claims may yet find new loopholes for the policyholder to squeeze through.

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ed by counsel; communications initiated by the represented party (under specified circumstances); communications made after a voluntary and knowing waiver of a defendant's "Miranda" rights; and communications that were necessary to protect from threats the safety or life of any person. *Id.*, § 77.6. Nearly all of these exceptions were inconsistent with state ethics rules governing such communications.

The 1994 DOJ regulations also established standards governing federal prosecutors' communications with employees of organizations, including corporations. These standards also departed substantially from state ethics rules. Specifically, the 1994 DOJ regulations: (1) applied the no-contact rule to a current employee of an organization (which itself was a represented party) *only* if the employee was considered a "controlling individual," defined in a manner substantially more narrow than that used by ABA Model Rule 4.2; and (2) through several broadly worded exceptions, permitted *ex parte* contacts even if an employee was a "controlling individual" who had obtained separate counsel.

James Robert Maxwell

Finally, in what was the most controversial aspect of the final 1994 regulations, DOJ stated the rules would "preempt and supersede the operation of state and local federal court rules as they relate to contacts by Department attorneys, regardless of whether such rules are inconsistent or consistent with this regulation..." 59 *Fed. Reg.* at 39,916.

The Eighth Circuit's 1998 Decision in O'Keefe

United States ex rel. O'Keefe v. McDonnell Douglas Corp., 132 F. 3d 1252 (8th Cir. 1998) put the validity of DOJ's former regulations squarely before a federal appeals court for the first time. *O'Keefe* involved a *qui tam* action brought under the False Claims Act, 31 U.S.C. §§ 3729-33, alleging that McDonnell Douglas Corp. had directed its employees to mischarge deliberately their labor hours under a number of defense contracts. The government intervened in the case. As part of its pretrial investigation, DOJ agents sent a questionnaire to various present and former lower-level McDonnell Douglas employees asking whether they had ever engaged in labor hour mischarging and, if so, at whose direction. McDonnell Douglas responded by filing a motion for a protective order seeking to prevent such contacts on the ground that they were barred by Missouri Supreme Court Rule 4-4.2, which had been adopted by the federal court for the Eastern District of Missouri where the action was pending.

In the district court, the government argued that the *ex parte* contacts with these company employees were permitted by section 77.10(a) of DOJ's former rules because the employees were not "controlling individuals" under the 1994 DOJ regulations, which DOJ argued should supersede the local rules of the federal district court. Alternatively, the government argued that because the DOJ regulations permitted the *ex parte* contacts, they came within the exception in Missouri Rule 4-4.2 for contacts "authorized by law."

The district court, and ultimately the Eighth Circuit, rejected these arguments, finding that Congress had not intended for government lawyers to be exempt from local ethics rules, and holding that DOJ lacked statutory authority to establish its own separate standards for communications with employees of a represented party. The government's request for rehearing *en banc* in *O'Keefe* was denied, and the Justice Department did not seek review by the Supreme Court.

DOJ "Interim Rules" Under The McDade Act

To resolve the controversy, Congress passed the McDade Act (quoted above). On April 20, 1999, DOJ published for comment an Interim Final Rule (the "Interim Rule") implementing the requirements of Section 530B. 64 *Fed. Reg.* 19273 (1999). The Interim Rule became effective immediately but is subject to change after a sixty-day comment period. 64 *Fed. Reg.* at 19275. The Interim Rule supersedes DOJ's previous regulations governing contacts with represented persons, but nevertheless contains several important limitations on the application of state ethics rules to federal prosecutors.

The Interim Rule covers all attorneys employed by DOJ who are authorized to conduct civil or criminal enforcement proceedings on behalf of the United States, as well as any specially appointed independent counsel. 28 CFR § 77.2(a). The new regulations will not apply to attorneys employed as investigators by DOJ or other law enforcement agents who are not authorized to represent the United States in criminal or civil law enforcement litigation. *Id.*, § 77.1(c). The Interim Rule also provides that Section 530B should not be construed to alter rules of professional responsibility that expressly exempt government attorneys from their application. *Id.*

The Interim Rule expressly applies to investigative agents operating under DOJ direction. *Id.*, § 77.4(f). The regulations admonish Department attorneys against "direct[ing] an investigative agent acting under the attorney's supervision to engage in conduct under circumstances that would violate the attorney's obligations under Section 530B." *Id.* The regulations contain a good faith exception for a Department attorney who provides legal advice or guidance upon request to an investigative agent. *Id.*

Under the Interim Rule, a federal prosecutor will not be subject to a state's ethics rules unless the attorney's conduct is "substantial and continuous" in that jurisdiction. Thus, taking a deposition (related to a case pending in another court), directing a contact to be made by an investigative agent, or responding to an inquiry by an investigative agent will not be considered sufficient to trigger the application of a particular state's ethical rules. *Id.* § 77.2(j)(2). One may question, however, whether even these "isolated" acts might constitute substantial and ongoing involvement by a lawyer in some situations.

The selection of which state's ethics rules are applied under the Interim Rule is based on whether or not a case is pending. When a case is pending, DOJ attorneys are required to comply with the ethical rules of conduct of the court where the case is venued. *Id.*, § 77.4(a). If no

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PETER J. BENVENUTTI

On CREDITORS' RIGHTS

When the other party to contemplated litigation files for bankruptcy, should your client file a claim in the Chapter 11 case? This can be a surprisingly difficult question.

Suppose each party asserts state law claims for substantial money damages against the other, but no litigation has been initiated when the bankruptcy case is filed. At some point, usually fairly early in the bankruptcy case, a claims bar date will be set by bankruptcy court order or local rule. Your client must file a claim by the bar date or lose, probably irretrievably, the right to obtain any payment from the debtor. Although the magnitude of that payment is highly uncertain, the adversary is continuing to operate its business and is making optimistic pronouncements about its prospects for recovery.

So, your client asks, what's to lose by filing a claim? The answer, sometimes, is plenty. Much depends on where you think your client is better off defending the debtor's action – the bankruptcy court or somewhere else. If your client files a bankruptcy claim, it has probably agreed to have the bankruptcy judge in the adversary's Chapter 11 case decide all disputes between your client and the debtor, and has waived its jury trial right in the bargain.

The reasons lie in the uneasy interplay between the bankruptcy jurisdictional statutes and rules, on the one hand, and several Supreme Court decisions construing the powers of the bankruptcy courts, on the other. By statute – the 1978 Bankruptcy Reform Act – bankruptcy courts have jurisdiction over virtually all matters germane to a bankruptcy case, including disputes that are "related to" the bankruptcy case. This "related to" jurisdiction is almost universally construed to encompass pre-bankruptcy claims asserted by the debtor in possession against third parties.

Enter the Supreme Court. In *Northern Pipeline Constr. Co. V. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Supreme Court held, as a matter of constitutional law, that non-life-tenured, non-Article III bankruptcy judges could not, absent the consent of the litigants, decide state law claims asserted by a bankruptcy debtor against third parties. Consequently, the bankruptcy jurisdictional structure was revamped to provide that, while the bankruptcy court can *hear* these "related to" cases and *propose* findings and a decision, the non-debtor party retains a right to *de novo* review by the federal district court. A non-debtor party sued by the debtor on a state law claim also has an enhanced basis to ask the bankruptcy court to abstain in favor of, or remand a removed action to, state court. In practice, bankruptcy judges tend to be willing to send "related-to" litigation to a state court forum if the non-debtor party so requests.

Another relevant limitation on the bankruptcy court's jurisdiction concerns the parties' right to a jury trial. Bankruptcy administration – including the allowance of claims – is an equitable process, with no jury trial right; but there are situations in bankruptcy in which a jury right is preserved, most specifically including suits by the debtor in possession to recover money. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). Because the bankruptcy court can conduct a jury trial only if *all* parties affirmatively consent [28 USC §157(e)], absent such consent the case must be tried in the federal district court [*In re Cinematronics, Inc.*, 916 F.2d 1444 (1990)] or an appropriate state court. Hence, a party sued by the bankruptcy debtor can, by asserting its right to a jury trial, veto the bankruptcy court as a forum for the litigation.

Peter J. Benvenutti

What does this have to do with filing a claim? Filing a claim can change everything. Under the post-*Marathon Pipe Line* jurisdictional statute, a counterclaim by the debtor against a creditor which has filed a claim is no longer a "related to" matter, but rather part of the bankruptcy court's "core" jurisdiction. 28 USC §157(b)(1)(C). As such, the bankruptcy court can hear *and decide* the dispute, subject only to regular appellate review. The rationale is that, in order to determine whether and for how much to allow the creditor's claim, the bankruptcy court must also be able to resolve any setoffs or counterclaims by the trustee against the claimant.

Under a similar logic, the creditor filing a claim loses its right to demand a jury on the debtor's counterclaim. What would otherwise have been a "legal" dispute subject to jury trial right (the debtor's claim for money damages) has become part of the "equitable" process of allowance and disallowance of claims in bankruptcy, to which no jury trial right pertains. *See Langenkamp v. Culp*, 498 U.S. 42 (1990).

Sometimes the bankruptcy court will be an attractive forum for the non-debtor party to litigate its business dispute with the debtor, and sometimes not. There is no hard and fast rule. The point here is that a non-debtor party, confronted by the prospect of a lawsuit by the debtor in possession, often has the right to require a non-bankruptcy forum for the litigation. It should not lose that right by filing a claim in the bankruptcy case without being aware of, and carefully considering, the consequences.

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State Ethics Rules

case is pending, the attorney is directed to comply generally with the ethical rules of the federal attorney's state of licensure, unless application of traditional choice of law principles directs the attorney to comply with the ethical rules of another jurisdiction or court, such as the ethical rules adopted by the court in which the case is likely to be brought. *Id.*, § 77.4(c)(1).

At any one time, DOJ attorneys may be engaged in activities in a number of different jurisdictions. When a case is pending and the rules of the attorney's state of licensure are more restrictive than the applicable state's ethics rules, the Interim Rule directs the attorney to consider various factors in deciding which ethics rules will apply. These factors include: (1) whether the attorney's state of licensure would apply the rule of the court before which the case is pending rather than the rule of the state of licensure; (2) whether the local federal court rule pre-empts contrary state rules; and (3) whether application of traditional choice of law principles directs the attorney to comply with a particular rule. *Id.*, § 77.4(b)(1). In making this determination, the Interim Rule encourages an attorney to consult with a supervisor or professional responsibility officer to determine the best course of conduct. *Id.*, § 77.4(b)(2). When no case is pending and the attorney concludes that multiple rules are conflicting, DOJ attorneys are also directed to consult with a DOJ supervisor or professional responsibility officer to determine the best course of conduct if consideration of traditional choice of law principles does not provide an adequate answer. *Id.*, § 77.4(c)(2).

DOJ intends to limit the effect of the Interim Rule on litigants. Thus, the regulations expressly provide that they are intended solely for the guidance of attorneys for the government, and are not intended to create any private rights in parties to litigation with the United States, including criminal defendants. *Id.*, § 77.5. Further, DOJ maintains that compliance with state and local federal court rules of professional responsibility are not to be construed in any way to alter federal substantive, procedural, or evidentiary law, or to interfere with the Attorney General's authority to send DOJ attorneys into any court in the United States. 28 CFR § 77.1(b). *See also United States v. Lowrey*, 166 F.3rd 1119 (11th Cir. 1999) (interpreting Section 530B prior to its effective date, and rejecting the argument that state rules of professional responsibility governed admission of evidence in federal court). The rules make clear that they shall not be used as a basis for dismissing civil or criminal charges or proceedings or for excluding relevant evidence in any judicial or administrative proceeding. 28 CFR § 77.5.

While the Interim Rule provides that Department attorneys shall not direct any attorney to engage in conduct that violates Section 530B, § 77.4(e), the Rule also contains a safe harbor: a supervisor or other Department attorney who in good faith gives ethics advice to another Department attorney will not be deemed to violate the Rule. *Id.* Finally, DOJ states that the decision to replace the Department's former regulations does not constitute a determination that any of the conduct previously authorized by those regulations is impermissible. 64 *Fed. Reg.* at 19274.

Although the Interim Rule is a major step forward toward resolution of the debate over application of state ethics rules to DOJ attorneys, it is not likely to be the final chapter in this long-standing controversy. Prior to passage of the McDade Act, the U.S. Judicial Conference Standing Committee on Rules of Practice had proposed issuance of uniform "Federal Rules of Attorney Conduct," to address the "maze of often ambiguous and sometimes conflicting ethical guidelines" in the federal courts. In addition, in the American Bar Association's current effort to update the Model Code, dubbed "ABA Ethics 2000," DOJ and others are seeking to amend ABA Model Rule 4.2 to permit DOJ contacts with represented parties pursuant to the guidelines established in DOJ's former rules. And legislation has already been introduced in Congress to repeal or limit the McDade Act. It will therefore be important to monitor these developments closely. But unless the sea change made by the McDade Act is reversed, federal prosecutors must comply with the state ethics rules of the forums in which they practice and, in particular, the rules governing communications with represented persons.

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